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REPORTS OF CASES

IN THE

SUPREME COURT

OF

NEBRASKA.

JANUARY AND SEPTEMBER TERMS, 1895.

VOLUME XLV.

D. A. CAMPBELL,
OFFICIAL REPORTER.

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BY D. A. CAMPBELL, REPORTER OF THE SUPREME COURT,
In behalf of the people of Nebraska.

THE SUPREME COURT

OF

NEBRASKA.

1895.

CHIEF JUSTICE,

T. L. NORVAL.

JUDGES,

A. M. POST,
T. O. C. HARRISON.

COMMISSIONERS,

ROBERT RYAN,
JOHN M. RAGAN,
FRANK IRVINE.

OFFICERS.

ATTORNEY GENERAL,

A. S. CHURCHILL.

CLERK AND REPORTER,

D. A. CAMPBELL.

DEPUTY CLERK,

W. B. ROSE.

DISTRICT COURTS OF NEBRASKA.

JUDGES.

First District—

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J. E. BUSH.....Beatrice.

Second District—

S. M. CHAPMAN.....Plattsmouth.

Third District—

CHARLES L. HALL.....Lincoln.
E. P. HOLMES.....Lincoln.
A. S. TIBBETS.....Lincoln.

Fourth District—

G. W. AMBROSE.....Omaha.
J. H. BLAIR.....Omaha.
E. R. DUFFIE.....Omaha.
A. N. FERGUSON.....Omaha.
M. R. HOPEWELL.....Tekamah.
W. W. KEYSOR.....Omaha.
C. R. SCOTT.....Omaha.

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WM. MARSHALL.....Fremont.
J. J. SULLIVAN.....Columbus.

Seventh District—

W. G. HASTINGS.....Wilber.

Eighth District—

W. F. NORRIS.....Ponca.

Ninth District—

J. S. ROBINSON.....Madison.

Tenth District—

F. B. BEALL.....Alma.

Eleventh District—

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J. R. THOMPSON.....Grand Island.

Twelfth District—
H. M. SINCLAIR.....Kearney.

Thirteenth District—
WILLIAM NEVILLE.....North Platte.

Fourteenth District—
D. T. WELTY.....Cambridge.

Fifteenth District—
ALFRED BARTOW.....Chadron.
M. P. KINKAID.....O'Neill.

PRACTICING ATTORNEYS.

ADMITTED SINCE THE PUBLICATION OF VOLUME XLIV.

BURNAM, HARRY E.
CRAPO, PHILIP A.
HOWE, GEORGE W.
NEWMAN, A. J.
VINSONHALER, D. M.

SUPREME COURT COMMISSIONERS.

(Laws 1893, chapter 16, page 150.)

SECTION 1. The supreme court of the state, immediately upon the taking effect of this act, shall appoint three persons, no two of whom shall be adherents to the same political party, and who shall have attained the age of thirty years and are citizens of the United States and of this state, and regularly admitted as attorneys at law in this state, and in good standing of the bar thereof, as commissioners of the supreme court.

SEC. 2. It shall be the duty of said commissioners, under such rules and regulations as the supreme court may adopt, to aid and assist the court in the performance of its duties in the disposition of the numerous cases now pending in said court, or that shall be brought into said court during the term of office of such commissioners.

SEC. 3. The said commissioners shall hold office for the period of three years from and after their appointment, during which time they shall not engage in the practice of the law. They shall each receive a salary equal to the salary of a judge of the supreme court, payable at the same time and in the same manner as salaries of the judges of the supreme court are paid. Before entering upon the discharge of their duties they shall each take the oath provided for in section one (1) of article fourteen (14) of the constitution of this state. All vacancies in this commission shall be filled in like manner as the original appointment.

SEC. 4. Whereas an emergency exists, this act shall take effect and be in force from and after its passage and approval.

Approved March 9, A. D. 1893.

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The syllabus in each case was prepared by the judge or commissioner writing the opinion.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NEBRASKA.

JANUARY TERM, A. D. 1895.

PRESENT:

HON. T. L. NORVAL, CHIEF JUSTICE.
HON. A. M. POST,
HON. T. O. C. HARRISON, } JUDGES.

HON. ROBERT RYAN,
HON. JOHN M. RAGAN,
HON. FRANK IRVINE, } COMMISSIONERS.

CLEARWATER BANK v. MARTIN KURKONSKI.

FILED MAY 1, 1895. No. 5928.

1. **Review**: VALIDITY OF STATUTE: CONSTITUTIONAL LAW: QUESTIONS NOT PRESENTED BELOW. Where a statute is claimed to be invalid on the ground that it was not enacted in the constitutional mode, such invalidity must be presented by the pleadings or in some other form in the trial court to be of any avail here. Such objection cannot be raised for the first time in the appellate court.

2. **Constitutional Law**: CHATTEL MORTGAGES: SATISFACTION. That portion of section 15, chapter 32, Compiled Statutes, which gives to the mortgagor of chattels a right of action to recover

the sum therein prescribed as liquidated damages for a failure of a mortgagee or his assignee to enter satisfaction of record of a chattel mortgage which has been paid within ten days after being thereto requested, does not conflict with section 3, article 1, nor with section 5, article 8, of the constitution of this state. *Graham v. Kibble*, 9 Neb., 182, followed.

3. **Chattel Mortgages**: SATISFACTION: DEMAND: ACTION FOR PENALTY. A demand must be made upon the mortgagee or his assignee for the satisfaction of a mortgage, before an action can be maintained to recover the fixed sum named in said section 15.

4. ——: ——: ——: ——. The entry of satisfaction after the statutory period will not defeat such an action.

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

The facts appear in the opinion.

Robertson, Wigton & Whitham, for plaintiff in error:

The amount sued for is a penalty. In an action for damages the true measure of plaintiff's recovery is the damage actually sustained. (*Atchison & N. R. Co. v. Baty*, 6 Neb., 40; *Boyer v. Barr*, 8 Neb., 71; *Roose v. Perkins*, 9 Neb., 315; *Riewe v. McCormick*, 11 Neb., 264; *Boldt v. Budwig*, 19 Neb., 745.)

Satisfaction having been entered before actual damages were sustained and before suit was brought, there can be no recovery for the penalty. (*Dickenson v. State*, 20 Neb., 81.)

The court should have instructed the jury that the demand for satisfaction of the mortgage should be direct, and not dependent upon a contingency or future event. (*Ewbanks v. Ashley*, 36 Ill., 177.)

S. D. Thornton and *O. A. Williams, contra:*

The penalty is incurred by a failure to enter the satisfaction within the proper time after request, and a subsequent entry of satisfaction, even before suit is brought for

the penalty, does not release the defendant from liability. (*Deeter v. Crossley*, 26 Ia., 180; *Hall v. Hurd*, 40 Kan., 740.)

NORVAL, C. J.

This action was brought by Martin Kurkonski against the Clearwater Bank under section 15, chapter 32, of the Compiled Statutes, to recover $50, the fixed damages therein provided for the failure and refusal of a mortgagee to release and discharge a chattel mortgage of record after the debt has been paid. The trial resulted in a verdict and judgment against the bank for the amount above stated.

The first point argued in the brief is that said section 15, in so far as it imposes a fixed sum for failure to discharge a chattel mortgage, is unconstitutional. The section was originally section 74, chapter 43, of the Revised Statutes of 1866, entitled "Real Estate." It made provision how and when a mortgage upon chattels may be renewed. The section was amended in 1879 (Laws, 1879, p. 108) so as to read as follows:

"Sec. 74. Such clerk shall also enter in a book to be provided by him for that purpose the names of all the parties to such instruments, arranging the names of mortgagors alphabetically, and shall note thereon the time of filing such instrument or copy. Such mortgage when satisfied may be discharged by an entry by the mortgagee or his agent on the margin of such index, which shall be attested by the clerk without fee, and the original instrument or copy so filed shall be returned to the mortgagor."

It was carried into the compilation of the statutes of 1881 as section 15, chapter 32, entitled "Frauds," and it was amended as such in 1885. Since then there have been no changes, and as now existing it is as follows:

"Sec. 15. Such clerk shall also enter in a book to be provided by him for that purpose the names of all the parties to such instrument, arranging the names of such

mortgagors alphabetically, and shall note thereon the time of filing such instrument or copy. Such mortgage when satisfied shall be discharged by an entry by the mortgagee, his agent or assignee on the margin of such index, which shall be attested by the clerk without fee; *Provided, also,* That the county clerk may discharge a mortgage on the presentation or receipt of an order in writing, signed by the mortgagee thereof and attested by a justice of the peace or some officer with a seal. Any mortgagee, assignee, or their legal personal representatives, after full performance of the conditions of the mortgage, who, for the space of ten (10) days after being requested, shall refuse or neglect to discharge the same as provided in this section, shall be liable to the mortgagor, his heirs, or assigns in the sum of fifty ($50) dollars damages; and also for all actual damages sustained by the mortgagor, occasioned by such neglect or refusal, said damages to be recovered in the proper action."

It is urged that the legislature of 1885 injected into the statute the provision imposing the sum of $50 in the nature of liquidated damages for failure to discharge a chattel mortgage, which is a new subject of legislation, not covered by the original section or the first amendment thereof, but one which is entirely foreign to the title of the last amendatory act, hence the provision is unconstitutional and void. We are relieved from the necessity of passing upon the validity of the law at this time, *i. e.*, whether it was enacted in the mode prescribed by the constitution, since no such question was raised in the court below, either by the pleadings or upon the introduction of the testimony. (*Burlington & M. R. R. Co. v. Saunders County*, 16 Neb., 123; *Pill v. State*, 43 Neb., 27; *Vose v. Cockcroft*, 44 N. Y., 415; *Delaney v. Brett*, 51 N. Y., 78.) The bank having made no objection to the constitutionality of the statute in the trial court, it must be held to have waived it.

The next point made is that the measure of recovery is

the amount of loss incurred, and no actual damages having been proved, there can be no recovery in this case. If the petition had been framed under the clause of the statute allowing the mortgagor to collect the actual damages sustained, the plaintiff would be limited in his recovery to such sum as would fully compensate him for his injury or loss, and it could not be increased by awarding punitive or exemplary damages. But such is not the form of the action. The suit is brought alone to recover the sum fixed by the statute for the failure to discharge a mortgage, and it was not necessary to prove upon the trial the amount of pecuniary injury suffered. The fact that the act gives the money, when recovered, to the party injured, does not make the law conflict with the provisions of section 5, article 8, of the state constitution. (*Graham v. Kibble*, 9 Neb., 182.) It was admitted upon the trial that on the 6th day of August, 1889, the plaintiff below executed and delivered to the bank his promissory note for $27.25, due on the 6th day of the following November, and at the same time secured the payment thereof by giving a mortgage upon certain personal property owned by the mortgagor. The mortgage was duly filed in the office of the county clerk of Antelope county on the day following its execution, and by him indexed as required by law. The indebtedness secured by said mortgage was fully paid to the bank on November 1, 1889, and the mortgage was released of record on January 29, 1890, or one day prior to the commencement of this action. The plaintiff testified that at the time he paid the note he requested Mr. Smith, the cashier of the bank, to release the mortgage, and that the latter promised so to do, and that on the 8th of January, 1890, he again demanded of Mr. Smith that the mortgage be discharged of record. J. C. Smith testified that the agreement with the plaintiff was that he (the witness) was to release the mortgage the first time he went to Neligh, and that the plaintiff expressed himself satisfied with that ar-

rangement; that no other demand to have the mortgage discharged was ever made. Mr. Smith is corroborated by the testimony of George Newer. The only controversy upon the facts is as to whether a discharge of the mortgage was demanded of the officers of the bank, and the conflict in the testimony upon that point was properly left to the jury to decide, and they resolved it against the bank, which they were warranted in doing upon the plaintiff's testimony alone, if they believed it to be true. Undoubtedly it was necessary for the plaintiff to prove a demand before an action could be maintained to recover the damages named in the statute. (*Hall v. Hurd*, 40 Kan., 740; *Deeter v. Crossley*, 26 Ia., 180.) A careful consideration of the record convinces us that the evidence is sufficient to authorize a finding that satisfaction of the mortgage of record was unconditionally demanded more than ten days prior to the bringing of this suit, and that there is no error in the instructions upon that branch of the case. Under the statute it was the duty of the bank to release the mortgage upon the payment of the debt thereby secured, whether a demand was made therefor or not, but, as stated above, the penalty did not attach until after demand and a failure to comply therewith within ten days. True, satisfaction was entered in this case the day before the action was brought, but that will not defeat a recovery of the penalty which had already attached. (1 Jones, Mortgages, sec. 990; *Deeter v. Crossley, supra; Hall v. Hurd*, 40 Kan., 740.) There is no reversible error in the record, and the judgment is

AFFIRMED.

PEORIA MANUFACTURING COMPANY V. E. T. HUFF ET AL.

FILED MAY 1, 1895. No. 6408.

1. **Negotiable Instruments:** ACCOMMODATION MAKER. An accommodation maker is one who executes commercial paper without consideration in order to enable the payee, or holder, to thereby obtain credit.
2. ———: ———: PRINCIPAL AND SURETY. One who executes a promissory note as surety for another is not an accommodation maker.
3. ———: ———: ADMISSION OF EVIDENCE. Rule applied to evidence in support of several signers claiming to be accommodation makers.
4. ———: ———: ———: REVIEW. A judgment will not be reversed on account of error in the admission of evidence not prejudicial to the party complaining.

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

Atkinson & Doty, for plaintiff in error.

Davis & Hibner, *Field & Holmes*, and *J. E. Philpott*, *contra*.

POST, J.

This was an action by the plaintiff in error, the Peoria Manufacturing Company (hereafter called the "Manufacturing Company"), against F. P. Lawrence, E. S. Hawley, and E. T. Huff on their joint promissory note for $2,000, dated January 22, 1891, due sixty days after date. The plaintiff recovered in the district court for Lancaster county against Lawrence, but there was a verdict and judgment therein in favor of the other defendants, from which both Lawrence and the Manufacturing Company have prosecuted a proceeding by petition in error to this court.

The defendants below answered separately, but alleging substantially the same defenses, viz.: (1) That the note in suit was executed at the instance and special request of the Manufacturing Company, and for no consideration whatever, but for the sole purpose of enabling said company, the payee thereof, to obtain credit in the city of Peoria, and that in consideration of the execution of said note for the purpose aforesaid the payee thereof agreed to protect and keep the defendants harmless on account thereof; (2) that on the 22d day of January, 1891, the Lawrence Implement Company, a Nebraska corporation whose principal place of business was in the city of Lincoln, executed its note in favor of the plaintiff in the sum of $2,000, due one day after date; that said last mentioned note was delivered to and accepted by the plaintiff in full satisfaction of the note sued on; that on the 9th day of March, 1891, an action was commenced by the plaintiff against the implement company on its said note, in which an order of attachment was issued and served by the seizure of the property of the defendant therein of the value of $——; that on the day following, to-wit, March 10, final judgment was entered in said action against the implement company for the amount of said note, accompanied by an order for the sale of the property previously attached in satisfaction thereof; that said judgment remains in full force and no steps have been taken by the plaintiff to enforce the same by the sale of the attached property or otherwise.

It is shown by the evidence that on and prior to the 22d day of January, 1891, said implement company, of which the defendants below were officers, said Lawrence being the president and general manager, was indebted to the plaintiff in the sum of $2,000, represented by a note of that amount, maturing on the day last mentioned. The plaintiff having been advised by the implement company through its president, Mr. Lawrence, that it would be unable to

pay said note when due, sent a representative to Lincoln, who agreed to an extension, provided said company would give individual signers instead of the note last mentioned. This proposition was accepted by Mr. Lawrence in behalf of the implement company, and in pursuance of that agreement the note in suit was prepared by Mr. Davis, the plaintiff's agent, and signed by Lawrence, and on the same day, or the next, by Hawley and Huff. Upon the delivery of said note to Davis the latter surrendered to the implement company its matured note and received from Lawrence the company's check for the interest thereon.

We will first consider the questions presented by the petition in error of the Manufacturing Company, which requires an examination of the evidence so far as it relates to the defendants severally. Mr. Huff testified in his own behalf that Lawrence and Davis, the plaintiff's agent, visited him at his office for the purpose of having him sign the note which had been previously executed by both the other makers and which Lawrence said was an accommodation note for the Manufacturing Company. Referring to his conversation with Davis on that occasion he testified as follows:

Q. For what purpose did he want it [the note]?

A. Accommodation paper to help themselves out.

Q. To help themselves out?

A. To help themselves out in credit I suppose.

Q. At that time were you personally indebted to the Peoria Manufacturing Company?

A. No.

Q. On his representation did you sign it?

A. I did.

Q. What else, if anything? That the Peoria Manufacturing Company would take care of the note?

A. Yes, sir; he represented that they would; that it would cost me nothing, but would help them out.

Q. Do you mean the note sued on in this case?

A. I do.

And on cross-examination he testified:

Q. Do you know whether the Peoria Manufacturing Company was insisting upon payment or security for money owing to it by the Lawrence Implement Company?

A. I do not.

He is contradicted by Mr. Davis, who testified that the consideration for the note was the extension allowed on the past due paper of the implement company. The claim of the defendants may to us seem unreasonable, but the evidence adduced in support thereof appears to have satisfied the jury that the note was given solely for the accommodation of the plaintiff. An accommodation note or bill, within the meaning of the law merchant, is one made or accepted not upon a consideration, but for the purpose of enabling the payee or holder to obtain credit. (*Pollard v. Huff*, 44 Neb., 892, and authorities cited.) The facts, as testified to by the defendant, bring the transaction clearly within the foregoing definition, and it was the province of the jury to determine the question of his credibility as a witness, and their finding, bearing as it does the approval of the trial judge, should not be disturbed in this proceeding.

It is also alleged that the court erred in admitting the record and files in the action of this plaintiff against the implement company, showing the order for the sale, in satisfaction of the judgment therein, of a large amount of property, real and personal. It is not contended that the judgment in that case is of itself a defense to this action, and no such claim was made at the trial before the district court. The record appears to have been admitted upon the theory that the prosecution to judgment of an action on the note of the implement company was a circumstance tending to support the claim that said note was received by the plaintiff in satisfaction of the note in suit. But assuming its admission to be error, we cannot on the record before us

say that it is in any sense prejudicial to the plaintiff. The fact that an order had been entered in that action for the sale of a large amount of property might have prejudiced the plaintiff with the jury but for the further undisputed fact that said property had all been sold and the proceeds thereof applied in satisfaction of a prior attachment in favor of the Lincoln National Bank. In the absence of a showing of error prejudicial to the plaintiff, the judgment in favor of the defendant Huff must be affirmed.

We will now examine the evidence upon which the judgment as to Hawley rests. His version of the transaction appears from his direct examination as follows:

Q. Where were you when you signed that note?

A. I think I was at the Lincoln Hotel.

Q. Were you indebted at the time you signed that note to the Peoria Manufacturing Company?

A. No, sir.

Q. State how you happened to sign it.

A. Mr. Lawrence brought the note to me and said that Mr. Davis wanted it signed by the individual members. (Objection. Overruled. Exception.) Mr. Lawrence brought the note over to me and said Mr. Davis wanted it signed up by himself, Mr. Huff, and myself. I objected to signing the note. I did not see any necessity of putting the individual names to any note, and he said it would be an accommodation to Mr. Davis, and would give us no trouble. They could use it in that shape and could not use the company's name.

Q. Did you afterwards see Mr. Davis?

A. I saw Mr. Davis at the hotel.

Q. Was anything further said at that time?

A. I don't think there was anything further said about the note.

The foregoing evidence does not bring the witness within the rule stated, or entitle him to the protection of an accommodation maker. Comment upon the candid testi-

mony of this defendant is unnecessary. It is sufficient that his obligation is that of a surety for the implement company, and that as to him there is an entire failure of proof of the essential allegations of the answer, for which the judgment in his favor must be reversed.

We come now to a consideration of the judgment in favor of the Manufacturing Company against Lawrence. There can be no doubt from the evidence in the record, including the written correspondence conducted by said defendant relating to the note maturing January 22, 1891, that the note in suit was intended as an extension of the indebtedness represented by the note first mentioned, and that the relation of the defendant named to the plaintiff is that of a surety for the implement company.

There are other allegations of error which relate to rulings during the course of trial, but they do not require further notice, for the reason that they could not have prejudiced the rights of the defendant, since, as we have seen, the court might properly have directed a verdict against him upon his own evidence.

Judgment affirmed as to defendant in error Huff and plaintiff in error Lawrence, and reversed as to defendant in error Hawley.

JUDGMENT ACCORDINGLY.

STATE OF NEBRASKA, EX REL. SCHOOL DISTRICT NUMBER SIX, THURSTON COUNTY, ET AL. V. EUGENE MOORE, AUDITOR OF PUBLIC ACCOUNTS.

FILED MAY 1, 1895. NO. 7580.

1. **Construction of Statutes.** In the interpretation or construction of statutes, ascertainment of the intention of the legislature is the end or purpose to be accomplished.

2. ———. Where a law is plain and certain in its terms and free from ambiguity, a reading suffices and no interpretation is needed or proper.

3. ———. Statutes which authorize the issuance of bonds by the minor political subdivisions of the state are subjects for strict construction when an interpretation is necessary, and where, from a careful study and analysis of the whole act and its several parts, the meaning and intent is doubtful, the doubt should be resolved in favor of the public or taxpayers.

4. **School Districts:** ISSUANCE OF BONDS: PAYMENT OF WARRANTS. The act approved March 30, 1887 (Session Laws, 1887, p. 100, ch. 9), entitled "An act to authorize counties, precincts, townships, or towns, cities, villages, and school districts to compromise their indebtedness and issue new bonds therefor," *held*, not to empower a school district to issue its bonds and deliver them to parties in compromise, or to take the place, of an indebtedness evidenced by school district warrants or orders.

ORIGINAL application for *mandamus* to compel the auditor of public accounts to register certain bonds issued by the school district to secure the payment of indebtedness evidenced by its warrants owned by the State Bank of Pender. *Writ denied.*

James H. Macomber, for relators cited: 1 Dillon, Municipal Corporations, sec. 65; *County of Scotland v. Thomas*, 94 U. S., 682; *County of Cass v. Gillett*, 100 U. S., 585; *County of Ralls v. Douglas*, 105 U. S., 728; *Commissioners of Jefferson County v. People*, 5 Neb., 127; *Lancaster County v. Trimble*, 33 Neb., 121; *State v. Babcock*, 25 Neb., 504; *Singer Mfg. Co. v. Fleming*, 39 Neb., 684; *People v. McCallum*, 1 Neb., 182; *State v. Ream*, 16 Neb., 681.

A. S. Churchill, Attorney General, and *W. S. Summers, Deputy Attorney General, contra*, cited: *City of Tecumseh v. Phillips*, 5 Neb., 305; *Messinger v. State*, 25 Neb., 674; *State v. Lancaster County*, 6 Neb., 474; *Holmberg v. Hauck*, 16 Neb., 337; *Touzalin v. City of Omaha*, 25 Neb., 817; *State v. Hurds*, 19 Neb., 316; *Ives v. Norris*, 13 Neb., 252; *Burlington & M. R. R. Co. v. Saunders County*, 9 Neb., 507.

HARRISON, J.

It appears from the application for a writ of *mandamus* in this action that school district No. 6 of Thurston county, one of the relators, had contracted an indebtedness of $1,365.26, and had issued warrants evidencing the indebtedness, of which the State Bank of Pender, also a relator, had become the owner by purchase. No question is raised in the pleadings of the good faith of either the issuance of the warrants by the school district or their acquisition by the bank, nor is their validity attacked. The school district was unable to pay the amount due the bank upon the warrants, and, as a result of negotiations between its officers and the bank, it was agreed that the school district would issue its bonds in the sum of $1,250, which the bank would receive in full of the indebtedness. The bonds were issued and the warrants held by the bank were surrendered and canceled. The bonds were presented to Hon. Eugene Moore, auditor of public accounts, respondent herein, for registration, and, upon his refusal to register them, this action was brought in this court, the relief sought being to compel the auditor to comply with the relator's demand for registration of the bonds. The auditor demurred to the petition or application of relators and thus put in issue the authority of the school district to issue the bonds and the right of the parties to require them to be registered.

The law to which our attention is directed, and pursuant to the provisions of which the relators assert they acted in making the agreement, and which, it is claimed, empowered the school district to issue the bonds for the purpose and in the manner it did, was passed during the legislative session of 1887 (see Session Laws, 1887, p. 100, ch. 9), and reads, in the portion which we need notice, as follows:

"An act to authorize counties, precincts, townships, or towns, cities, villages and school districts to compromise their indebtedness and issue new bonds therefor.

* * *

"Section 1. That any county, precinct, township or town, city, village, or school district is hereby authorized and empowered to compromise its indebtedness in the manner hereinafter provided.

"Sec. 2. Whenever the county commissioners of any county, the city council of any city, the board of trustees of any village, or the school board of any school district shall be satisfied by petitions or otherwise that any such county, precinct, township, or town, city, village, or school district, is unable to pay in full its indebtedness, and two-thirds ($\frac{2}{3}$) of the resident taxpayers of such county, precinct, township, or town, city, village, or school district shall by petition ask that such county, precinct, township, town, city, or village, or school district to compromise such indebtedness, they are hereby empowered to enter into negotiation with the holder or holders of any such indebtedness of whatever form, scaling, discounting, or compromising the same.

"Sec. 3. Whenever satisfactory arrangements are made with the holder or holders or any of them of any such indebtedness, and upon a surrender of the same for cancellation or satisfaction, the county commissioners for and on behalf of any such county, precincts, townships, or towns, or the city council of any such city, or the board of trustees of any such village, or school board of any such school districts, shall upon petition of two-thirds ($\frac{2}{3}$) of the resident tax payers of such county, precinct, township, or town, city, village, or school district, shall have authority and they are hereby empowered to issue the bonds of such county, precinct, township, or town, city, village, or school district, to the holder or holders of the indebtedness so surrendered, canceled, or satisfied for the amount agreed upon, not exceeding the original indebtedness.

"Sec. 4. Before issuing bonds under the provisions of this act the board issuing the same shall by resolution enter upon its records, recite the number and denomination of the bonds to be issued, the rate of interest, and to whom and when payable. Such bonds shall be payable in not more than twenty (20) years from the date of their issue, or at any time before maturity at the option of such municipality. They shall bear interest at a rate not exceeding seven (7) per cent, nor the rate borne by the bonds surrendered, with interest coupons attached, payable annually or semi-annually," etc.

During a number of years school districts in this state issued bonds for certain purposes, by virtue of the right given them by law to borrow money, this court holding, when the question was presented to it for determination, that the power to issue bonds was implied from the authority conferred by statute to "borrow money." (*State v. School District*, 13 Neb., 78; also *State v. School District*, 13 Neb., 82.) There was some legislation on the subject of school district bonds, their issuance, registration, etc., during the legislative session of 1875 (Session Laws, 1875, pp. 118, 185), and in 1879 an act was passed by the legislature entitled "An act to provide for the issuing and payment of school district bonds," which repealed the former acts on the subject and provided for the issuance of bonds to obtain money, by the officers of school districts, for the purpose of purchasing a site for, and the erection thereon of, school houses and furnishing the same; that prior to the issuing of any bonds the subject of the bonding of the district must be submitted to the voters, and two-thirds of the qualified electors of the school district declare by their votes in favor of issuing the bonds; that a notice of such election be given at least twenty days prior to the day of the election; that no such vote be ordered unless pursuant to the request of a petition signed by at least one-third of the electors of the school district, presented to the district

board, suggesting that a vote be taken in relation to the issuance of bonds for the purposes specified in the petition and within the purposes stated in the act. This law of 1879 has been amended, but not so as to change its requirements in regard to presentment of a petition and the holding of an election being necessary to the authorization of an issue of bonds. There was also passed by the legislature of 1879 (Session Laws, 1879, p. 176) "An act to provide for the funding of outstanding school district bonds," which provided that any school district in the state of Nebraska which has heretofore voted and issued bonds which remain unpaid is authorized to issue bonds to be substituted and exchanged for the original bonds, at a rate not to exceed dollar for dollar, and further providing that no vote of the people be required to authorize the issue of the new bonds. This act was amended in 1893, but the amendment need not be further noticed here. In 1887 came the act under which the bonds over which this controversy has arisen were issued, and which we have hereinbefore quoted. We have shown the condition of our law in reference to the subject under consideration to the extent it appears in the foregoing statement, for the purpose, in the main, of establishing, as it does, that prior to the passage of the act of 1887 the power of the school district board to issue bonds was confined to instances where the legislature had authorized them to do so only when the proposition had first been submitted to and acted upon favorably by the body of the district, the voters, for at no time were the officers empowered to issue bonds except when the expenditure had the approval of the electors of the district, save in the funding act of 1879, and this only extended to bonds which had been previously voted and issued, the indebtedness evidenced by them having received the consideration and, by their votes, the approval of the electors of the district.

It is not contended by the relators that the bonds which

the auditor refused to register were issued pursuant to any election at which the proposition of their issuance was voted upon by the electors of the school district relator, but that they were executed and delivered strictly in accordance with the requirements of the act of 1887, and it is not controverted by respondent that the provisions of the law of 1887 were in every essential fulfilled by the district officers in the issuance of these bonds; hence, the main question for our determination is, are the provisions of the act of 1887 sufficiently broad to authorize the issuance of bonds by a school district to substitute or exchange for an indebtedness of the district other than a bonded indebtedness? The other points noticed are only incidental to this, and important alone insomuch as they bear upon and affect its disposition. In the interpretation and construction of statutes one of the cardinal rules is that it is the intent of the law that is to be sought after, and, if possible, ascertained, and where the law is expressed in words which are clear and not ambiguous, and no doubt as to its purpose and meaning can arise from the language employed where to understand and know its intent it is but necessary to read, then there is no call for an interpretation, but where the intention and meaning of the law-makers as expressed in the statute enacted is uncertain or obscure, as in the one now under consideration, a bare reading will not suffice, and we are obliged to resort to a construction of its terms and provisions. This statute contemplates the issue of bonds by officers of certain governmental divisions and subdivisions of our state and necessarily carrying with it a resort to the power of taxation of the people to raise the funds to meet the indebtedness created by such action, in the majority of instances not accorded until the proposition involved is submitted to and approved by a vote of the electors of the particular political body or subdivisions whose tax bearers are to be affected thereby, and hence, agreeably to a well established rule, is to be strictly con-

strued, and where there is any doubt it must be resolved in favor of the public or taxpayers.

The first section of the act under discussion enumerates the particular bodies or municipalities to which power is granted, and contains the authorization to compromise indebtedness without designation of any particular kind of indebtedness. Section 2 provides for the presentation of a petition by two-thirds of the resident taxpayers of the county, city, town, or school district, etc., asking that such a compromise be made, and empowers the proper officers to negotiate with the holders of "any such indebtedness of whatever form, scaling, discounting, or compromising the same." The words "of whatever form," applied in explanation of the indebtedness and making it include, as given their natural and ordinary purport they do, any and all indebtedness, seem to make the intention in relation to what claims were in contemplation and referred to by the legislature passing the act, plain and certain, and if there were no statements in other portions of the law bearing upon this same point, we might well stop here, content with the determination to which it would lead us. Section 3 of the law authorizes the issuance of the bonds upon the surrender and cancellation or satisfaction of the indebtedness and presentment of a petition by two-thirds of the taxpayers requesting such action. It does not designate or indicate any particular kind of indebtedness, but refers to it in each instance by the use of the general term. In section 4, in referring to the bonds to be issued, it is stated: "They shall bear interest at a rate not exceeding seven (7) per cent, nor the rate borne by the bond surrendered;" thus, it would seem, clearly indicating that it was an indebtedness evidenced by bonds which the legislator had in mind when he framed and introduced the bill containing the act in question, and in contemplation of the legislative body when it passed the act. From a study of the body of the law we think it must be concluded that there is a doubt whether

the compromise of all kinds of indebtedness is intended to be authorized, or only those of a bonded nature. It is a well settled rule that if the meaning conveyed by the body of the act is uncertain or in doubt, resort may be had to the title, and more especially is this the rule in jurisdictions where, as in our state, there is a constitutional provision requiring the subject of every bill to be clearly expressed in its title. In the title of this act the subject was stated as follows: "An act to authorize counties, precincts, townships, or towns, cities, villages, and school districts to compromise their indebtedness and issue new bonds therefor." The portion which we desire mainly to notice is contained in the words, "and issue new bonds therefor," and more particularly to the two words, "new bonds." The principal object of the title of a bill is to convey to a person who reads it a general idea or knowledge of the contents of the act. To a person reading the title of this bill, the use of the word "new" in connection with word "bonds," and allowing to them their ordinary signification, as must be done, and referring back and viewing them, coupled with the other idea expressed in the title, *i. e.*, the compromise of the existing indebtedness, it seems clear that the natural thought would be bonds "new" for bonds "old," given the appellation "new" in the title because issued in place or renewal of bonds which would be designated by the opposing word "old." We then have the use in both title and act, of the general term indebtedness, which, without anything to extend or explain it, would include all kinds of indebtedness. In one section it is stated to be intended to cover indebtedness of whatever form, which would include the warrants or school orders held by the bank, and surrendered on the issuance of the bonds presented and which the auditor refused to register. On the other hand, we have the title stating that the act is to provide for new bonds which conveys the idea of compromising, replacing, or renewing other or old bonds, a statement in the

text that the bonds issued shall not bear interest at a rate in excess of that borne by the bonds surrendered, which, to say the least, leaves us in doubt and renders it uncertain whether the law was intended by the legislature to empower the issuance of bonds in the manner stated therein for the compromise of an existing indebtedness other than in the form of bonds. Add to these the thought that there was no provision for submitting the proposition of the issuance of these bonds to a vote, it being the wise and wholesome general policy of our law to so submit such questions, involving, as they necessarily do, the levying of a tax, to the decision of the voters who must pay the tax, and further that such laws are the subject for strict interpretation, and if there is a doubt as to the intention, it must be resolved in favor of the taxpayers or public, and we are constrained to say that our conclusion is that the act we are considering did not empower the issuance of the bonds to replace the indebtedness consisting, as it did, of school warrants or orders, and the writ prayed for in this action must be denied.

WRIT DENIED.

NATHAN K. GRIGGS, APPELLANT, V. WILLIAM J. HARMON, APPELLEE.

FILED MAY 1, 1895. No. 6458.

Bill of Exceptions: AUTHORITY OF CLERK TO SIGN: REVIEW. In this case there are presented only questions of fact which cannot be examined upon what purports to be a bill of exceptions signed by the clerk of the district court wherein judgment was rendered, for the reason that there was no showing of the sickness or absence of the presiding judge from his district, and because the parties litigant did not agree upon such bill. Following *Scott v. Spencer*, 42 Neb., 632.

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

Samuel Rinaker, J. A. Smith and *R. S. Bibb*, for appellant.

Frick & Dolezal, contra.

RYAN, C.

This was an action to quiet title brought by appellant in the district court of Saunders county. There is presented no question other than of fact. These questions cannot be considered upon what is submitted as a bill of exceptions signed by the clerk of said court, for the reason that it was not shown that the said bill was settled by the clerk because of the absence or sickness of the district judge, and there was no agreement upon the bill of exceptions. There was a stipulation in which, however, the last mentioned requirement does not appear. It was in the following language: "It is hereby agreed by and between the plaintiff and defendant in this action that a bill of exceptions in this case may be settled, allowed, and signed by the clerk of said district court, and that the same may be so signed and allowed without service or notice to defendant, except that in case of amendments proposed to the bill of exceptions as the same now stands, notice of any such amendments shall be given by plaintiff to defendant if any such amendments shall be desired by the plaintiff to be made. The bill to be settled and signed as aforesaid within the time provided by law." Following the case of *Scott v. Spencer*, 42 Neb., 632, we must ignore the act of the clerk in assuming to settle the bill of exceptions. Since the pleadings amply justified the relief granted the appellee, the judgment of the district court is

AFFIRMED.

SOUTH OMAHA NATIONAL BANK, APPELLANT, v. WRIGHT & BALDWIN ET AL., APPELLEES.

FILED MAY 1, 1895. No. 6312.

1. **Principal and Surety:** INDEMNITY FOR SURETY. Where a surety for the payment of a debt receives a security for his indemnity and to discharge such indebtedness, the principal creditor is in equity entitled to the full benefit of that security. *Richards v. Yoder*, 10 Neb, 429, followed.

2. **Subrogation.** The doctrine of subrogation is not administered by courts of equity as a legal right, but the principle is applied to subserve the ends of justice and to do equity in the particular case under consideration. It does not rest on contract, and no general rule can be laid down which will afford a test in all cases for its application. Whether the doctrine is applicable in any particular case depends upon the peculiar facts and circumstances of such case.

3. **Chattel Mortgages:** INDEMNITY: SUBROGATION. A surety on a note, to indemnify her against loss by reason of her suretyship, and also to secure the payment of a debt due to her from her principal, took from him a mortgage. The principal afterwards gave to the payee of the note signed by the surety a mortgage to secure its payment. This mortgage pledged the same property pledged to the surety and by the terms was made subject thereto. In a suit to foreclose the mortgage given to secure the note signed by the surety the latter answered and claimed a first lien on the mortgaged property to satisfy the debt owing her by her principal, and which was then due. *Held*, That the holder of the note signed by the surety should be subrogated to her lien on the mortgaged property

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

The facts are stated by the commissioner.

Charles Offutt, for appellant:

A creditor is in equity entitled to the benefit of any security for the payment of a debt given by the principal

debtor to the surety, although the creditor did not originally rely upon the credit of such security or even know of its existence; and a creditor has an equitable right to be substituted to the benefit of any such security for a debt which the principal debtor has given to his surety. (Sheldon, Subrogation, sec. 154; *Richards v. Yoder*, 10 Neb., 431; *Curtis v. Tyler*, 9 Paige Ch. [N. Y.], 432; *Kinsey v. McDearmon*, 5 Cald. [Tenn.], 395; *Saffold v. Wade*, 51 Ala., 218.)

The bank's note on which Flora M. Wright is surety must be paid out of the proceeds of the mortgaged property before she can take anything under her other mortgage for one thousand dollars. (1 Pomeroy, Equity Jurisprudence, secs. 243, 275; *Fitzhugh v. Custer*, 4 Tex., 391; *Carr v. Clough*, 59 Am. Dec. [N. H.], 345; *Schley v. Dixon*, 71 Am. Dec. [Ga.], 121; *Polk v. Rose*, 89 Am. Dec. [Md.], 773; *Ten Eyck v. Holmes*, 3 Sandf. Ch. [N. Y.], 428; *Griffin v. Chase*, 36 Neb., 328; *Siebert v. True*, 8 Kan., 53.)

Slabaugh & Rush, contra, on the question of subrogation, cited: *Ohio Life Ins. & Trust Co. v. Reeder*, 18 O., 35; *Van Orden v. Durham*, 35 Cal., 145; *Newsom v. McLendon*, 6 Ga., 400; *Belcher v. Hartford Bank*, 15 Conn., 382; *Osborne v. Noble*, 46 Miss., 454; *Eastman v. Foster*, 8 Met. [Mass.], 19; *Jackson v. May*, 28 Ill. App., 305; *Robertson v. Baker*, 11 Fla., 232; *Cooper v. Jenkins*, 32 Beav. [Eng.], 337; *Cornwell's Appeal*, 7 W. & S. [Pa.], 308; *Keyes v. Brush*, 2 Paige Ch. [N. Y.], 311; *Pool v. Doster*, 59 Miss., 258.

RAGAN, C.

On the 7th of January, 1891, S. G. Wright and A. J. Baldwin executed and delivered their promissory note to the South Omaha National Bank for the sum of $3,000, due in ninety days. This note Flora M. Wright signed as surety. October 3, 1891, Wright & Baldwin executed and

delivered another note to the said bank for $2,500, due thirty days after date. On the 10th day of January, 1891, Wright & Baldwin executed and delivered their note for $1,000 to Flora M. Wright, due in ninety days. This note was given for money borrowed by Wright & Baldwin of Flora M. Wright. On the 9th of November, 1891, Wright & Baldwin executed and delivered to Flora M. Wright two chattel mortgages, and thereby conveyed to her certain personal property. One of these mortgages was given to secure the payment of the note of $1,000, given to her on January 10, 1891, by Wright & Baldwin. The other mortgage was given her to indemnify and keep her harmless from any loss which she might sustain by reason of having signed as surety the note of Wright & Baldwin for $3,000 dated January 7, 1891. These two mortgages were filed in the office of the county clerk of Douglas county at three o'clock and twenty minutes in the afternoon of the day of their execution. On the 9th of November, 1891, Wright & Baldwin executed and delivered a chattel mortgage to the South Omaha National Bank and thereby conveyed to said bank the same personal property covered by the mortgages given to Flora M. Wright. This mortgage to the bank was given to secure the payment of the note for $3,000 dated January 7, 1891, and the note of $2,500 dated October 3, 1891. The mortgage recited that it was given subject to the two mortgages given by Wright & Baldwin to Flora M. Wright, and it was filed in the office of the county clerk of Douglas county after the filing of the mortgages to Flora M. Wright. The South Omaha National Bank brought this suit in the district court of Douglas county to foreclose the chattel mortgage given to it by Wright & Baldwin, and they and Flora M. Wright as well were made parties to the action. Flora M. Wright filed an answer in the nature of a cross-petition, claiming that Wright & Baldwin were indebted to her in the sum of $1,000, and interest thereon from January 10, 1891, on

the promissory note of that date given her by them, and that to secure the payment of such indebtedness she was entitled to a first lien upon the mortgaged property by reason of the chattel mortgage executed to her thereon by Wright & Baldwin on November 9, 1891. Pending the action a receiver was appointed, who took charge of the mortgaged property and converted the same into cash. The district court found that there was due from Wright & Baldwin to Flora M. Wright, $1,184.66; that there was due to the South Omaha National Bank from Wright & Baldwin and Flora M. Wright, $3,446.66; and that there was due to the bank from Wright & Baldwin, $2,672.97; and that to secure the payment of said several sums of money, the bank and Flora M. Wright were entitled to the proceeds of the sale of said property mortgaged to them by Wright & Baldwin. The district court, however, decreed that the amount found due Flora M. Wright was the first lien upon the mortgaged property or its proceeds, and that the amount due the bank from Wright & Baldwin and Flora M. Wright was a second lien upon such mortgaged property or its proceeds, and that the amount due the bank from Wright & Baldwin was a third lien upon such mortgaged property or its proceeds, and ordered the proceeds derived from the sale of said mortgaged property distributed accordingly. From this decree the bank has appealed.

The contention of the appellant is that the debt due to it from Wright & Baldwin as principals and Flora M. Wright as surety should have been declared a first lien upon the mortgaged property or its proceeds. This contention is an invocation of the equitable doctrine of subrogation, the argument of the bank being that it is entitled to be subrogated to all the claims against the mortgaged property acquired by Flora M. Wright by the mortgage given to her by Wright & Baldwin to secure the debt due from them to her, and to indemnify her for becoming surety

on their note to the bank. We think this contention must be sustained. The general rule is that a creditor is entitled to the benefit of all securities given by the principal debtor for the indemnity of his surety. (*Haven v. Foley*, 18 Mo., 136, 19 Mo., 632; *Ten Eyck v. Holmes*, 3 Sandf. Ch. [N. Y.], 428; *Van Orden v. Durham*, 35 Cal., 136.) In *Richards v. Yoder*, 10 Neb., 431, it was held: "Where a surety for the payment of a debt receives a security for his indemnity and to discharge such indebtedness, the principal creditor is in equity entitled to the full benefit of that security." (*Curtis v. Tyler*, 9 Paige Ch. [N. Y.], 432.)

This is a suit in equity. All the parties are before the court. It is undisputed that Flora M. Wright is surety for Wright & Baldwin to the bank on the $3,000 note dated January 7, 1891. This note is past due and wholly unpaid. To secure its payment the bank has a lien upon certain chattels by virtue of a mortgage executed to it thereon by Wright & Baldwin; and Flora M. Wright, to indemnify her for signing this note as surety, has also a mortgage upon the same chattel property. She has also a mortgage upon this property to secure a debt due to her from Wright & Baldwin, but this debt is past due, is unpaid, and is held by her. She owes the bank, then, the $3,000 note which she signed as surety. If her debt due from Wright & Baldwin be first satisfied out of the proceeds of the chattel property, the remaining money will be insufficient to discharge the debt owing by her and Wright & Baldwin to the bank. This would necessitate supplemental or further proceedings on the part of the bank against Mrs. Wright to recover the balance due on the note which she signed as surety for Wright & Baldwin. In other words, it would lead to a multiplicity of suits,—a result which a court of equity is always desirous of preventing when it can be done without injury or injustice to the parties.

The doctrine of subrogation is not administered by courts

of equity as a legal right, but the principle is applied to subserve the ends of justice and to do equity in the particular case under consideration. It does not rest on contract, and no general rule can be laid down which will afford a test in all cases for its application. Whether the doctrine is applicable in any particular case depends upon the peculiar facts and circumstances of such case. The case at bar appears to us to be one which calls for the application of this doctrine. The record before us affords not even a suspicion that any injustice will be done Flora M. Wright by postponing the payment of her debt out of the proceeds of the sale of the chattel property to the payment of the debt of Wright & Baldwin to the bank, for which she is also liable. This debt is her debt. The property which has been pledged to her to indemnify her for contracting this debt and to secure to her the payment of the $1,000 loaned Wright & Baldwin is also pledged to secure the payment of the debt of Wright & Baldwin for which she is surety. To apply this mortgaged property then to the payment of Wright & Baldwin's and Flora M. Wright's debt before applying it to the payment of Wright & Baldwin's debt to Flora M. Wright is but to do simple justice. We conclude, therefore, that out of the proceeds of the mortgaged property the district court should have, in this particular case, ordered payments to be made as follows: (1) The costs of the suit, including expenses of the receiver; (2) to the appellant, the amount due to it from Wright & Baldwin and Flora M. Wright; (3) to Flora M. Wright, the amount due to her from Wright & Baldwin; (4) the amount due to the appellant from Wright & Baldwin. The decree of the district court is reversed and the cause remanded for further proceedings in accordance with this opinion.

REVERSED AND REMANDED.

SOUTH OMAHA NATIONAL BANK V. FARMERS & MERCHANTS NATIONAL BANK OF FREMONT, NEBRASKA, ET AL.

FILED MAY 1, 1895. NO. 6271.

1. **Appearance:** DEFINITION. An appearance is special when its sole purpose is to question the jurisdiction of the court. It is general if the party appearing invokes the power of the court on any question other than that of jurisdiction. Whether it is general or special is to be determined by an examination of the substance of the pleading, and not by its form.
2. **Garnishment:** VENUE. Under our Code, an order of garnishment cannot be issued to a county other than that in which the principal action is brought.

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

The opinion contains a statement of the case.

Charles Offutt, for plaintiff in error:

The motion filed by the garnishee constituted a general appearance and a waiver of its objections to jurisdiction. (*Porter v. Chicago & N. W. R. Co.*, 1 Neb., 14; *Aultman v. Steinan*, 8 Neb., 109; *Klopp v. Water-Works Co.*, 34 Neb., 808; *Bucklin v. Strickler*, 32 Neb., 602; *Whitney v. Lehmer*, 26 Ind., 503; *Peck v. Barnum*, 24 Vt., 75; *Reed v. Fletcher*, 24 Neb., 451.)

The district court of Douglas county acquired jurisdiction by the issuance of the order of attachment to Dodge county. The ancillary action of attachment was thus brought in Dodge county, and the garnishee was properly served there. (*Reed v. Maben*, 21 Neb., 696; *Blue Valley Bank v. Bane*, 20 Neb., 300; *Moore v. Stainton*, 22 Ala., 831; *Conahan v. Cullin*, 2 Dis. [O.], 1; *Toledo, W. & W. R. Co. v. Reynolds*, 72 Ill., 487; *Peck v. Barnum*, 24 Vt., 75;

Whitney v. Munroe, 19 Me., 42; *Bank of Augusta v. Conrey*, 28 Miss., 667; *Bryan v. Lashley*, 21 Miss., 284; *Barney v. Patterson*, 6 H. & J. [Md.], 182; *Perkins v. Norwell*, 6 Humph. [Tenn.], 151; *Mansfield v. New England Express Co.*, 58 Me., 38; *Northfield Knife Co. v. Shapleigh*, 24 Neb., 638; *Beamer v. Winter*, 21 Pac. Rep. [Kan.], 1078; *Woodward v. Adams*, 9 Ia., 474.)

E. F. Gray and *D. B. Carey*, *contra*, cited: *Mathews v. Smith*, 13 Neb., 178; *Stevens v. Dillman*, 86 Ill., 233.

IRVINE, C.

The plaintiff in error brought this action in the district court of Douglas county against George W. E. Dorsey, Hamilton H. Dorsey, and Jesse M. Marsh, individually and as partners doing business under the firm name of Dorsey Bros. & Co., to recover on a promissory note for $8,000. Attachments were issued directed to the sheriffs of Douglas, Saunders, and Dodge counties. Subsequently to the commencement of the action an affidavit for garnishment in the following form was filed:

"The affiant, Harry C. Bostwick, having been first duly sworn, deposes and says that he is the cashier of the plaintiff bank herein and its duly authorized agent; that he has good reason to and does believe that the Farmers & Merchants National Bank of Fremont, Nebraska, in the county of Dodge, has property of the defendants George W. E. Dorsey and Hamilton H. Dorsey, and of the defendants Dorsey Bros. & Co., in its possession or under its control; that this affiant is unable to specifically describe said property further than to say that it is money, choses in action, promissory notes, stocks, bonds, and other evidences of debt.

"And affiant further says that said Farmers & Merchants National Bank of Fremont, Nebraska, is indebted to said defendants George W. E. Dorsey and Hamilton H.

Dorsey, and each of them, and to the said defendants Dorsey Bros. & Co., in an amount unknown to this affiant."

On this affidavit an order of garnishment in the usual form was issued, directed to the sheriff of Dodge county, and a notice of garnishment served on the Farmers & Merchants National Bank, directing it to appear in the district court of Douglas county, on a day named in the writ and answer. Instead of answering, the bank appeared by the following motion: "The Farmers & Merchants National Bank of Fremont, Nebraska, moves the court to quash the notice of garnishment served upon Otto Huette, its president, by the sheriff of Dodge county, Nebraska, requiring him and it to appear in this said district court of Douglas county, to answer touching property and credits of said defendants, upon an order of attachment herein, and the sheriff's return to the service of said notice, because said notice and service are void, and without the authority of the law, and because said Farmers & Merchants National Bank and its said president reside and are within Dodge county and do not reside and are not within Douglas county, where this action is brought, and because it and its president ought not to be required to answer in garnishment in any other county than that of their residence. This motion is supported by affidavit." This motion was sustained, and the garnishee discharged; from the order thus made the plaintiff prosecutes error.

Two questions are presented by these proceedings. The first is whether the motion filed by the garnishee constituted a general appearance and waived jurisdictional defects; second, whether, if the appearance of the garnishee did not waive defects, an order of garnishment can be issued to a county other than that in which the action against the debtor is pending?

We do not think that the motion filed by the garnishee constituted a general appearance or estopped it from urging that it was not properly brought before the court. The

argument is, that the motion is too broad; that it does not purport to be a special appearance, and that by stating that the garnishee does not reside in Douglas county, it presents an issue not necessary to the question of jurisdiction. On the latter point it is sufficient to say that the pleader was merely stating the grounds upon which his motion was based; that by injecting the element of residence he was not calling upon the court for any affirmative action. The motion alleged that the garnishment was invalid; first, because the bank did not reside in Douglas county, and second, because it was not within Douglas county. If the bank gave one good reason for holding the garnishment invalid, the fact that it gave another reason which might not be good, and which was unnecessary, would not affect the merits of the motion; nor do we think that the appearance was made general by the failure to designate it as special. At the common law, pleadings had formal parts, and were determined rather according to their form than their substance. By the Code, formal pleadings do not exist, and the substance alone is looked to; therefore, if this motion was, in its substance, a special appearance, the plaintiff's contention must fail. An examination discloses that the object of the motion was merely to quash the notice of garnishment. It went solely to the question of jurisdiction, and did not invoke the power of the court on any question except that of jurisdiction. This, we think, is what distinguishes a special from a general appearance. In *Porter v. Chicago & N. W. R. Co.*, 1 Neb., 14, it was said by MASON, C. J., that a defendant may appear specially to object to the jurisdiction of the court, but if he seeks to bring its powers into action excepting on a question of jurisdiction, he will be deemed to appear generally. The same language was issued by LAKE, C. J., in *Crowell v. Galloway*, 3 Neb., 215. The same principle was applied in *Aultman v. Steinan*, 8 Neb., 109, and an appearance held general, because a motion was made to dismiss the case for reasons

held not to affect the jurisdiction of the court. This was also the ruling of the court in *Cropsey v. Wiggenhorn*, 3 Neb., 108, and in *Bucklin v. Strickler*, 32 Neb., 602. See, also, on this question a review of the cases in *Hurlburt v. Palmer*, 39 Neb., 158. The reason and the doctrine of all the cases is that an appearance is special when it is confined to an attack upon the jurisdiction, but that it becomes a general appearance whenever the power of the court is invoked on any other question.

We now come to the merits of the motion. It is familiar law that process of attachment and garnishment is solely the creature of statute. While the statutes on the subject are remedial in their character, and should consequently receive a liberal construction, still no powers can be exercised which are not within the terms of the statute expressly or by fair implication. Our Code (sec. 202) provides for issuing orders of attachment to different counties, and as a general proposition a garnishment, when founded upon a proper affidavit, may follow an attachment; but the garnishment depends upon the affidavit, and the requisites thereof appear in section 207 of the Code of Civil Procedure, which is as follows: "When the plaintiff, his agent or attorney, shall make oath, in writing, that he has good reason to and does believe that any person or corporation, to be named and within the county where the action is brought, has property of the defendant (describing the same) in his possession, if the officer cannot come at such property, he shall leave with such garnishee a copy of the order of attachment, with a written notice that he appear in court, at the return of the order of attachment, and answer, as provided in section 221." This section has existed without amendment since the adoption of the Code, November 1, 1858. It is contended on behalf of the plaintiff that the attachment and garnishment constitute a separate action, and that the requirement that the garnishee shall be within the county where the action is brought re-

fers to the attachment and to the county where the writ is executed; but an inspection of the rest of the chapter relating to attachment, we think, makes it clear that the "action" referred to is the principal action on which the attachment is based. Thus, section 198, the first of the chapter, provides: "The plaintiff in a civil action for the recovery of money may, at or after the commencement thereof, have an attachment," etc. Section 199 provides: "An order of attachment shall be made by the clerk of the court, in which the action is brought," etc. Section 203: "The return day of the order of attachment, when issued at the commencement of the action, shall be the same as that of the summons." Section 226: "Final judgment shall not be rendered against the garnishee until the action against the defendant in attachment has been determined; and if in such action judgment be rendered for defendant in attachment, the garnishee shall be discharged and recover costs." And so on throughout the chapter, the word "action" being used, evidently, to distinguish the principal case from the attachment proceedings. If such be the true construction, then it is clear that the statute, in plain and unambiguous language, requires the affidavit to show that the garnishee is within the county where the principal action is brought, and it is not claimed that outside of section 207 there is any authority for issuing an order of garnishment to another county. But if the word "action" be held to refer to the attachment proceedings, still Douglas would be the county where such action was brought. The writ was issued from and was returnable to the district court of Douglas county. The action was brought in Douglas county, the writ was merely to be executed in Dodge county. It was no more brought in Dodge county than was the principal case, because a summons was issued and served in that county upon the defendants there residing. There exists in principle a reason for giving the statute the construction we have indicated. A garnishee is an innocent

party not interested in the suit. The whole policy of the law is to protect him from expense, damages, costs, or unnecessary annoyance. A defendant must be sued in the county where he resides, or is at the commencement of the action, except in special cases, where a departure from the general rule is necessary. A witness cannot be required in a civil case to leave the county where he resides, or is found, in response to a subpœna from another county. It seems to have been the intention of the legislature to put a garnishee on as favorable a footing as a defendant or a witness. It would certainly be a great hardship to compel a garnishee to travel over the state for the purpose of making answer. In support of plaintiff's contention, we are cited to the case of *Conohan v. Cullin*, 2 Dis. [O.], 1. In that case it was held that service of an order of garnishment in Cincinnati on an agent there of a corporation situated in Cleveland was bad, and in the opinion there is a *dictum* that to authorize service on the Cleveland company an order of attachment should be issued to Cuyahoga county. We do not know whether the Code, as it then existed in Ohio, was similar to ours in this respect. It is not now similar, and has not been for many years. It does not now require that the affidavit shall show that the garnishee is within the county, but provides especially for issuing orders of garnishment to other counties, and for the taking of the answers of the garnishees in the counties to which the orders are issued. But if the Ohio Code was, at the date of this decision, similar to ours, we cannot think that we are bound by the construction given by an inferior Ohio court in an *obiter dictum*, the same year in which our Code was adopted.

From an examination, necessarily somewhat cursory, of the statutes of other states we find none embracing the language which is here the subject of investigation. Florida, Georgia, Ohio, and Texas provide specially for garnishments to other counties, and all provide that in such case an answer may be made without requiring the garnishee to

leave the county. We are aware that the construction we are giving the statute seems to leave the law in such a shape that property and credits of a debtor residing in the state cannot be reached when they are in the hands of a third person in a county where action cannot be brought against the debtor, because it has been held that action may not be brought in a county where the garnishee resides, and summons issued to the county of the debtor's residence. (*Hoagland v. Wilcox*, 42 Neb., 138.) We do not think, however, that we can avoid this difficulty without a forced construction of the statutes. The legislature, and not the courts, must correct the defect.

JUDGMENT AFFIRMED.

CLEMMA CONGER V. B. F. DODD.

FILED MAY 1, 1895. NO. 4675.

1. **Bill of Exceptions:** DEFECTS: SUFFICIENCY OF EVIDENCE. If a bill of exceptions discloses that important evidence has been therefrom omitted authentication of the bill to the effect that it contains all the evidence will not control, and in such case the verdict will not be disturbed as contrary to the evidence.
2. **Review:** DEFECTIVE TRANSCRIPT: INSTRUCTIONS. Where error is assigned upon the giving of a certain instruction, on the ground that while abstractly correct, it is misleading for want of modifications, the court will not consider such assignment where it appears that the whole charge is not included in the transcript, because proper modifications may have been given in other instructions.

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

J. R. Scott, for plaintiff in error.

Nightingale Bros. and *Wall & Bradley, contra.*

IRVINE, C.

Dodd began this suit against Conger in replevin to recover certain chattels. Dodd claimed the property as owner. Defendant below, Mrs. Conger, had taken the property under a chattel mortgage purporting to be executed by Dodd to secure a promissory note for $101.50 purporting to have been executed by Dodd July 11, 1887, and due August 11, 1887. Dodd had judgment in the district court from which Mrs. Conger prosecutes error.

The first assignment of error is that the verdict is not sustained by the evidence. Dodd undoubtedly made out a *prima facie* case of ownership. Mrs. Conger then introduced evidence tending to prove that her husband had procured her to loan Dodd $100; that after the negotiations had been made, and the money advanced, Mr. and Mrs. Dodd and Mr. Conger met at Mr. Conger's house; that a note and mortgage were there produced by Conger, read over to the Dodds, and Dodd's signature affixed to both by Mrs. Dodd, Dodd expressly authorizing her and directing her so to do. Dodd, in rebuttal, offered evidence tending to show that when this occurred he was so intoxicated as not to understand what he was doing; that he had been negotiating with Conger for the sale to Conger of his farm; that Conger paid him $100 in cash, taking this note, and agreeing on the maturity of the note to pay him $200 more. Dodd claims that he did not know that he signed or directed to be signed any mortgage, and Mrs. Dodd claims that she was informed the instrument she signed was an agreement for the sale of the farm. It appears quite clearly that Dodd knew of the mortgage not long after its maturity, which was long before the bringing of this action. The evidence is extremely vague and far from convincing. We would have great doubt whether what appears in the bill of exceptions would be sufficient in itself to sustain the verdict; but the bill of exceptions discloses that three

documents were introduced in evidence: one was the mortgage, one was the note, the third was offered in this language: "Counsel for defendant here offered in evidence an instrument signed by B. F. Dodd, and marked 'Exhibit B'." A careful search of the record discloses no evidence tending to show what this instrument was, and no copy of the instrument appears in the bill. In the examination of the witnesses, with reference to the alleged sale of the land, and the transactions at the time the note and mortgage were executed, much reference is made to this Exhibit B. This document may have been of such a character as to have supplemented the proof in regard to the alleged contract of sale and the fraud alleged to have been practiced upon Dodd and his wife. The certificate that the bill of exceptions contained all the evidence does not prevail against the intrinsic evidence afforded by the bill itself that there was an important omission, and in such case the verdict will not be disturbed as contrary to the evidence. (*Missouri P. R. Co. v. Hays*, 15 Neb., 224; *Oberfelder v. Kavanaugh*, 29 Neb., 427; *Dawson v. Williams*, 37 Neb., 1.)

Several assignments of error relate to the exclusion or admission of evidence, but these assignments, with perhaps one exception, are too indefinite to point out the ruling complained of, and must, therefore, be disregarded. In the one instance referred to the error assigned was in excluding testimony. No offer was made to show what it was sought to prove, and the question itself does not show the materiality of the inquiry.

It is assigned as error that the court erred in giving instruction No. 4. Counsel do not argue that this instruction misstated the law, but they contend that it was misleading when not accompanied by any modifying instructions. Instruction No. 4 is, however, the only instruction included in the transcript, and the certificate of the clerk is that the transcript is a true and perfect one "of petition, answer,

and instruction No. 4, given by the court." The inference, both from this certificate and from the number of the instruction, is that other instructions were given. Error will not be presumed; and when objection to an instruction is made on the ground stated, we cannot determine that there was error without having the whole charge before us.

Finally, it is assigned that the court erred in overruling the motion for a new trial, but as the motion referred to states eight grounds for a new trial, this assignment is too indefinite to present a case for review.

JUDGMENT AFFIRMED.

STATE OF NEBRASKA, EX REL. LION INSURANCE COMPANY, ET AL. V. ELIAS BAKER, CLERK OF THE DISTRICT COURT.

FILED MAY 2, 1895. No. 7651.

1. **Supersedeas Bonds:** SURETIES: APPROVAL. The only qualifications prescribed by the Civil Code for sureties on undertakings therein authorized are those mentioned in section 898, viz., that such sureties must be residents of this state, worth double the sum to be secured beyond the amount of their debts, and have property liable to execution in this state equal to the sum to be secured.

2. ——: SURETIES IN DIFFERENT COUNTIES: APPROVAL. A supersedeas undertaking executed by several sureties, but one of whom resides in the county in which such undertaking is required, the others being residents of a different county in this state, should not be rejected on the ground that the resident surety lacks the necessary property qualifications, provided his co-sureties possess all of the qualifications prescribed by law, and the undertaking in other respects satisfies the requirements of the statute.

3. **Final Order:** RULING ON MOTION TO REQUIRE APPROVAL OF SUPERSEDEAS BOND: MANDAMUS. The decision of the district

court, refusing to require the approval by the clerk thereof of a particular undertaking for a stay of execution pending proceedings by petition in error, is "an order affecting a substantial right in a summary proceeding after judgment," and, therefore, a final order which may be reviewed in this court upon petition in error.

ORIGINAL application for *mandamus* to compel the respondent to approve a supersedeas bond. *Writ denied.*

Jacob Fawcett, for relator.

Charles O. Whedon, contra.

POST, J.

This is an application for a writ of *mandamus* and presents the following essential facts: On the 29th day of December, 1894, the Buckstaff Bros. Manufacturing Company, a corporation, recovered a judgment against the relator in the district court of Lancaster county on a policy of insurance. On the 25th day of February, 1895, said judgment having been removed into this court for review by means of a petition in error, the relator tendered to the respondent, as clerk of the district court for said county, a supersedeas undertaking and requested the latter to examine and approve the same if found satisfactory. The respondent, while admitting that it is in due form, declines to approve it on the ground that but one of the three sureties thereon is a resident of Lancaster county, and that he is not possessed of the property qualifications prescribed by law.

It is conceded by the relator that the resident surety is not worth double the amount named in the bond over and above the amount of his debts, and is not possessed of property in this state liable to execution equal to the amount sought to be secured. It is claimed, however, and not denied, that the other sureties, who all reside in Douglas county in this state, possess the necessary qualifications.

The respondent has not only waived the issuing and service of the alternative writ, but has appeared in person and joins in requesting a construction of the provisions of the Code prescribing the qualifications of sureties in like cases. We might under ordinary circumstances decline to consider the question above suggested, since the writ must be denied on other grounds; but in view of the evident desire of the respondent to discharge his duty in a position shown to be peculiarly embarrassing, and the further fact that a decision of the question will probably prevent a second proceeding having for its object the relief herein sought, we have concluded to examine the provisions of the statute bearing upon the subject.

Section 898 of the Civil Code reads as follows: "The surety in every undertaking provided for by this Code, must be a resident of this state, and worth double the sum to be secured beyond the amount of his debts, and have property liable to execution in this state equal to the sum to be secured. Where there are two or more sureties in the same undertaking, they must in the aggregate have the qualifications prescribed in this section." The provision under which the stay is sought in this instance is section 588 of the Code, and which, so far as material to our inquiry, is as follows: "No proceeding to reverse, vacate, or modify any judgment or final order rendered in the probate court, or district court, except as provided for in the next section, * * * shall operate to stay execution, unless the clerk of the court in which the record of said judgment or final order shall be, shall take a written undertaking, to be executed on the part of the plaintiff in error to the adverse party, with one or more sufficient sureties, as follows," etc. Among the many undertakings authorized by the Code we discover four special provisions only, which will control the general one above quoted, viz., section 206, for a delivery bond in favor of the sheriff holding an execution; section 219, for the discharge of an at-

tachment on the execution of a bond by the defendant or other person in his behalf; section 919, for an undertaking by the plaintiff to secure an order of arrest in a civil action before a justice of the peace; section 949, for the discharge of an attachment issued by a justice of the peace upon the execution of an undertaking, etc. There are, on the other hand, many special provisions which harmonize with the general rule of the statute, but one of which need be here cited, viz., section 234, authorizing the discharge of an attachment at any time before judgment whenever made to appear to the court that the surety on the plaintiff's undertaking is not sufficient or has removed from the state.

Residence is, as a rule, one of the qualifications prescribed for the sureties on the official bonds of county and municipal officers; but we find no authority for extending that rule to undertakings under the Code, especially in view of the express provision therein to which reference has been made. The law has conferred upon the respondent, as clerk of the district court, a discretion in determining the sufficiency of undertakings to be approved by him, and that discretion will not be controlled by the writ of *mandamus*. (*State v. Kendall*, 15 Neb., 262.) But in the case before us the respondent justifies his refusal on the sole ground that the surety residing in Lancaster county is insufficient, without regard to the qualifications of those residing in Douglas county. Assuming, therefore, what is not decided, viz., that the petition states a cause for the relief sought, it is probable that the relator would have been entitled to judgment on the pleadings but for an allegation of the answer which is confessed by the demurrer. It is therein alleged that the relator heretofore, by motion, applied to the district court for a rule upon the respondent requiring him to show cause why he should not be required to approve the identical bond mentioned in the pleadings in this cause; that he thereafter appeared in obedience to an order of the court and was examined on oath touching his reasons for

such refusal, and an order was by the court therein entered fully justifying his action in the premises and discharging him from further responsibility in the matter, which order has never been reversed or modified. The following is the record of said order, omitting caption: "This cause now comes on to be heard on the motion of the defendant for an order directing the clerk of this court to approve the supersedeas bond tendered in this case, and, after hearing the oral evidence of the clerk of this court, the said clerk is hereby discharged from further responsibility in the matter, and upon due consideration whereof and of the statutes of this state relating to supersedeas bonds, the court holds that the law requires at least one of the sureties on a supersedeas bond to be a resident of the county where the judgment is rendered and to be financially responsible in the amount by law required. Whereupon it is by the court ordered that said motion be, and the same is hereby, overruled, to which the said defendant duly excepted." A final order which may be vacated, modified, or reversed upon proceedings in error is one "affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding, or upon a summary application in an ac ion after judgment." (Code, sec. 581.) That the above order is one affecting a summary proceeding after judgment, within the meaning of the Code, cannot be doubted; and that the subject thereof is within the jurisdiction of the district court, as an incident to its power to control its process in the enforcement of its judgments and decrees, is a proposition not controverted by the relator. Although a future consideration of that question on its merits may lead to a different result, we are for the purpose of this proceeding willing to adopt a conclusion satisfactory to both the relator and the respondent. The question whether the remedy by motion, as in this instance, is exclusive or concurrent merely, is not presented and is

not decided. It follows, however, from what has been said that the remedy pursued was an appropriate one, and the decision of the court as embodied in the final order cannot be disregarded or assailed in a collateral proceeding. The writ will, therefore, be denied, and like orders will be made on the application of the other relators, fourteen in number.

WRIT DENIED.

HARRIET WRIGHT V. STATE OF NEBRASKA.

FILED MAY 2, 1895. No. 7339.

1. **Criminal Law**: REVIEW: RECORD. All presumptions exist in favor of the regularity of the judgments of courts of general jurisdiction, and he who asserts the contrary is required to establish the alleged error by an exhibition of the record.

2. ———: ———: ———. An objection on the ground that a particular charge of an information was not included in the complaint upon which an accused was held to answer by the examining magistrate, will not be noticed by this court on petition in error to review a judgment of conviction where such preliminary complaint is not set out or made a part of the record.

3. **Disorderly Houses**: EVIDENCE. Evidence examined, and *held* to sustain a conviction under section 210, Criminal Code, for the knowingly owning, using, and occupying of a house in this state for the purpose of prostitution.

4. **Criminal Law**: BILL OF EXCEPTIONS: AFFIDAVITS. Where affidavits are used as evidence on the trial of any issue of fact, they must, to be available for the purpose of review by petition in error in this court, be identified and preserved in the form of a bill of exceptions.

5. ———: SENTENCE: REVIEW. To the district court and not to this has been entrusted the power to impose sentences for the commission of offenses against the laws of the state, and the judgments of that court will not be interfered with on the ground that they are excessive in the absence of a clear abuse of discretion.

ERROR to the district court for Platte county. Tried below before SULLIVAN, J.

C. A. Woosley and *W. M. Cornelius*, for plaintiff in error.

A. S. Churchill, Attorney General, and *W. S. Summers, Deputy Attorney General*, for the state.

POST, J.

It is by this proceeding sought to reverse a judgment of the district court for Platte county, whereby the plaintiff in error, Harriet Wright, was adjudged guilty of a violation of section 210 of the Criminal Code. The information upon which the accused was convicted charges the knowingly owning, using, and occupying by her of a certain house or building in said county for the purpose of prostitution. The provisions of the section above mentioned, so far as material to the questions presented by the record, are as follows: "Every house or building situated in this state, used and occupied as a house of ill-fame, or for the purposes of prostitution, shall be held and deemed a public nuisance, and any person owning, or having control of, as guardian, lessee, or otherwise, such house or building, and knowingly leasing or subletting the same in whole or in part for the purpose of keeping therein a house of ill-fame, knowingly, or permit the same to be used or occupied for such purpose, or using or occupying the same for such purpose, shall for every such offense be fined in any sum not exceeding $100, or imprisoned not less than thirty days nor more than six months, or both, at the discretion of the court."

The first assignment of the petition in error is that the trial court erred in refusing to quash the information on the ground that the accused had not been allowed a preliminary hearing upon the particular offense charged in the information. It is conceded by counsel that a complaint of some kind was lodged with a magistrate and that an exami-

nation of the accused was had on the charge therein stated; and said information not being included in the record before us, it cannot be determined that the district court erred in the ruling assigned. The rule is too firmly established to require the citation of authorities, that all presumptions exist in favor of the judgments of courts of general jurisdiction, and that he who asserts the contrary is required to establish the alleged error by an exhibition of the record. The principal contention of the accused relates to the sufficiency of the evidence to sustain the judgment. The character of the premises in question as a house of prostitution, and the former proprietorship of the accused, are facts clearly established by the proofs, and not seriously controverted on this hearing. It is, however, contended that she was not during the period named in the information either the owner or proprietor of said house, or in anywise related to the management or control thereof. It is shown by the record that the accused, on the 24th day of May, 1893, by written undertaking agreed to sell and convey said property to Mrs. L. M. Gaffney upon the payment by the latter of $2,500 on or before the 10th day of February, 1894, and on the day last named said property was conveyed by her to said Gaffney by warranty deed, with the usual covenants. There is evidence also tending to prove that Mrs. Gaffney, in the month of September, 1893, sold and assigned her interest in the property under and by virtue of said contract to one Edna De Vore, who it is claimed was the proprietress of the house at the time in question, and that the position of the accused therein was that of a servant only. On the part of the state it is contended that the contracts above mentioned, as well as the alleged proprietorship of Miss De Vore, are mere devices resorted to by the accused in order to evade responsibility for the traffic in which she was engaged. That question was submitted to the jury, assisted by a charge to which no exception was taken, and which is conceded to be an admirable exposition of the law of

the subject; and with the verdict rendered we discover no ground for interference in the proceeding. Aside from admissions proved which tend to establish the allegations of the information, it appears that there were during the period stated, in addition to the accused, five or six inmates of said house, all of whom, including Edna De Vore, the alleged proprietress, were prostitutes. The groceries and provisions for use in said establishment were ordered by the accused, and when not paid for by her as purchased, were sold and delivered on her credit. She also ordered beer by the case for use on the premises, and personally paid fines assessed against the inmates of said house who had been convicted under the ordinances of the city of Columbus on the charge of being inmates of a house of ill-fame. The evidence explanatory of the foregoing facts is, it must be conceded, consistent with the theory of her innocence, but the credibility of such evidence was purely a question of fact; and the verdict of guilty having received the approval of the judge who presided at the trial, must, on the record presented, be deemed conclusive. The case of *Drake v. State*, 14 Neb., 536, relied upon by the plaintiff in error, merely states the rule that to warrant a conviction in such a case the prisoner must have owned or controlled the house, and knowingly permitted it to be used for the purpose of prostitution, and is therefore in harmony with the conclusions here stated.

The next assignment is that the trial court erred in refusing to set aside the verdict on the ground of misconduct of the jury. From the transcript it appears that the question of the alleged misconduct was submitted to the court upon affidavits, and by that court resolved in favor of the state; but that ruling cannot be examined in this proceeding, for the reason that said affidavits are not incorporated in a bill of exceptions. It is the settled rule of this court that affidavits used on the trial of issues of fact must be preserved in the form of a bill of exceptions in order to be

available to the complaining party on appeal or petition in error. (*Vindquest v. Perky*, 16 Neb., 284; *Fitzgerald v. Benedom*, 35 Neb., 317; *Maggard v. Van Duyn*, 36 Neb., 862.)

Finally, it is urged that the sentence (imprisonment for a term of three months in the county jail) is excessive; but to the district court and not to this court is entrusted the power to impose sentences for the commission of crimes against the state; and the judgments of that court cannot be controlled or interfered with in the absence of a clear abuse of discretion. (*Davis v. State*, 34 Neb., 558.) The minimum penalty for the offense charged is, as we have seen, a fine not exceeding $100, or imprisonment for not less than thirty days, while the maximum penalty is both the fine named and imprisonment for a period not exceeding six months. The judgment, being far short of the extreme penalty prescribed by law, cannot be regarded as an abuse of discretion authorizing a reversal on that ground. There being no error apparent from the record, the judgment will be

AFFIRMED.

GEORGE H. EASTMAN, APPELLEE, V. ORIN R. CAIN ET AL., APPELLANTS.

FILED MAY 2, 1895. No. 7335.

1. **Appointment of Receivers: FORUM OF JURISDICTION: APPEAL.** The district courts and judges are vested with jurisdiction by statute to hear and determine applications for the appointment of receivers in cases then pending in such courts, and also after appeal on the merits to this court.

2. ——: ——: ——. The district courts and judges being clothed with such jurisdiction, it is consonant with the better practice to present such applications to them, and, except in cases where sufficient reasons exist therefor, this court will not entertain and determine original applications for the appointment of receivers.

APPLICATION of E. Charles Francis, intervenor, for appointment of a receiver to control mortgaged property pending appeal from a decree of foreclosure rendered by the district court of Douglas county. *Application overruled.*

F. B. Tiffany, for intervenor.

E. C. Wolcott, for appellants.

E. R. Duffie, for appellee.

HARRISON, J.

In an action to foreclose a real estate mortgage, commenced in the district court of Douglas county, such proceedings were had as resulted in a sale by a master commissioner, a confirmation of the sale and deed to the purchaser. After such sale a motion was filed to make Ethan C. Wolcott a party defendant to the action, which was sustained, and it appears that summons was duly issued and service of it made upon Wolcott, who entered a special appearance and filed objections to the jurisdiction of the court, which, upon hearing, were overruled, and Wolcott having elected to not further appear or plead, a decree of foreclosure was entered as to his rights in the premises, from which he appealed to this court, and the purchaser of the property at the sale made under the decree of foreclosure makes this his application for the appointment of a receiver to take charge of the property during the pendency of this appeal and to collect the rents, issues, and profits thereof and apply the same to the payment of the taxes assessed against the property, in necessary repairs thereon, and in payment of the interest accruing or accrued upon a mortgage indebtedness existing against it, which was a lien upon it prior to and at the time of the foreclosure suit and sale, and superior to the mortgage foreclosed, stating further that Wolcott is in possession and control of the

premises and collecting the rents, etc., and containing such other allegations as the pleader deemed proper to show the necessity for the appointment of a receiver, but which we need not here give further notice, as in the disposition now contemplated of the application its merits will not be in question, and no statement or knowledge of its grounds will be essential.

Section 266 of the Code of Civil Procedure relative to the appointment of receivers is as follows: "A receiver may be appointed by the supreme court or the district court, or by the judge of either, in the following cases: First—In an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject any property or fund to his claim, or between partners or others jointly owning or interested in any property or fund, on the application of any party to the suit, when the property or fund is in danger of being lost, removed, or materially injured. Second—In an action for the foreclosure of a mortgage, when the mortgaged property is in danger of being lost, removed, or materially injured, or is probably insufficient to discharge the mortgage debt. Third—After judgment, or decree to carry the same into execution, or to dispose of the property according to the decree or judgment, or to preserve it during the pendency of an appeal. Fourth—In all cases provided for by special statutes. Fifth—In all other cases where receivers have heretofore been appointed by the usages of courts of equity." And in section 271 it is provided, in reference to a hearing upon such an application, as follows: "Any party to the suit may, upon the hearing of the application, show, by affidavit or otherwise, objections to the proposed sureties and to the proposed receiver, and what is the value of the property to be taken possession of, and that a receiver ought not to be appointed. He may also nominate a person to be receiver, giving at the same time the names of his proposed sureties. No person shall be appointed receiver who is party, so-

licitor, counsel, or in any manner interested in the suit." It will be noticed that the district courts and the judges thereof are, by the first section of the Code hereinbefore quoted, given jurisdiction, and by the other sections the right is accorded the party against whom the application is directed to litigate issues in relation to the value of the property and other matters alleged in the petition as the basis for the prayer for the appointment of the receiver, and to show the facts, as to such points, "by affidavits or otherwise." The district courts or judges being clothed with jurisdiction to hear and determine applications for receivers, and a trial as to the facts by affidavits or otherwise being granted as a part of the proceedings, it seems to us that in the absence of any special facts or reasons for the presentation of the application to this court originally, it would probably be less expensive to litigants and more convenient in all respects, and the ends of justice be as well subserved, if such applications be made to district courts or the judges in the districts or counties where the actions were instituted. The district courts or judges are given the authority by law to take the testimony and to hear and determine as to all questions pertaining to the relief sought, and grant and enforce the prayer of the petition, or have full power and jurisdiction of the subject in all respects; and this court is an appellate court, one established, in the main, for the hearing of causes brought to it by error proceedings or appeal. It seems to us but meet and proper that applications of this nature should, so far as practicable, and where, as we have before stated, no particular reasons are disclosed for their commencement originally in this court, be presented to and disposed of by the power which seems most convenient and proper for their adjudication, the district courts and judges, and such actions in this court be discouraged or not entertained. That the district courts and judges are by our statute clothed with jurisdiction of such applications during the pendency of the

actions in which made, in the district court, and also after an appeal has been taken on the merits of the case, we have no doubt, and we deem it better practice that it should be made to them. (Beach, Receivers, secs. 11, 114.)

In the case of *Fitzgerald v. Fitzgerald & Mallory Construction Co.*, 44 Neb., 463, this court very recently entertained an application for the appointment of a receiver and, on hearing, made such appointment. The reason which moved us to retain the matter in this court and appoint a receiver and not remand it to the district court, will be understood by reading the following statement quoted from that opinion: "In the plaintiff's amended bill he prays for a receiver to wind up the business of the Construction Company and to distribute its property among the stockholders thereof, after paying and satisfying all of its just debts. And a supplemental application has been addressed to us for the appointment of a receiver here instead of remanding the cause for final action by the district court. We should, in view of our settled practice, feel constrained to dismiss the application summarily, but realizing that we are not without blame for the long delay in this court, to the prejudice of all parties concerned, we have decided to retain the cause for such further action as may hereafter be deemed appropriate. The usual and orderly course of procedure would be through the agency of a receiver. * * * No sufficient reason having been suggested for denying the application, a receiver will be appointed with authority to collect the amount here adjudged against the defendant company and to disburse the same under the directions of the court."

It follows from what has been hereinbefore expressed that the present application will be denied without prejudice to a new application, there having been no consideration or adjudication in regard to its merits.

JUDGMENT ACCORDINGLY.

FRITZ JOHANNSON V. LORENZO E. MILLER.

FILED MAY 2, 1895. NO. 6157.

1. **Replevin:** EVIDENCE. In replevin the right of possession must be affirmatively shown to exist in favor of the plaintiff, and plaintiff's right to recover cannot be predicated upon the mere failure of the defendant affirmatively to establish in his own favor a superior right in that respect.
2. ———: ———. Where the rights of plaintiff in an action of replevin owe their existence to certain written leases to parties from whom plaintiff claims to have derived his superior right of possession in the property replevied, the failure to offer in evidence either such original leases, or copies thereof when admissible, will operate to defeat plaintiff's action.

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

Nightingale Bros., for plaintiff in error.

Aaron Wall, contra.

RYAN, C.

This action of replevin was brought by the plaintiff in error for the possession of twenty tons of hay contained in three stacks which stood on premises owned by the defendant. In his petition plaintiff described the hay as having grown on section 36, township 16, range 14, a school-land section in Sherman county. On the usual issue in an action of this nature, there was a trial to a jury, which returned a verdict in favor of the defendant, upon which judgment was duly rendered.

The plaintiff claimed that he had the exclusive right to cut the grass on section 36 aforesaid, in 1890, under an oral lease with Johnson T. Hale, who, he alleged, had the right to make such lease by reason of authority to that effect

conferred upon him by R. H. Maxwell, the alleged holder of the lease of said school section made to him by the owner, the state of Nebraska. The defendant, though he attempted it, showed no valid right to enter upon said section for the purpose of making hay. He cut the grass thereon, and, when it was cured, removed it with no better claim of right than that the land was uninclosed and that the grass growing thereon could lawfully be converted into hay and removed by any one who took that trouble. As against any person owning or lawfully holding under the owner, this assumption was without question unwarranted, and yet, for the hay so removed, no mere stranger could maintain replevin. The instructions fairly embodied this proposition, and if the jury under such instructions, justified by the evidence, found correctly, there exists no reason for considering any other question presented in this court.

The only testimony tending to show a lease to R. H. Maxwell of this school section was given by himself. He said: "I held and owned a school land lease upon it in 1890—No. 35,445, No. 32,737. Maxwell, Sharpe & Ross Co., of Lincoln, Nebraska, now own my interest in it." Upon request to make the lease referred to, and which he said was in his possession, a part of his deposition, Mr. Maxwell said: "The present owners refuse said lease to be used for this purpose." There was no further attempt to introduce in evidence either the original or a copy of this lease. In reference to the rights of Hale with respect to the school section in 1890 the testimony, also by deposition of Mr. Maxwell, was, that he made a grass lease of it for that year to Mr. Hale; that he in writing appointed as his agent in Sherman county, Johnson T. Hale, whose residence was in Loup City, to look after and attend to said school lease land in 1890. This witness, when asked as to the authority which he conferred upon Hale, said that it was by a writing which would show for itself, and that he would send a certified copy of it, if necessary. There was intro-

duced in evidence neither the original nor a copy of the instrument just mentioned. The asserted right of plaintiff to the exclusive possession of the aforesaid section 36 was therefore not shown by competent evidence, for there was no proper proof of the existence and terms of the alleged school lease under which Maxwell claimed, neither was there primary, nor admissible secondary evidence of the contents of the written contract made by Maxwell with Johnson T. Hale, from which Hale derived his right to control said section. The judgment of the district court is

AFFIRMED.

WILLIAM H. MITCHELL v. B. F. JONES.

FILED MAY 2, 1895. No. 5450.

1. **Physician:** EVIDENCE OF EMPLOYMENT: REVIEW. Where the sole question contested was whether or not plaintiff in error had employed the defendant in error as a physician to render needed services for the daughter of plaintiff in error, who was at the time over eighteen years of age, the verdict of the jury upon conflicting evidence will not be disturbed on error proceedings in this court.

ERROR from the district court of Buffalo county. Tried below before HAMER, J.

Frank E. Beeman, for plaintiff in error.

Greene & Hostetler, contra.

RYAN, C.

The defendant in error recovered against the plaintiff in error a judgment for the sum of $5 in the district court of Buffalo county for services as a physician rendered at the

instance of the plaintiff in error for his daughter. The defense was that this daughter, when the alleged services were rendered, was over eighteen years of age and was supporting herself and was alone responsible for medical services rendered on her behalf. There was also pleaded in the answer a counter-claim in the sum of $20, being the amount due for the use of a horse, carriage, and driver furnished the defendant in error, for which it was alleged he had agreed to pay. There was a reply in denial of all the averments of the answer. There was sufficient evidence to sustain a much larger recovery than was had. Indeed, the verdict could properly have been as small as it was, only upon the theory that there was something allowed by reason of the counter-claim pleaded in the answer.

The daughter of the plaintiff in error, at the time the services were rendered in her behalf, was sick at the house of her father, distant about eighteen miles from Kearney. It seems from the evidence of Mr. Mitchell, the plaintiff in error, that he was in Kearney when he learned that his daughter required the services of a physician. He testified, at any rate, that upon receiving information of the condition of his daughter, he went out to hunt a physician for her; that he went to Mr. Wells to get a team to take a physician out with him, and by Mr. Wells was referred to Dr. Jones, the defendant in error; that Mr. Mitchell said that he did not know Dr. Jones, and Mr. Wells answered that he would go over to Mr. Baker's to telephone and see if Dr. Jones would go. Mr. Mitchell assented to this, as he testified, simply by going with Mr. Wells to the telephone suggested. At the telephone Mr. Wells told Mr. Mitchell that Dr. Jones would go. Mr. Wells sent a driver with the team he furnished and thereby Mr. Mitchell and Dr. Jones together were taken to the place where the doctor had been by Mr. Wells requested to go. Mr. Mitchell testified that nothing was said by him to Dr.

Jones about the employment of the latter, and that he himself expected his daughter to pay the bill of the physician. There were, however, two witnesses who testified that they had heard Mr. Mitchell admit, on another occasion while being examined as a witness, that he himself employed Dr. Jones to render the services which, for his daughter, were rendered. The counter-claim pleaded in the answer was for the hire of the team and driver with which Dr. Jones and Mr. Mitchell made the above described trip. This bill Mr. Mitchell claimed in his testimony, he had incurred, and the amount of it, he had paid to Mr. Wells. If Mr. Mitchell really believed that his daughter should pay the expenses incident to receiving medical assistance, it would seem that he would have required her and not the doctor to reimburse him to the amount of this outlay. There was sufficient evidence as to the value of the services rendered, and in all other respects to sustain the verdict, and it is unnecessary to state it at all in detail. There has, however, been given such a summary of the proofs adduced as seems to justify the court in saying by its instruction to the jury that "if defendant so conducted himself that the plaintiff had reason to believe that the defendant purposed to pay for his services, you will allow him what they are reasonably worth." The judgment of the district court is

AFFIRMED.

UNION PACIFIC RAILWAY COMPANY v. G. H. D. JOHNSON ET AL.

FILED MAY 2, 1895. No. 6141.

1. **Carriers:** BILLS OF LADING: INDORSEMENT: EFFECT. Bills of lading are symbols of property, and when properly indorsed operate as a delivery of the property itself, investing the indorsees

with a constructive custody which serves all the purposes of an actual possession, and so continues until there is a valid and complete delivery of the property, under and in pursuance of the bill of lading, to the person entitled to receive the same. *Pennsylvania R. Co. v. Stern*, 119 Pa. St., 24, and *Gates v. Chicago, B. & Q. R. Co.*, 42 Neb., 379, followed.

2. ———: ———: DELIVERY OF GOODS. The delivery of goods by a common carrier to the consignee thereof is made at the peril of the carrier, unless when made the consignee surrenders the bill of lading either made or indorsed to himself. *Gates v. Chicago, B. & Q. R. Co.*, 42 Neb., 379, followed.

3. ———: ———: ———: LIABILITY OF CARRIERS: TORTS. A railway company issued to shippers of grain in Nebraska several bills of lading as follows: "Received of ——— [the name of the shipper] the following described freight * * * marked and consigned as noted below * * * to be transported to ———, and delivered at the railway depot on payment of freight charges together with such charges as have been advanced on the same. Consignee, Brown Bros. Grain Company. Destination, Milwaukee, Wis." The bills of lading contained the following notations: "Care Union Elevator, Council Bluffs, Iowa. Stop at Brown Bros. Elevator Company to clean. Transfer at Council Bluffs." The carrier transported the grain to Council Bluffs and there delivered it to the consignee named in the bills of lading without requiring their presentation or surrender. The consignee sold the grain to Bacon & Co., of Milwaukee, and drew on them for its value, with the bills of lading indorsed to them attached to the drafts. Bacon & Co. honored the drafts, presented the bills of lading to the carrier and demanded the grain, and as it was not delivered, sued the carrier for its value. Part of the grain was delivered by the carrier to the consignee named in the bills of lading before he indorsed and attached them to the drafts drawn on Bacon & Co. *Held*, (1) That the bills of lading were through contracts, under and by which the carrier agreed to transport the grain from the places where it received it to Milwaukee, and there deliver it to the party entitled thereto; (2) that the notations on the bills of lading meant nothing more than that the grain should go by way of Council Bluffs to be cleaned there, or transferred to other carriers through the instrumentality of the elevator located there; (3) that the carrier, by the bills of lading, contracted to transport this grain to Milwaukee, and there deliver it to the consignee named in the bills of lading, or, if they had been transferred, to the lawful holders of said bills of lading; (4) that Bacon & Co., by honor-

ing the drafts drawn against them by the consignee named in the bills of lading, became and were entitled to have said grain delivered to them at Milwaukee; (5) that the carrier, by delivering the grain to the consignee at a station intermediate the point of shipment and the point of destination and without the surrender of the bills of lading, was guilty of a misdelivery and conversion of said grain; (6) that so long as the bills of lading were outstanding they were representations by the carrier to the commercial world that it had in its possession and under its control and in transit to Milwaukee the grain for which the bills of lading called; (7) that the carrier by delivering the grain while in transit to the consignee named in the bills of lading without their surrender put it in the power of Brown Bros. Grain Company to defraud third parties by selling the grain and indorsing the bills of lading, and that the carrier was also liable for the grain, on the principle that where one of two innocent parties must suffer, he who by his conduct has enabled a wrong-doer to perpetrate a wrong must bear the loss rather than the party without fault.

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

John M. Thurston and *W. R. Kelly*, for plaintiff in error, cited: *Pullman Palace Car Co. v. Missouri P. R. Co.*, 115 U. S., 587.

John D. Howe and *E. R. Duffie, contra*, cited: Hutchinson, Carriers, secs. 130, 344; *Furman v. Union P. R. Co.*, 106 N. Y., 579; *Colgate v. Pennsylvania R. Co.*, 102 N. Y., 120; *Missouri P. R. Co. v. Young*, 25 Neb., 651; *Ladue v. Griffith*, 25 N. Y., 364; *St. Louis, K. C. & N. R. Co. v. Piper*, 13 Kan., 505; *Mercantile Mutual Ins. Co. v. Chase*, 1 E. D. Smith [N. Y.], 115; *Home Ins. Co. v. Western T. Co.*, 51 N. Y., 93; *Bulkley v. Naumkeag Steam Cotton Co.*, 24 How. [U. S.], 386; *Claflin v. Boston & L. R. Co.*, 7 Allen [Mass.], 341; *Devereaux v. Barclay*, 2 B. & Ald. [Eng.], 704; *Forbes v. Boston & L. R. Co.*, 133 Mass., 154; *Weyand v. Atchison, T. & S. F. R. Co.*, 75 Ia., 580.

RAGAN, C.

In the months of October and November, 1891, certain persons at certain points in the state of Nebraska delivered to the Union Pacific Railway Company (hereinafter called the "Railway Company") for transportation seven cars of grain. The Railway Company at the time of such delivery issued and delivered to said shippers bills of lading for the grain received by it. All said bills of lading were substantially as follows: "Received of ——— [the name of the shipper] the following described freight * * * marked and consigned as noted below * * * to be transported to ———, and delivered at the railway depot on payment of freight charges, together with such charges as have been advanced on the same." Such bills of lading also contained the following directions and notations:

No. 1. "Consignee, Brown Bros. Grain Co. Destination, St. Louis, Mo." (Notation:) "Care Union Elevator, Council Bluffs, Iowa."

No. 2. "Consignee, Brown Bros. Grain Co. Destination, St. Louis, Mo." (Notation:) "Care Union Elevator Co., Council Bluffs."

No. 3. "Consignee, Order Brown Bros. Grain Co. Destination, Milwaukee, Wis." (Notation:) "Stop at Council Bluffs, Brown Bros. Elevator Co., to clean. Transfer at Council Bluffs."

No. 4. "Consignee, Order Brown Bros. Grain Co. Destination, Milwaukee, Wis." (Notation:) "Clean at Council Bluffs, Brown Bros. Elevator Co. Transfer at Council Bluffs."

No. 5. "Consignee, Order Brown Bros. Grain Co. Destination, St. Louis." (Notation:) "Care Union Elevator, Council Bluffs, Iowa."

No. 6. "Consignee, Order Brown Bros. Grain Co. Destination, St. Louis." (Notation:) "Care Union Elevator, Council Bluffs."

No. 7. "Consignee, Brown Bros. Destination, Milwaukee." (Notation:) "Care Union Elevator, Council Bluffs."

The grain consisted of oats, barley, and shelled corn. The parties designated as consignee on the bills of lading are sometimes denominated "Brown Bros." and sometimes "Brown Bros. Grain Co.," but Brown Bros. Grain Company was the party intended as the consignee on each bill of lading. The notation, "Union Elevator" and "Brown Bros. Elevator, Council Bluffs" had reference to an elevator located in that city at that time leased and operated by Brown Bros. Grain Company, the consignee of the grain. It appears from the evidence in the bill of exceptions that at the time these shipments were made there was an elevator located in the city of Council Bluffs, Iowa. This elevator was owned by a corporation known as the Union Elevator Company. A contract existed between the elevator company and some five or six railway companies whose roads entered Council Bluffs, that the elevator company, in handling grain which might come into its possession for cleaning or transfer, or both, would not discriminate either in favor of or against either one of the railway companies mentioned. The Union Pacific Railway Company was a party to this agreement. It further appears that Brown Bros. Grain Company, at the time of the shipments in controversy, was the lessee of this elevator, was in possession of it and operating it. Persons shipping grain from points in Nebraska over the Union Pacific Railway Company's road, and which grain was consigned to Milwaukee or St. Louis, or other eastern points, if they desired, could have said grain stopped at Council Bluffs and cleaned in this elevator; and if it was desired by the Railway Company that the car in which such shipment was made should not go further than Council Bluffs, then the grain would be transferred through this elevator to the cars of the road which was to haul it from there to its place of destination. The Railway Company did not deliver this grain or any

of it either at Milwaukee or St. Louis, but it transported the grain to Council Bluffs, and there made an unconditional delivery of it to Brown Bros. Grain Company, the party named as the consignee in each of the bills of lading, and made such delivery to such consignee without the consignee's surrendering to the carrier the bills of lading issued by it to the shipper. Brown Bros. Grain Company, it appears, sold this grain to E. P. Bacon & Co.; made drafts on them for the value of the grain, and attached to such drafts the bills of lading, each bill of lading being indorsed, "Deliver to the order of E. P. Bacon & Co. Brown Bros. Grain Company. By C. T. Brown, Pt." Bacon & Co., on presentation of the drafts, honored them, and then presented the bills of lading to the Railway Company and demanded the grain. In the meantime Brown Bros. Grain Company had failed, and neither they nor the Railway Company ever delivered the grain to Bacon & Co. At the time Brown Bros. Grain Company indorsed the bills of lading to Bacon & Co., and attached them to the drafts which they drew on them for the value of the grain, the greater part of the grain had already been delivered to them, only one car of the grain being in transit or undelivered to Brown Bros. Grain Company at the time they indorsed said bills of lading and drew said drafts. Bacon & Co. brought this suit against the Railway Company in the district court of Douglas county for the value of said grain. A jury was waived and the case was tried to the court, resulting in a finding and judgment in favor of Bacon & Co.; and to reverse this judgment the Railway Company has prosecuted to this court a petition in error.

1. The bills of lading issued by the Railway Company to the shippers of this grain were through contracts, under and by which the Railway Company agreed to transport this grain from the places where it received it to Milwaukee and St. Louis, and there deliver it to the party entitled thereto. The terms of the bills of lading fixing the ex-

press destination of this grain and the notations, when explained by the evidence, leave no room for doubt whatever that these bills of lading were through contracts. (*Angle v. Mississippi & M. R. R. Co.*, 9 Ia., 487; *Mulligan v. Illinois C. R. Co.*, 36 Ia., 181; *Ogdensburg & L. C. R. Co. v. Pratt*, 22 Wall. [U. S.], 123; *Beard v. St. Louis, A. & T. H. R. Co.*, 44 N. W. Rep. [Ia.], 803.) The notations on the bills of lading, "Care of the Union Elevator, Council Bluffs," "Stop at Council Bluffs to clean," "Transfer at Council Bluffs," meant and mean nothing more than that the grain should go by way of Council Bluffs; some of it should be cleaned there; and some of it should be transferred to other lines or into other cars at that place through the instrumentality of said elevator. Doubtless it was a contract on the part of the Railway Company that it would transport said grain to its place of destination by way of Council Bluffs; that it would stop some of the grain at the elevator for the purpose of having it cleaned; and that whatever transfer it might be under the necessity of or desirous of making to other carriers in order to complete the transit should be made at that point. But nothing in these bills of lading, including the notations made thereon in reference to the elevator at Council Bluffs, authorizes or will sustain a construction that by the bills of lading the Railway Company agreed to transport this freight only to Council Bluffs or to make delivery of it there.

2. In the case at bar the Railway Company, the carrier, delivered the freight to the consignee named in the bills of lading without such bills of lading having been first surrendered to it. We are not necessarily concerned with the question whether a carrier may with impunity deliver goods to the consignee named in the bill of lading at the place of destination mentioned in such bill of lading without its surrender, the carrier having no knowledge at the time that such bill of lading has been assigned or transferred. The precise question in this case is whether the Railway Com-

pany, having no knowledge that these bills of lading had been transferred to Bacon & Co., was justified in delivering the grain to the consignee named in the bill of lading at a point intermediate the place of shipment and the place of destination.

In *Gates v. Chicago, B. & Q. R. Co.*, 42 Neb., 379, it was held: "The bill of lading issued by a carrier to the owner or shipper is the symbol of ownership of the goods shipped, and though not negotiable is assignable." (See, also, *Furman v. Union P. R. Co.*, 106 N. Y., 579, 13 N. E. Rep., 587.)

In *Pennsylvania R. Co. v. Stern*, 119 Pa. St., 24, 35 Am. & Eng. R. Cases, 551, it was held: "Bills of lading are symbols of property, and when properly indorsed operate as a delivery of the property itself, investing the indorsers with a constructive custody which serves all the purposes of an actual possession, and so continues until there is a valid and complete delivery of the property, under and in pursuance of the bill of lading, and to the persons entitled to receive the same." (See, also, Hutchinson, Carriers, sec. 129; *Forbes v. Boston & L. R. Co.*, 133 Mass., 154; *The Thames*, 81 U. S., 98. See, also, *Walker v. Detroit, G. H. & M. R. Co.*, 9 Am. & Eng. R. Cases [Mich.], 251.) In this case a creditor of the consignee attempted to get possession of the property by garnishment proceedings against the carrier. The supreme court of Michigan, however, discharged the carrier from liability on the garnishment proceedings, and held: "Common carriers must recognize transfers of bills of lading and consignments of goods, and unless protected by proper vouchers cannot always assume to deal with consignments as actually and beneficially belonging to the consignee."

In *McEntee v. New Jersey Steamboat Co.*, 45 N. Y., 34, it was held: "Common carriers deliver property at their peril, and must take care that it is delivered to the right person, for if the delivery be to the wrong person,

either by an innocent person or through fraud of others, they will be responsible, and the wrongful delivery will be treated as a conversion."

In Hutchinson, Carriers, sec. 130, it is said: "The carrier takes the risk of a delivery to the person entitled to the goods by the bill of lading and its indorsements. * * * Too great caution cannot, therefore, be exercised in respect to the right of the person to whom the delivery is made. No obligation of the carrier is more rigorously enforced than that which requires delivery to the proper person, and the law will allow in fact of no excuse for a wrong delivery except the fault of the shipper himself." (See, also, Hutchinson, Carriers, secs. 340, 344.)

In *Pennsylvania R. Co. v. Stern*, 35 Am. & Eng. R. Cases [Pa.], 551, it is said: "A railroad company has no right to make a delivery of freight otherwise than in strict accordance with the bill of lading."

In *Gates v. Chicago, B. & Q. R. Co.*, 42 Neb., 379, it was held: "The delivery of goods by a common carrier to the consignee thereof is made at the peril of the carrier, unless when made the consignee surrenders the bill of lading either made or indorsed to himself." (See, also, *Louisville & N. R. Co. v. Barkhouse*, 13 So. Rep. [Ala.], 534; *Weyand v. Atchison, T. & S. F. R. Co.*, 75 Ia., 580.)

In the light of these authorites we conclude: (1) That the Railway Company, by its bills of lading, contracted to transport the freight to Milwaukee and St. Louis and there deliver it to the consignee named in the bills of lading, namely, Brown Bros. Grain Company, or if the bills of lading had been transferred by them, then to the lawful holders of said bills; (2) that Bacon & Co., by honoring the drafts drawn against them by Brown Bros. Grain Company, with said bills of lading attached thereto and assigned to them, became and were entitled to have said grain delivered to them at Milwaukee and St. Louis; (3) that the Railway Company, by delivering said grain to the

consignees mentioned in said bills of lading, at a station intermediate the point of shipping and the point of destination, and without the surrender of the bills of lading, was guilty of a misdelivery and conversion of said grain.

3. It is suggested in argument here by the counsel for the Railway Company that it ought not to be held liable to Bacon & Co. for so much of the grain as was delivered to Brown Bros. Grain Company before they indorsed to Bacon & Co. the bills of lading for such grain. This position we think is untenable. In the first place the Railway Company, having issued these bills of lading, would be estopped as against the assignee and holder thereof for value from saying that it had never had such grain in its possession. (*Sioux City & P. R. Co. v. First Nat. Bank of Fremont*, 10 Neb., 556.) And the Railway Company, having received this grain and undertaken its transportation, by delivering it while in transit to the consignee named in the bill of lading and without the surrender of such bills of lading at the time put it in the power of Brown Bros. Grain Company to defraud third parties by selling the grain and indorsing the bills of lading. And the Railway Company is also liable for this grain on the familiar principle that where one of two innocent parties must suffer, he who by his conduct has enabled a wrongdoer to perpetrate a wrong must bear the loss rather than the party without fault. (*Walters v. Western & A. R. Co.*, 56 Fed. Rep., 369.) It was the duty of the Railway Company, the carrier, before delivering this grain to any person at any place, to take up the outstanding bills of lading which it had issued for it. So long as the bills of lading were outstanding they were representations by the Railway Company to the commercial world that it had in its possession and under its control and in transit to Milwaukee and St. Louis the grain for which the bills of lading called.

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

AFFIRMED.

EDWARD HOOPER ET AL. V. ABRAM CASTETTER ET AL.

FILED MAY 2, 1895. No. 5798.

1. **Ruling on Motion to Set Aside Judicial Sale:** REVIEW. In reviewing the action of the district court in refusing to set aside a sale, this court can consider only whether the district court erred in refusing to set aside the sale on the specific grounds assigned for that purpose in the motion filed in the court below.

2. ———: ———. This court cannot, either on appeal or error, say that the district court should or should not have set aside a sale for any reason or irregularity appearing in the record, unless such reason or irregularity was urged upon the district court as a reason for its action. *Smith v. Spaulding*, 40 Neb., 339, *Johnson v. Bemis*, 7 Neb., 224, and *Ecklund v. Willis*, 44 Neb., 129, followed and reaffirmed.

3. **Judicial Sales:** CAVEAT EMPTOR. A purchaser at a mortgage foreclosure sale will not be relieved from completing his purchase on account of defective title, or on the ground of there being prior incumbrances on the property, when the true condition of the title is fully set out in the pleadings and the record of the proceedings under which the sale was made, as he is chargeable with the notice of such material facts as the record discloses. *Norton v. Nebraska Loan & Trust Co.*, 35 Neb., 466, followed and reaffirmed.

4. ———: DECREE. An officer selling property under execution or a decree in equity can sell such property on such terms, and such terms only, as are provided by the decree and the law in force governing such sale which is incorporated into and a part of such decree.

5. ———: PAYMENT OF BID: SHERIFFS. An officer selling property on execution or under a decree in equity has no authority to sell on credit or to accept in payment of the bid anything

other than lawful money, unless otherwise expressly authorized by the terms of the decree or the law in force governing such sale.

6. ———: ———: ———. An officer who makes return to an order of sale, issued for the satisfaction of a decree in a mortgage foreclosure proceeding, that he sold the property described in such return to a designated bidder, is conclusively presumed to have made such sale for cash, less the amount of the purchaser's claim, if any, existing against said property and to satisfy which such sale was made, unless the decree on which said order of sale is based expressly authorizes a sale on credit.

7. ———: ———: RIGHTS OF PURCHASER: WAIVER OF ERRORS. A purchaser of property sold at judicial sale, who, after its confirmation, accepts a conveyance for said property executed in pursuance of such sale, its confirmation, and the order of the court, and who applies to and obtains from the court an order for a writ of possession for such property, thereby waives all errors and irregularities which occurred in the making of such sale and all objections and exceptions to the court's order of confirmation.

8. **Review**: TRIAL TO COURT: CONFLICTING EVIDENCE. The finding of a district court made on conflicting evidence, like the finding of a jury, is binding on this court if such finding is supported by sufficient evidence.

9. **Mortgages**: JUDICIAL SALES: DISTRIBUTION OF PROCEEDS. Certain real estate was incumbered by two mortgages. The holder of the second mortgage brought a suit in equity to foreclose, obtained a decree, and at a sale thereunder purchased the property. The holder of the first mortgage was not made a party to the foreclosure suit. After obtaining his decree, but before the sale, the holder of the second mortgage purchased and took an assignment to himself of the first mortgage. *Held*, That his ownership of the first mortgage did not of itself entitle him as against the mortgagor to a decree applying the surplus proceeds of the sale towards the liquidation of the mortgage purchased.

10. ———: DECREE OF FORECLOSURE: LIEN OF JUDGMENTS: HOMESTEAD: PROCEDURE IN ASSERTING RIGHTS: DISTRIBUTION OF PROCEEDS OF SALE. In a suit to foreclose a real estate mortgage, certain creditors of the mortgagor having ordinary judgments, apparent liens on the mortgaged property, were made parties defendant. They filed answers asking that their judgments might be paid out of any surplus arising from the sale of the property and remaining after satisfaction of the mortgage

being foreclosed, and the decree rendered so provided. The mortgagor, though personally served, did not appear in the case until after a sale of the mortgaged property, when he applied to the court for an order to have $2,000 of the surplus paid to him in lieu of his homestead exemption. *Held*, (1) That the mortgagor was entitled to the order; (2) that the question of the homestead rights of the mortgagor was not involved nor litigated in the foreclosure suit; (3) that the decree rendered in the foreclosure suit was not a bar to the mortgagor's application to have the surplus paid to him in lieu of his homestead; (4) that though the judgments were liens upon the real estate before the bringing of the foreclosure suit, such liens were subject to the mortgagor's homestead rights in the property; (5) that the decree in the foreclosure suit finding the judgments were liens, and ordering them paid out of the surplus, should be construed as if it read, that they were liens and should be paid out of the surplus, subject to the mortgagor's homestead rights; (6) that the mortgagor did not lose his homestead exemption because the real estate had been converted by a decree of court into money, nor did the judgment creditors acquire by the decree any greater liens upon or right to the money than they had against the property; (7) that the mortgagor might claim the surplus money in lieu of his homestead exemption at any time before such surplus was finally distributed by order of the court.

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

See opinion for statement of the case.

Charles Offutt, for Abram Castetter:

The order of confirmation is erroneous, because no copy of the appraisement was deposited with the clerk of the district court. (*McKeighan v. Hopkins*, 14 Neb., 367; *Jones v. Mill*, 9 Neb., 254.)

The failure of the appraisers to deduct and enumerate prior incumbrances made the order of confirmation erroneous. (*Sessions v. Irwin*, 8 Neb., 5.)

The order of confirmation was erroneous, because Castetter's bid was not absolute, but was expressly conditioned upon the application of the mortgage for four thousand five

hundred dollars as part of the purchase price. (*Morrill v. Davis*, 27 Neb., 775; *Hurt v. Stull*, 4 Md. Ch., 391; *Armor v. Cochrane*, 66 Pa. St., 308; *Bozza v. Rowe*, 30 Ill., 198.)

Had the bid made for Castetter been unconditional it would not have bound him. (*Brown v. Johnson*, 51 Am. Dec. [Miss.], 118.)

The order of confirmation was also erroneous, because the bid was induced by the false representations and subsequently violated promises of the judgment debtor. (*Paulett v. Peabody*, 3 Neb., 196; *Frasher v. Ingham*, 4 Neb., 531; *Webster v. Haworth*, 8 Cal., 21; *Masson v. Bovet*, 1 Den. [N. Y.], 69; *Stevens v. McNamara*, 58 Am. Dec. [Me.], 740; *Spragg v. Shriver*, 64 Am. Dec. [Pa.], 698; *Ray v. Virgin*, 12 Ill., 216; *O'Kelley v. Gholston*, 15 S. E. Rep. [Ga.], 123; *Vannice v. Greene*, 16 Ia., 574; *Evans v. McGlasson*, 18 Ia., 150; *Butterfield v. Walsh*, 21 Ia., 97; *Wood v. Chopin*, 3 Kern. [N. Y.], 509.)

As to the question of distribution the following cases were cited: *Adams v. Angell*, L. R. 5, Ch. Div. [Eng.], 634; *Bullard v. Leach*, 27 Vt., 495; *Smith v. Swan*, 69 Ia., 412; *Pyke v. Gleason*, 60 Ia., 150; *Rector v. Rotton*, 3 Neb., 171; *Jackson v. Creighton*, 29 Neb., 310.

L. W. Osborn, for judgment creditors:

A decree foreclosing a mortgage is none the less final because subsequent proceedings under the direction of the court may be necessary to execute the decree. (*Bronson v. La Crosse & M. R. Co.*, 2 Black [U. S.], 531; *Ray v. Law*, 3 Cranch [U. S.], 179.)

The decree was conclusive. Nothing further was to be done except to make the sale and distribute the proceeds as directed by the decree. (Jones, Mortgages, secs. 1587, 1588; Freeman, Judgments, sec. 303, and cases cited.)

The Remingtons failed to assert their rights before the decree was entered and are concluded by it. (Freeman, Judgments, secs. 246–249.)

As to homestead rights and waiver thereof the following authorities were cited: Jones, Mortgages, sec. 1632; *Chapman v. Lester*, 12 Kan., 592; *Searle v. Chapman*, 121 Mass., 19; *White v. Polleys*, 20 Wis., 504.

Jesse T. Davis, E. R. Duffie, and *Francis A. Brogan, contra.*

RAGAN, C.

Abram Castetter brought this suit in equity in the district court of Washington county against O. N. Remington and wife and a number of other persons, hereinafter designated "judgment creditors." The object of the action was to foreclose certain mortgages belonging to Castetter which had been executed and delivered to him by Remington and wife on certain real estate in said county. At the time the suit was brought the Scottish-American Investment Company held a mortgage upon this real estate for $4,500. This mortgage had been executed by Remington and wife and was a first lien upon all the real estate involved in this action. No reference was made to this mortgage in any of the pleadings filed in this case, and the Scottish-American Company, the holder of the mortgage, was not made a party to the action. Remington and wife, though personally served with summons, made no appearance in the action. The judgment creditors appeared and filed answers, setting out certain judgments which they held against Remington, and asked that in case of a sale of the mortgaged premises under Castetter's mortgages, and after the satisfaction of such mortgages, that the surplus proceeds of the sale might be applied towards the satisfaction of their judgments. By the decree pronounced in the case the district court found the amount due Castetter on his mortgages made by Remington and the amount due each of the judgment creditors from Remington, but that the liens of Castetter and of the judgment creditors were each subject to the $4,500

mortgage held by the Scottish-American Investment Company as above stated. Aside from this mortgage Castetter's debt was declared to be the first lien upon the premises. The judgment creditors were declared to have liens upon the premises, subject to Castetter's, in the order of the date of the filing in the office of the clerk of the district court of said county of their judgments. The decree further provided for a sale of the mortgaged premises and the bringing of the proceeds into court to be applied to the liquidation of the amounts found due Castetter and the judgment creditors. The issuance of an order for the satisfaction of the decree was, at the request of Remington, stayed for nine months in pursuance of the statute. On the 28th of January, 1892, the order of sale was issued, and on the 7th of March, 1892, the sheriff returned said order of sale into court, reciting that he had on the 4th day of March, 1892, sold all the real estate described in the decree at public auction to Abram Castetter, the plaintiff in the action, for $11,200. On the 9th of March, 1892, Castetter filed a motion to set aside the sale made by the sheriff, the only ground of this motion being "that the bid at said sale was made by this plaintiff under a total misapprehension of facts, as shown by affidavits filed in support of this motion." On the 27th of September, 1892, the court overruled the motion of Castetter to set aside the sale and confirmed it. To this ruling of the court Castetter took no exception, but at the same time made application for and obtained from the court an order for a writ of possession of the premises. After the rendition of said decree, but before the sale thereunder, Castetter purchased of the Scottish-American Investment Company its $4,500 mortgage, took an assignment of the same, and owned and held said mortgage and the debt it secured at the date of the judicial sale. On the same day that the court overruled Castetter's motion to set aside this sale he filed in the case an application reciting the existence of this Scottish-

American Investment Company's mortgage as a first lien upon the premises at the time of the bringing of the suit, and that at the request of Remington he had purchased and taken an assignment of said mortgage after the rendition of the decree and before the sale herein; that he had made the purchase of said mortgage under an agreement with Remington that the amount due on said mortgage should be applied by him on whatever bid he might make for said mortgaged property at the sale thereof; and he prayed the court to order that after the amount found due him from Remington by the decree, with interest and costs, had been satisfied, the surplus proceeds arising from the sale of said property might be applied to the liquidation of the Scottish-American Company mortgage. This application the court denied. The judgment creditors also made application to the court for an order directing that whatever remained of the $11,200, after paying the costs of the suit and the amount found due Castetter by the decree, should be applied towards the payment of the amounts found due them on their judgments against Remington. This order the court refused, and on the application of Remington and wife ordered the amount found due Castetter by the decree, with interest and costs of the action, to be first paid out of the bid of $11,200, and that out of the surplus there should be paid to Remington and wife $2,000 in lieu of a homestead, and if any surplus then remained it should be distributed to the judgment creditors. Castetter has prosecuted to this court a petition in error to reverse the order of the district court overruling his motion to set aside the sale, and to reverse the order of the court overruling his application to have the surplus proceeds of the sale applied to a liquidation of the Scottish-American Company mortgage. The judgment creditors have prosecuted to this court a joint petition in error to reverse the order of the court postponing the payment of their judgments out of the surplus proceeds of the sale to the home-

stead claims of Remington and wife. We will first dispose of the petition in error of Castetter.

1. The order of the district court overruling Castetter's motion to set aside the sale: Counsel in his argument here alleges various irregularities as reasons why the court should have sustained Castetter's motion to set aside the sale. It is said that no copy of the appraisement of the property was deposited with the clerk of the court before the property was advertised and sold; that the appraisers failed to deduct and enumerate incumbrances upon the property which were prior to those for which the property was sold; that Castetter's bid was not absolute, but was a conditional bid; that he was not himself present at the sale, but the bid was made in his behalf by his agent and that this agent violated his instructions. As already seen, the only ground alleged by Castetter in his motion for setting aside this sale was that the bid made by him had been made under a misapprehension of facts. In *Johnson v. Bemis*, 7 Neb., 224, it was held: "A motion to set aside a sale, or order confirming a sale of real estate, should point out specifically the errors complained of. General objections are too indefinite to be considered." And in *Ecklund v. Willis*, 44 Neb., 129, it was held: "Objections to the confirmation of a sale of real estate must be specifically assigned in the motion filed in the lower court to vacate the sale, or they will be unavailing." In reviewing the action of the district court in refusing to set aside a sale this court can consider only whether the district court erred in refusing to set aside the sale on the specific grounds assigned for that purpose in the motion filed in the court below. We cannot on error or appeal say that the district court should or should not have set aside a sale for any reason or irregularity appearing in the record unless such reason or irregularity was urged upon the district court as a reason for this action. (*Smith v. Spaulding*, 40 Neb., 339.) Therefore, in the case under consideration,

in determining whether the court erred in refusing to set aside this sale, our inquiry must be limited to the correctness of the conclusion of the district court that the bid made by Castetter was made under a misapprehension of the facts. The evidence to this point on behalf of Castetter tends to show that he purchased the Scottish-American mortgage before the sale at the request of Remington and under an agreement with him that the amount due on this mortgage should be paid instead of money to satisfy the bid which Castetter might make for the mortgaged premises, and that Castetter, at the time of the sale, understood and believed that the Scottish-American mortgage was included in the decree; that whatever was bid at the sale for the property would have to be applied to the discharge of that mortgage, and that Remington concealed from him, Castetter, the fact that the Scottish-American mortgage was not foreclosed in this decree. On the other hand, Remington positively and unequivocally denies that he ever requested or induced Castetter to purchase the Scottish-American mortgage, or knew that he had done so prior to the sale. The evidence in the bill of exceptions is not such as enables us to say that the finding of the district court in favor of Remington, that he did not request or induce Castetter to purchase this Scottish-American mortgage, and that he did not conceal from Castetter the fact that this mortgage was not embraced in the decree, is unsupported by sufficient evidence; and if, for the purposes of this case, we assume that Castetter, at the time he made the bid, was under the impression or belief that the proceeds of such bid would have to be first applied to the payment of the Scottish-American mortgage, we are still unable to say how such a misapprehension could avail Castetter here. He was the plaintiff in this action, and it must be presumed that he knew the averments of his petition and for what relief he prayed therein, and it must also be presumed that he knew the terms of the decree.

Whatever may be the rule elsewhere, the doctrine of this court is that the rule of *caveat emptor* applies to a purchaser of real estate at a judicial sale thereof; that he is bound to examine the title which he is about to purchase; that he cannot even rely upon statements made by the officer conducting the sale as to the condition of the title; and if he buys without such examination, he does so at his peril and must suffer for his neglect. See *Norton v. Nebraska Loan & Trust Co.*, 35 Neb., 466, where it was held: "A purchaser at a mortgage foreclosure sale will not be relieved from completing his purchase on account of defective title, or on the ground of there being prior incumbrances on the property, when the true condition of the title is fully set out in the pleadings and the record of the proceedings under which the sale was made, as he is chargeable with notice of such material facts as the records disclose." This case was again before the court in 40 Neb., 394, and reaffirmed. Again, if we assume that Castetter's contention is true, that he purchased the Scottish-American mortgage at the request of Remington, and that he was induced to make the bid he did because of an agreement with Remington that the amount due on such mortgage should be applied in satisfaction of such bid instead of paying money, we would still be unable to say that the district court was wrong in refusing to set aside the sale for that reason. Section 854 of the Code of Civil Procedure provides: "The proceeds of every sale made under a decree in chancery shall be applied to the discharge of the debt adjudged by such court to be due, and of the costs awarded, and if there be any surplus it shall be brought into court for the use of the defendant, or of the person entitled thereto, subject to the order of the court." An officer selling property under execution or a decree in equity can sell such property on such terms, and such terms only, as are provided by the decree and the law in force governing such sale, which is

incorporated into and a part of such decree. In other words, an officer selling property on execution or under a decree in equity has no authority to sell on credit unless by the express terms of the decree or by the statute he is so authorized. (Freeman, Executions, sec. 300; *Swope v. Ardery*, 5 Ind., 213.) In the case at bar the officer was directed to sell at public auction to the highest bidder the real estate described in the decree, and he was authorized to sell it, and sell it only for cash, but by reason of the statute and by reason of the fact that Castetter had been given a lien against the real estate sold and for which it was sold, the officer was authorized to accept from Castetter the amount of this decree as money. Therefore, if it was the agreement between Remington and Castetter that the latter should turn in to the sheriff the Scottish-American mortgage as a part of the $11,200 bid by Castetter for the premises, the sheriff would have had no authority to accept such mortgage in lieu of money and having made a return into court that he had sold this property to Castetter for $11,200, he is conclusively presumed to have collected this money from Castetter, less the amount of Castetter's decree against the property. The officer could not be heard in this or any other proceeding to say that he accepted from Castetter for the excess of the bid over and above his decree anything other than money. After the court had overruled the motion of Castetter to set aside this sale, he applied to and obtained from the court an order for a writ putting him in possession of the premises. The evidence also shows that the sheriff executed and delivered to Castetter, or his agent, a deed for these premises. Castetter, or his agent, paid the fee for recording this deed, and, it would seem, took possession of the premises. At least Castetter listed these lands with a real estate agent for sale. Here, then, was a waiver by Castetter of all errors and irregularities, if any there were, which occurred in the making of this sale, and a waiver of all objections and exceptions to

the order of the court in confirming it. For the foregoing reasons we conclude that the district court did not err in overruling the motion of Castetter to set aside the sale and in confirming the same.

2. Did the court err in refusing to apply the excess of Castetter's bid remaining, after discharging the amount found due him by the decree and the costs of the case, towards the liquidation of the Scottish-American mortgage? As already stated, this application of the surplus was asked by Castetter on the grounds that he had advanced the money, purchased and taken an assignment of this Scottish-American mortgage, at the request of Remington and under an agreement with him that he should turn in this mortgage and apply it on whatever bid he might make upon the land at the foreclosure sale instead of so much money. The evidence in the record in behalf of Castetter tends to support his contention. Castetter and his agent and others testify that this was the agreement and understanding with Remington. The evidence also tends to show that Castetter bid for this land more than it was worth because of this agreement. On the other hand Remington positively swears that he never requested or induced Castetter to purchase this Scottish-American mortgage, and that he did not know he had purchased it until after the sale; that he never had any agreement with Castetter by which the latter was to apply this mortgage on any bid he might make at a sale of the property. The appraisement made of the land under the direction of the sheriff holding the order of sale shows that the land was appraised at $40 per acre, the amount bid for it by Castetter. The evidence also discloses that at the sale there was some competition. That a man named Shields bid $30 per acre for the property, that Castetter then bid $35 per acre, and that Shields then bid $37.50 per acre, whereupon Castetter bid $40 per acre for the property and it was struck off to him at that price. The finding of a district court, made on conflicting

evidence, like the finding of a jury, is binding upon this court if such finding is supported by sufficient evidence. Had we been trying this question of fact it may be that we would have reached a different conclusion from that reached by the learned district judge, but that consideration does not authorize us to say that the district court came to the incorrect conclusion. We do not feel at liberty to disturb this finding, as there is sufficient evidence in the record to sustain it. If, then, Castetter took an assignment of this mortgage without the solicitation of Remington, without his knowledge, and without any agreement on the part of Remington that the mortgage should be applied upon whatever bid Castetter might make upon the land, it would be inequitable to apply the surplus in the hands of the sheriff arising from the sale made towards the liquidation of that mortgage. Counsel for Castetter seems to be of opinion that the district court denied his client's application to apply the surplus from the sale on the Scottish-American mortgage on the ground that when Castetter purchased the premises at the foreclosure sale that his lien upon the premises acquired by virtue of his purchase of the Scottish-American mortgage was merged in the title acquired at the foreclosure sale. We do not think that the district court denied the application of counsel's client on this ground; nor do we think that it necessarily follows that the mortgage purchased by Castetter from the Scottish-American Company was extinguished or merged by Castetter's purchase of the premises. Whether the mortgage was extinguished or merged by Castetter's purchase was a matter which rested in his volition. If he desired to keep the mortgage alive upon the premises, and at the same time hold the legal title to the premises, we know of no principle of law which prevented it; nor do we perceive how that question could have been material or have influenced the court in the consideration of the application made by Castetter to apply the surplus bid to the extinguishment of

such mortgage. Keeping in view the finding of fact made by the district court, Castetter has no more right to have the surplus proceeds of the sale applied to the liquidation of the Scottish-American mortgage than would a stranger to the proceedings have, had such stranger purchased this Scottish-American mortgage and taken an assignment of it after a decree rendered against the Remingtons and in favor of Castetter; and it will scarcely be contended that had a stranger purchased this mortgage at the time Castetter did that his ownership of the mortgage would have entitled him to have the surplus proceeds arising from the foreclosure sale applied to its discharge; or that the Scottish-American Mortgage Company would have such right.

3. Petition in error of the judgment creditors. As already stated, certain persons whom we have designated judgment creditors were made defendants to the foreclosure suit brought by Castetter. These parties, and each of them, had ordinary money judgments against Remington. They filed their answers in the action, setting out their judgments and asking that the judgments be paid out of whatever surplus there might be in the hands of the officer after a sale of the property and a payment of Castetter's liens; and the district court, by its decree, found what was due to each of the judgment creditors from Remington; that the amount found due was a lien upon the real estate; ordered the property sold and the proceeds brought into court to be applied in satisfaction of the sums found due Castetter and the judgment creditors. Neither Remington nor his wife appeared in the action, and a decree was rendered against them by default. After the premises had been sold at a foreclosure sale, after the costs and expenses of the suit and the amount found due Castetter had been paid, the judgment creditors claimed the surplus remaining should be applied upon their judgments against Remington. On the other hand, Remington and his wife at that time filed an application to have $2,000 of the surplus paid to them in

lieu of their homestead. The court directed $2,000 of the surplus to be paid to the Remingtons in lieu of their homestead; and it is to reverse this order that the judgment creditors have filed here their petition in error. The argument is that the Remingtons are concluded and estopped by the decree in the foreclosure suit which found that the amounts due to them from Remington were liens upon the real estate. Without going into any extended discussion, we are satisfied that the contention must be overruled. The judgments of the judgment creditors were liens upon this real estate before the bringing of the foreclosure suit; but while they were liens upon the real estate, the lien was subject to the homestead rights of the Remingtons. The fact that they set up their judgments in their answers filed in the foreclosure suit, and that the court found that they were liens upon the real estate, added nothing whatever to the character of these judgment liens. The decree must be construed as if read: The judgments are liens upon and to be paid out of the surplus, subject to the homestead rights of the Remingtons. The question of the right of the Remingtons to hold a part of the land as a homestead was not involved in, nor litigated in, the foreclosure suit; and that decree constitutes no bar to their application to have the surplus paid to them in lieu of their homestead. (*Mooers v. Dixon*, 35 Ill., 208; *Wing v. Cropper*, 35 Ill., 256; *Hoskins v. Litchfield*, 31 Ill., 137; *Moore v. Titman*, 33 Ill., 358; *Sears v. Hanks*, 14 O. St., 298.) At no time could the judgment creditors have sold the homestead of the Remingtons for the satisfaction of their judgment; but since the homestead was pledged for the payment of the Castetter mortgage, the court had authority to decree that it be sold for that purpose. But if the sheriff could have satisfied the Castetter mortgage by a sale of a portion of the premises, it would have been his duty, and doubtless he would have done so; and had a portion of the land occupied by the Remingtons of the value of

$2,000 remained unsold, the judgment creditors would have had no authority to have such portion of land sold for the satisfaction of their judgments. The Remingtons did not lose their exemption because the property had been converted by a decree of the court into money, nor did the judgment creditors acquire any greater liens upon or right to this money than they had to or against the property. The Remingtons had a right to claim this surplus money in lieu of their homestead exemption at any time before it was finally distributed. The decree of the district court is in all things

AFFIRMED.

JAMES BINGHAM V. SAMUEL SHADLE ET AL.

FILED MAY 2, 1895. NO. 6422.

1. **Appeal Bonds:** APPROVAL BY JUSTICE OF THE PEACE. An undertaking given for the purpose of appealing a case from a justice of the peace to the district court is approved by the justice, if he receives it, examines it, and expresses himself as "satisfied," and retains it in his custody.
2. **Alteration of Instruments.** Where a written instrument is altered by one not claiming under it, the party claiming under it may still enforce it so long as its original character is susceptible of proof.
3. **Appeal Bonds:** ALTERATION: LIABILITY OF SURETIES. Therefore, where, after an appeal undertaking had been approved by the justice, some of the sureties erased their names therefrom, this did not release them from liability, and consequently did not release their co-sureties, the obligee not knowing of or consenting to the change.
4. ———: ———. The fact that the justice knew of the erasure was not material. It was beyond his power after approving the bond to deprive the obligee of his security.

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

Henry M. Kidder, for plaintiff in error.

Judson C. Porter, contra.

IRVINE, C.

This was an action by Bingham against Shadle and nine others, on an appeal undertaking in a case taken from a justice of the peace to the district court, the defendants being the sureties on the undertaking. The defense was that the bond was signed by each one under an agreement that all should sign, but that before approval the signatures of three of the defendants were erased, whereby it is claimed all were discharged. The case was tried to the court without a jury. The court found generally for the defendants, and then found specially that three of the defendants, before the bond was approved, erased their names therefrom with the knowledge and without objection on the part of the justice, and without the knowledge or consent of the other sureties. Judgment was entered for the defendants.

The facts appear without any material conflict in the evidence. The ten defendants signed the appeal undertaking. The appellant then delivered the undertaking to the justice, who received it, examined it, and expressed himself as "satisfied." Owing to the press of other business he laid the bond aside without indorsing his approval in writing thereon. Subsequently, three of the sureties came to his office, asked for the bond, and erased their names therefrom. The justice knew this fact. He thereafter indorsed his approval on the bond. On this evidence we think the learned district judge erred in finding that the erasures were made before approval. In *Asch v. Wiley*, 16 Neb., 41, an appeal bond had been presented to the county judge within the time required by law. It was received by him, filed and spread upon his docket. He afterwards indorsed upon it that it was not approved. This court held that if the justice did not intend to approve the

bond he should have refused to receive it and notified the appellant of that fact, and that his receiving the bond and filing it, and spreading it upon his docket, constituted an approval. This decision is in accordance with the great weight of authority elsewhere. In view of the reasons given we cannot regard the spreading of the bond upon the docket as an essential part of its approval. A paper is filed when it is delivered in due order to the proper officer for custody or such action as the law requires of him. (*Cook v. Hall*, 1 Gilm. [Ill.], 575; *King v. Wade*, 1 B. & Ad. [Eng.], 861; *Naylor v. Moody*, 2 Blackf. [Ind.], 247; *Gorham v. Summers*, 25 Minn., 81; *Fanning v. Fly*, 2 Cold. [Tenn.], 486.) This bond was therefore filed, and the justice's approval affirmatively given. The notation of the approval on the bond was only evidence of this fact, and it was proper to show by parol the precise time of approval. (*Woodburn v. Fleming*, 1 Blackf. [Ind.], 4; *McCloskey v. Indianapolis Manufacturers' & Carpenters' Union*, 87 Ind., 20; *Williams v. McConico*, 25 Ala., 538.) The bond had, therefore, become a complete obligation before the names of the three sureties were erased. It was formerly the law that any material alteration, even though made by a stranger, avoided a written instrument; but the injustice and unreasonableness of this rule have led to its abandonment of late years. It is now the law that an instrument is avoided by a material alteration made by the person claiming under it. But where the change is made by a stranger, without the consent of the person claiming under the instrument, it is usually designated a spoliation or mutilation, and the intrument may still be enforced, so long as its original character is susceptible of proof. (*Waring v. Smyth*, 2 Barb. Ch. [N. Y.], 119; *United States v. Spalding*, 2 Mason [U. S.], 482; *Medlin v. Platte County*, 8 Mo., 235; *Boyd v. McConnel*, 10 Humph. [Tenn.], 68; *Barrington v. Bank of Washington*, 14 S. & R. [Pa.], 405.) The fact that the justice knew of the erasure does not charge the plaintiff with no-

tice. The justice acted officially, and not as the plaintiff's agent. The bond was for the plaintiff's benefit, and it was beyond the power of the justice, after the bond became complete by approval, to rescind it, or by any act or consent of his to deprive the plaintiff of his security. If alteration by a stranger without the consent of the person entitled could not defeat the bond, *a fortiori* it could not be defeated by the act of the obligors themselves. These three sureties could not relieve themselves from a vested obligation by striking their names off the instrument; and it follows that if their obligation remained, the erasure of their names in nowise affected the bond, and was not material to the rights of their co-sureties. We think that the district court, under the facts proved, should have rendered judgment in favor of the plaintiff, against all the defendants before the court.

The conclusion reached seems at first to be contrary to the doctrine announced in *Martin v. Thomas*, 24 How. [U. S.], 315. But an inspection of that case shows that the signature to the bond there in question was erased with the consent of the obligee, and without the consent of the other obligors.

The case of *Smith v. United States*, 2 Wall. [U. S.], 219, was a case very similar to the present, except that the signature was erased before the bond was approved. The argument there was that the sureties were released because of that fact, and this contention was sustained by the court. It was clear in that case that the erasure having been made before the bond was approved, the surety who erased his name was not bound, and the court, following the rules in relation to suretyship, held that this was a material change in the contract, which released the other surety. But in that case the modern rule restricting the avoiding of instruments by alterations to such as are made by, or with the consent of, the person entitled was distinctly approved.

REVERSED AND REMANDED.

DAVID E. SEDGWICK V. M. A. DURHAM ET AL.

FILED MAY 2, 1895. No. 6181.

1. **County Courts: BILL OF EXCEPTIONS.** The procedure in county courts in regard to bills of exceptions is governed by the law relating to justices of the peace.
2. **Bill of Exceptions.** The provisions of section 587*a* of the Code of Civil Procedure authorizing the certification of the original bill of exceptions are confined to proceedings in the supreme court reviewing judgments of district courts. The original bill of exceptions cannot be certified from a county court to the district court.
3. **Justice of the Peace: COUNTY COURTS: EXCEPTIONS: TRANSCRIPTS FOR REVIEW.** The manner of preserving exceptions in county courts and before justices of the peace is provided by sections 988 and 1026 of the Code. The exceptions must be entered upon the docket of the justice or county judge and be presented to the district court by a transcript of that docket.

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

Sedgwick & Power, for plaintiff in error.

George B. France, contra.

IRVINE, C.

Sedgwick recovered a judgment for $239.46, against the defendants in error, in the county court of York county, the case having been tried to a jury. Defendants prosecuted error to the district court, where the judgment of the county court was reversed. From the order of reversal the plaintiff prosecutes error to this court.

There was attached to the transcript, as filed in the district court, a document purporting to be a bill of exceptions, embodying the evidence taken on the trial in the

county court. Before hearing in the district court a motion was made to quash this bill of exceptions because it was never made a part of the record; because no exceptions were entered on the docket of the county court; because the bill was not certified by the county judge to be a true bill, and because the bill had never been submitted to plaintiff's attorneys for examination. The district court overruled the motion to quash. This ruling is one of the errors here assigned. The transcript of the record attached to the petition in error filed in the district court discloses no exceptions whatever. The certificate to this transcript is "That the foregoing is a full and correct copy of my docket of all the proceedings had before me in said case, together with the original bill of exceptions." The bill of exceptions itself is not signed, sealed, or its allowance in anywise authenticated. It is well settled that county courts, even when acting within their special jurisdiction, are governed as to procedure, except where otherwise specified, by the laws regulating procedure before justices of the peace, and that the law in regard to bills of exceptions in cases tried before justices of the peace applies to county courts. (*Taylor v. Tilden*, 3 Neb., 339; *Moline, Milburn & Stoddard Co. v. Curtis*, 38 Neb., 520.) The provisions of section 311 of the Code of Civil Procedure do not apply to justices of the peace. (*Leach v. Sutphen*, 11 Neb., 527.) There is, therefore, no requirement that the bill of exceptions in a case tried in the county court, or before a justice of the peace, be submitted to the adverse party before its allowance. The last ground for quashing the bill was, therefore, not well taken. The bill should, however, have been quashed for other reasons. There is no authority for certifying the original bill of exceptions in such a case. Such a course is only permitted in any case because of section 587*a* of the Code of Civil Procedure, which permits the original bill of exceptions to be certified up from the district court to the supreme court. The statute expressly

confines the practice to such a case. The provisions in regard to bills of exceptions before justices of the peace, and consequently county courts, are found in section 988 and 1086 of the Code of Civil Procedure. By section 988, in all cases tried by a jury either party shall have the right to except to the opinion of the justice upon any question of law arising during the trial of the cause; and when either party shall allege such exception, it shall be the duty of the justice to sign and seal a bill containing such exception, if truly alleged, with the point decided, so that the same may be made a part of the record in the cause. By section 1086 it is made the duty of the justice to enter these exceptions on his docket; and by section 1087 he may enter the exceptions after the trial, unless required to enter them at the time by one of the parties. The exceptions thus become a part of the record, and the transcript thereof filed in the district court with the petition in error preserves the exceptions for review in the district court. No exceptions were in this case entered upon the docket, and it does not even appear from the docket that any exceptions were taken. The document filed in the district court was, therefore, neither in form nor substance a bill of exceptions such as the law permits in such a case, and the district court erred in overruling the motion to quash. Similar questions seem to have been raised in the case of *Hawley v. Robeson*, 14 Neb., 435; but the court then refused to consider them, because they had not been raised in the district court. Here the questions were properly raised in the district court. A recent act of the legislature may affect the questions herein discussed, but as that act has not yet gone into operation, it does not affect this case, and no opinion is expressed as to its construction.

All the errors assigned in the district court relating to matters occurring on the trial are disclosed only by the bill of exceptions. As the district court should not have considered this bill, it follows that it should not have reversed

the judgment of the county court. The judgment of the district court is reversed and that of the county court affirmed.

JUDGMENT ACCORDINGLY.

DUFF GREEN, APPELLEE, V. GEORGE W. HALL ET AL., IMPLEADED WITH EDWIN H. SHERWOOD ET AL., APPELLANTS.

FILED MAY 4, 1895. No. 5931.

1. **Mortgages:** ASSUMPTION OF PAYMENT BY PURCHASER OF LAND: EVIDENCE. An alleged agreement to pay an existing mortgage, as part of the consideration for the conveyance of mortgaged premises, is not established by recitations in the deed of conveyance that such deed is subject to said mortgage, nor a mere recitation that said mortgage is part of the consideration or purchase price.
2. ———: ———: ———. A binding assumption of the payment of a mortgage by the grantee in a deed which merely recites the existence of such mortgage on the premises conveyed, and that such mortgage is a part of the consideration or purchase price, cannot be established by proof that subsequent to the execution of such deed the grantee therein named, orally, and without consideration, promised the mortgagee that he would pay such mortgage.
3. ———: ———: ———: DEFICIENCY JUDGMENT. To entitle the holder of a mortgage to a deficiency judgment against a purchaser of the premises mortgaged the proofs must be such as would enable such mortgagee to maintain against such purchaser an action for the amount secured by said mortgage.

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

The facts are stated by the commissioner.

E. W. Simeral and *William Simeral*, for appellants:

Evidence of a parol agreement by the vendees to assume

payment of the mortgage is inadmissible. (*Lewis v. Day*, 53 Ia., 575; *Remington v. Palmer*, 62 N. Y., 31; *Conover v. Brown*, 29 N. J. Eq., 510.)

The recital in the deed that the land is sold subject to a mortgage should not be made the basis of a deficiency judgment against the purchaser. (Jones, Mortgages [2d ed.], sec. 751; *Bennett v. Bates*, 94 N. Y., 354.)

Kennedy, Gilbert & Anderson, contra:

The deficiency judgment is justified under the rulings in *Rockwell v. Blair Savings Bank*, 31 Neb., 128.

The following cases were also cited as to appellee's right to a deficiency judgment: *Marriman v. Moore*, 90 Pa. St., 78; *Crowell v. Hospital of St. Barnabas*, 27 N. J. Eq., 650; *Ferris v. Crawford*, 2 Denio [N. Y.], 595; *Wood v. Smith*, 51 Ia., 156; *Russell v. Ostrander*, 30 How. Pr. [N. Y.], 93; *Wright v. Briggs*, 99 Ind., 563; *Stover v. Tompkins*, 34 Neb., 465; *Dean v. Walker*, 107 Ill., 540.

RYAN, C.

This action was brought in the district court of Douglas county for the foreclosure of a mortgage made February 28, 1889, by the defendants George W. Hall and Helen M. Hall to plaintiff, securing payment of the sum of $6,000, due in five years from said date, which debt was evidenced by two promissory notes, one for $4,000 and the other for $2,000. On March 28, 1889, George W. Hall and his wife conveyed the mortgaged premises to Victor H. Coffman. This deed was by its terms subject to the above described mortgage, which mortgage was expressly excepted from the covenants of warranty. On the 14th day of October, 1889, Victor H. Coffman, his wife joining, conveyed the mortgaged premises to Arvilla Allyn. This deed was made expressly subject to the above mortgage. On February 20, 1890, Arvilla Allyn and her husband reconveyed the mortgaged property to Victor H. Coffman

as expressed in their deed, subject to the mortgage thereon. On the first day of April, 1890, Victor H. Coffman and his wife conveyed the said real property to Edwin H. Sherwood, likewise subject to the mortgage above described, and in the deed of conveyance it was further recited that the said mortgage was "part of the above mentioned consideration, or the purchase price" ($16,000). In the above mentioned petition for a foreclosure the aforesaid conveyances were identified in very general terms, following which descriptions the averments were as follows: "That each of said deeds, in express terms, is made subject to said mortgage of $6,000, and said mortgage debt is charged upon the purchase money in each deed as a part thereof, and said mortgage is expressly executed [probably excepted] in the covenant of warranty in each deed, and each grantee assumes and agrees to pay said mortgage debt and indemnify his grantor against the same. * * * * That there is now due from said George W. Hall and his said grantees on said notes and mortgage the sum of $6,000, with interest, payable annually, at the rate of eight per cent per annum." Following the prayer for a foreclosure and a sale thereunder for satisfaction of the amount secured by the mortgage there was this language: "That on the coming in of the report of such sale, if the court find a balance of the mortgage debt remaining unsatisfied, the court decree, adjudge, and direct the payment thereof by said George W. Hall and his said grantees, viz., Edwin H. Sherwood, Victor H. Coffman, and Arvilla Allyn, according to their respective legal liability," etc. There was a foreclosure and sale, from which there were net proceeds sufficient to justify the application on the amount found due upon a confirmation of such credits as left a deficiency of $3,578.10, for which Edwin H. Sherwood, Victor H. Coffman, and Arvilla Allyn were held liable as recited in the decree, "upon the promissory notes set forth in the petition." From this deficiency judgment Sherwood and Coffman alone appeal.

The appellee confidently relies upon the case of *Rockwell v. Blair Savings Bank*, 31 Neb., 128, to sustain the personal judgment rendered against the appellants. In the case cited the Rockwells mortgaged to the bank certain real property which they afterwards conveyed to Isaac Tebury. A foreclosure was subsequently decreed in favor of the bank, and the mortgaged property sold, leaving unpaid a deficiency, for which the district court refused to enter judgment against Tebury, though judgment therefor was duly rendered against the Rockwells, by whom, on that account, error proceedings were prosecuted to this court. On the subject of Tebury's liability the language of the opinion was as follows: "Austin Rockwell and Isaac Tebury were the only persons who gave testimony as to the terms of the agreement for the sale of the lot. The testimony of these witnesses agrees that the purchase price was $2,500; that Tebury only paid the Rockwells $300; that he never agreed to pay the balance of the consideration to them, and gave no obligation for the remainder of the contract price. Tebury knew of the existence of the mortgage for $2,200 held by the bank when the sale was made, and after obtaining the deed he paid three installments of interest on the lien. Austin Rockwell also testified that Tebury agreed to pay the amount due the bank on the mortgage. This testimony is not overcome by the evidence of Tebury. * * * He makes no claim in his testimony that he only bought the Rockwells' equity of redemption, but admits that he was to pay $2,500 for the property; that he only paid $300 on the same, and that the mortgage holds the balance. The testimony establishes beyond any question that Tebury retained part of the purchase price to pay the $2,200 incumbrance. He thereby made the mortgage debt his own, and is, therefore, personally liable with the Rockwells for the amount of the deficiency remaining after the foreclosure of the mortgaged premises. In *Cooper v. Foss*, 15 Neb., 515, the same doctrine was held and applied by Chief Justice COBB."

In the answer of the Rockwells it was alleged, in substance, as we learn from the opinion above quoted from, "that on the 24th day of March, 1887, they sold and conveyed the lot to Tebury, who, as a part of the purchase price, assumed and agreed to pay the said note and mortgage." In the case at bar it is doubtful whether or not there was an averment of an undertaking on the part of Coffman or Sherwood independently of the deed to each of them. The language, which has already been quoted so far as it relates to this subject, first stated what was believed by the pleader to be the legal effect of the language of the deeds described. By the petition it was charged that each conveyance was made subject to the existing mortgage and that by the language of each conveyance the mortgage debt was charged upon the purchase price in each deed as a part thereof, and that said mortgage was expressly excepted from the covenants of warranty in each deed, and that each grantee had assumed and agreed to pay said mortgage debt and indemnify his grantor against the same. It is possible to construe the averment last mentioned as one independent of the language of the deeds of conveyance. There are presented then by this petition, liberally construed, two questions; the one of the proper construction of the language of the deeds in question, the other a question of fact dependent upon oral evidence for proof of its existence. There was no conflict in the testimony given orally that the property was conveyed by the Halls to V. H. Coffman, subject to the above mortgage, in exchange for other real property also incumbered. The consideration recited in this deed to him therefore does not materially aid us as to the question of construction presented. The deed from Coffman to Arvilla Allyn and from Arvilla Allyn back to Coffman are scarcely referred to, much less explained, by the testimony adduced. The conveyance by Coffman to Sherwood was in consideration of other mortgaged property conveyed by Sherwood to Coffman. From a consid-

eration of the deeds, therefore, it cannot be said, or even assumed, that there was devolved upon each grantee an obligation to pay off the mortgage to Duff Green. The recitation in respect to this incumbrance found in the deed from Coffman to Sherwood, that it was "part of the above consideration or the purchase price," cuts no special figure, for that did not constitute such an agreement to pay the amount secured by the mortgage to Green, the mortgagee, that he could have obtained a personal judgment upon it against Sherwood, and this, in legal effect, was what was accomplished by the successful prayer for a deficiency judgment to the amount of the balance of the mortgage remaining unpaid after a sale on foreclosure. We conclude, therefore, that upon consideration of the terms of the deeds alone there was established against neither Coffman nor Sherwood such a liability to Duff Green as was enforceable by a deficiency judgment against either of them. The oral evidence showed, without contradiction, that in fact the deeds upon which Sherwood and Coffman were held liable personally were the consummations of exchanges of what witnesses describe as equities of redemption in the properties conveyed. In some states this term has an obvious signification, and from such states its use has probably been brought into this state, where it seems to be employed to describe such interest in real property as is retained by the owner after he has mortgaged it. Whether or not this is the general acceptation of this term is not so important, as that it was so accepted and understood by the parties and witnesses in this case. There was no agreement that there should be an undertaking by any one to pay the mortgage to Green. It was understood by all parties that the property was to be taken simply subject to Green's mortgage; in fact, so far as his rights were concerned, the agreements would have been fully expressed if nothing but quitclaim deeds had been used, for, in law, any purchaser of property upon which there is a mortgage duly recorded takes it sub-

ject to such mortgage. The case of *Rockwell v. Blair Savings Bank, supra*, therefore furnishes no warrant for the recovery of a deficiency judgment in this case; indeed quite the contrary is the tendency of the reasoning therein. (*Reynolds v. Dietz*, 39 Neb., 180.)

It was attempted by the testimony of Duff Green to show that subsequent to the making of the deed to Coffman, and that to Sherwood, each of these trustees had orally promised to pay the amount secured by the mortgage held by Green. This naked promise, if established by sufficient proof, was without consideration, and, considered by itself, was simply one to answer for the debt of another, and, therefore, not being in writing, was not enforceable. The deficiency judgment of the district court against the appellants is

REVERSED.

ADDISON P. WESTON, APPELLANT, V. JOSEPHINE MEYERS ET AL., APPELLEES.

FILED MAY 4, 1895. No. 6089.

Quieting Title: REMOVAL OF CLOUD CREATED BY TAX DEED: PLEADING: TAX LIENS: SUBROGATION. Appellant in a suit in equity alleged in his petition that he was the owner of certain real estate and entitled to the possession thereof; that appellee claimed an interest in said premises by virtue of a tax deed; that "there was no legal and sufficient levy of the taxes," for which said real estate was sold and on which said tax deed was based. He prayed that the tax sale and deed, and appellee's title by virtue thereof, might be decreed void; that the title to the real estate might be quieted in, and the possession of the premises awarded to, appellant. The petition contained no offer to pay appellee any sum the court might find he had paid to purchase the premises at the tax sale or for taxes subsequently paid on the premises. *Held*, (1) That the averment in the petition that "there was no legal and sufficient levy of the taxes"

was a mere conclusion; (2) that the tax levied became by virtue of the statute a lien on the real estate until paid or barred by law; (3) that the appellee by his purchase of the real estate for such taxes, although the sale was an invalid one, became thereby subrogated to the right of the public, and this right was a lien upon the real estate for the taxes paid until paid or barred; (4) that he who asks equity must do equity; and as the appellant did not offer in his petition to pay the appellee whatever sum the court might find he had paid out for the purchase of the premises at the tax sale, nor for legal taxes subsequently paid on the premises, the petition did not state facts entitling the appellant to equitable relief.

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

C. W. Seymour, for appellant.

John C. Watson and *John A. Rooney, contra.*

RAGAN, C.

This suit was brought in the name of Addison P. Weston in the district court of Otoe county against Josephine Meyers and her husband. The petition alleged that Weston was the owner of the legal title and entitled to the immediate possession of certain described property in the city of Nebraska City; that the defendant Josephine Meyers set up and claimed an interest in and to said premises adverse to the interest of Weston; that Meyers was the owner and holder of a certain pretended tax deed to the premises, dated November 27, 1885; that said pretended tax deed purports to be based upon the sale of said premises for the alleged delinquent taxes for the year A. D. 1879; that the pretended sale of said premises for said year was wholly illegal and void; that the premises were not properly assessed for taxes, "and that there was no legal and sufficient levy of taxes for said year." The petition then averred that said premises were not offered at public sale for the taxes for the year 1879; that the treasurer of the county

did not make a return of his sale of lands for taxes of said year; that the treasurer did not file in the office of the county clerk a notice of sale of lands for taxes for said year, nor a certificate of the advertisement verified by affidavit; that during the years 1880, 1881, 1883, 1884, and 1885 Weston was a resident of the state of Nebraska, and that he was not served with a personal notice before the time of redeeming of said tax sale expired or at any other time; and that in the year 1879 he was the owner of personal property in Cass county, where he then resided, out of which the taxes due from him on said lands could have been collected; and that the treasurer of said Otoe county made no attempt whatever to collect said taxes out of his personal property. The prayer of the petition was that the parties made defendants might be compelled to show their title to the real estate; that such title might be determined null and void; that the pretended tax sale of 1879 might be declared null and void; that the tax deed might be set aside; and that the court should decree that the parties made defendants had no estate in, or lien upon, said premises. It is not necessary to set out the averments of the answer. The district court found the issues in favor of the defendants and dismissed the petition, and the case is before us on appeal.

The district court found specially that Weston was not the real party in interest in this action. The evidence on this issue is somewhat unsatisfactory, but we think it is sufficient to support the finding of the court; and we have no doubt whatever but that had the court seen fit to make a special finding that Weston did not bring nor authorize the bringing of this suit, that such special finding would have abundant support from the evidence in the record. It is not necessary to quote this evidence, but it establishes the fact that Weston did not bring nor authorize the bringing of this action. He did not employ or pay counsel who brought it. The suit appears to be a speculative one insti-

tuted by a real estate agent of Nebraska City. The district court also found specially that there was no equity in the petition filed in this case, and we think the district court was right in this finding. It will be observed that this is a petition in equity in which it is alleged that appellant owns certain real estate; that this real estate is in the possession of the appellees, who claim an adverse title or interest therein; that the interest and claim of appellees are based in part upon a sale of real estate for the taxes for the year 1879, and a tax deed issued in pursuance of such sale. The allegation in the petition that "the premises were not properly assessed for taxes and that there was no legal and sufficient levy of taxes for said year" is a mere conclusion. The petition sufficiently shows that a tax was levied upon this real estate for public purposes, and having been levied it became, by virtue of the law, a lien on the real estate until paid or until barred by the statute. The sale made of this real estate for the taxes for the year 1879 may have been and probably was invalid, and the deed may have been and probably was void; but the purchaser of this real estate at such tax sale, although the same was an invalid one, became subrogated to the rights of the public by his purchase, and that right, as already seen, was a lien upon the real estate for the amount of the taxes paid until paid or barred. The petition in this case does not offer to pay the taxes paid at this sale or subsequently. On the contrary, the prayer is that the tax levy, the sale, and the deed may all be decreed void, and the title and possession of the premises may be decreed to be in the appellant, free from any lien for any such taxes.

In *Loney v. Courtney*, 24 Neb., 580, Loney had executed a mortgage upon certain real estate. There had been a foreclosure, or attempted foreclosure, of this mortgage, a sale of the real estate, and a sheriff's deed executed in pursuance of such foreclosure and sale. For reasons not necessary to set out here, the proceedings and the decree fore-

closing this mortgage were void. Loney then brought his action in equity to cancel the deed made by the sheriff as a cloud upon his title, and in the petition he made no offer to pay what was equitably due the parties made defendants upon the mortgage. The court below entered a decree in favor of Loney canceling the sheriff's deed. On appeal this court said: "In the case under consideration the mortgage was given to secure a *bona fide* debt. This debt, to the extent of the purchase price of the land, under the decree, has not been paid, if the deed in question is declared void. The plaintiff, however, ignores this demand. He makes no offer to pay what is equitably due the defendants upon the mortgage, and therefore is asking for equitable relief without offering to do equity." And the decree of the district court was reversed. To the same effect see *Morrison v. Hershire*, 32 Ia., 271.

If the appellant was the owner of the legal title to the premises in controversy and entitled to their possession, he had the right to put his title on trial before a law judge and a jury; but when he invokes the court for equitable relief he must offer himself to do equity; and since he did not offer in the petition to pay to the appellees whatever sum the court might find they had paid out in the purchasing of these premises at the tax sale made thereof for taxes which were a lien on the premises and taxes subsequently paid that were a lien upon said premises, the petition stated no ground for equitable relief and the decree of the district court was correct. Its judgment is accordingly

AFFIRMED.

SARAH DISHER V. PETER DISHER ET AL.

FILED MAY 21, 1895. No. 5172.

1. **Waste:** INJUNCTION. Although the rule of the common law in relation to waste has been greatly relaxed in favor of the tenant, the preventive jurisdiction of courts of equity by means of injunction is still freely exercised in favor of the reversioner against a tenant in possession, whenever the threatened acts amount to a manifest injury to the estate and a wanton abuse of the tenant's rights.

2. ———: RIGHTS OF LIFE TENANT. It is not waste for a life tenant to remove timber so as to fit the land for pasture or cultivation, provided he does not in so doing damage or diminish the value of the inheritance, and his acts are conformable to the rules of good husbandry. (*Wilkinson v. Wilkinson*, 59 Wis., 557.)

3. ———: INJUNCTION AGAINST LIFE TENANT: EVIDENCE. Evidence examined, and *held* to sustain the allegation of waste by the reversioners against the defendant, a tenant for life.

4. **Equity:** EXERCISE OF JURISDICTION: PRACTICE. When a court of equity has acquired jurisdiction of a cause for any purpose, it may retain it for all purposes, and proceed to a determination of all of the matters put in issue by the pleadings. (*Morrissey v. Broomal*, 37 Neb., 766.)

5. **Estrepement:** INJUNCTION: DAMAGES. Under our system, the reversioner in an action to stay threatened waste by a tenant for life may recover for waste previously committed, provided there be some connection between the injury done and the acts threatened.

6. **Estates:** PAYMENT OF TAXES. As between a tenant for life and the reversioner the former is required to pay taxes assessed against the estate.

7. ———: WASTE: DAMAGES: COUNTER-CLAIM. Finding against the defendant on the cause of action alleged in her counter-claim *held* sustained by the evidence.

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

J. C. Johnston, for plaintiff in error.

George A. Murphy, contra.

POST, J.

This is a petition in error and presents for review a decree of the district court of Gage county in a proceeding in which the defendants in error were plaintiffs and the plaintiff in error was defendant, to restrain the commission of threatened waste by the defendant therein as tenant for life, and to recover for damage to the plaintiffs' estate on account of waste previously committed. From the petition, which was filed March 6, 1891, it appears that Stephen T. Disher died intestate on the 22d day of March, 1884, leaving no issue, and that the plaintiffs, his brothers and sisters, and children of deceased brothers and sisters, are his heirs at law; that deceased was at the time of his death the owner of 560 acres of land in Gage county, which under the laws of this state descended to the plaintiffs, subject to the life estate therein of the defendant Sarah Disher, widow of said deceased; that the defendant has remained in possession of said property since the death of the said Stephen T. Disher, receiving the rents and profits therefrom; that said property is rendered valuable by reason of growing timber upon a portion thereof (which is by witnesses described as the home place); that on or about January 1, 1891, the defendant, without authority or license from plaintiffs, cut down and converted into cord wood for the purpose of sale a large quantity of the most valuable timber growing upon said premises, to-wit, 250 cords of four-foot wood; that she has contracted to sell 300 cords of four-foot wood and 100 cords of two-foot wood to be cut from said premises, and is now cutting and threatening to cut and carry away all of the valuable timber upon said premises, and which is especially valuable to said

land as a shelter to stock as well as the keeping in repair of the fences and other improvements thereon. It is further alleged that the defendant, on or about January 1, 1891, wrongfully removed from said premises a dwelling house situated thereon, of the value of $260, to property of her own, and is threatening to remove other buildings from said premises. The defendant in her answer, after a general denial of the allegations of the petition, admits the cutting of certain timber growing upon said premises, but which she charges was by way of improvement thereof and for the betterment of plaintiff's estate, and which does not, she alleges, constitute waste. She admits the wood cut by her amounted to 240 cords, of the value of $2 per cord, and which it was her purpose to sell in order to reimburse herself on account of money paid out for taxes, and labor in keeping said place in repair, in excess of the rents received therefrom. She admits the removal of the dwelling house mentioned in the petition, but denies that it was of any value, or that her act in that regard constituted waste for which she is accountable in this proceeding. For a counter-claim she alleges that plaintiffs are indebted to her in the sum of $1,400 and interest for money advanced to the administrator of the estate of her said husband, and which was used for the purpose of paying and discharging a mortgage of $700 on the lands mentioned, and a further mortgage of $700 which said deceased had during his lifetime assumed and agreed to pay. The reply is (1) a general denial, (2) an allegation that the cause of action mentioned in the counter-claim did not accrue within four years. There was a general finding for the plaintiffs, their damage being assessed at $200, for which judgment was allowed, accompanied by a decree prohibiting the further removal of buildings from said premises, also the further cutting or removing of the growing timber except for firewood and for repairs and improvements thereon.

The first assignment of error to which we will give attention is the denial by the district court of a trial by jury on demand of the defendant, and which presents the question of the jurisdiction of a court of equity over the cause of action alleged. It cannot be denied that the doctrine of the common law in relation to waste has been greatly relaxed in favor of the tenant. But the preventive jurisdiction of courts of equity by means of injunction is still freely exercised in order to protect the reversioner against waste by the tenant in possession when the threatened acts amount to a manifest injury to the inheritance and a wanton abuse of the tenant's rights. (2 Story, Equity Jurisprudence, sec. 915; High, Injunctions, sec. 432 *et seq.;* Wood, Landlord & Tenant, sec. 54; 4 Kent, Commentaries, 76 *et seq.;* 3 Pomeroy, Equity Jurisprudence, sec. 1348.) The doctrine above stated is recognized in many reported cases, and is so well established as to be regarded elementary law. The objection we are discussing, it should be remembered, was to the allegations of the petition. It must, therefore, for the purpose of the present inquiry, be regarded as a general demurrer and not presenting the sufficiency of the evidence to sustain the finding of the court,—a question which will be noticed under another assignment. The allegations that the land in this case is valued chiefly on account of the growing timber thereon, which is especially suitable as shelter for live stock, and that the defendant is cutting and threatening to cut and carry away all of the valuable timber thereon, and that she has removed therefrom a dwelling house and threatens to remove other buildings, certainly present a case for equitable cognizance. It is, however, urged that where the pleadings present both legal and equitable issues the parties will be entitled to submit them to a jury, provided demand therefor be made at the proper time. But this court, in *Morrissey v. Broomal*, 37 Neb, 766, recognized as sound the opposing view, and held that when a court of

equity has acquired jurisdiction over a cause for any purpose it may retain it for all purposes and proceed to a determination of all matters put in issue by the pleadings. And whatever may be the rule at common law, we have no doubt that under our system the reversioner in an action to stay threatened waste by a tenant for life may compel the latter to account for waste previously committed, provided there be some connection between the injury done and that threatened. (Bliss, Code Pleading, 211; *Rodgers v. Rodgers*, 11 Barb. [N. Y.], 595.)

We find in the several briefs submitted herein an exhaustive discussion of the rights of a tenant for life as against the reversioner with respect to growing timber upon the demised premises, but an examination of the many cases cited by counsel would result in an unnecessary prolonging of this opinion without corresponding profit. It is sufficient that we are constrained to adopt the rule asserted by Judge Cassoday, whose views upon this and kindred subjects are entitled to especial consideration, viz., that it is not waste for a life tenant to cut wood or timber so as to fit the land for pasture or cultivation, provided he does not, in so doing, damage or diminish the value of the inheritance, and his acts are conformable to the rules of good husbandry, although the wood and timber so cut be sold or consumed off the premises (see *Wilkinson v. Wilkinson*, 59 Wis., 557); and that view, which was evidently adopted by the district court, is in substantial accord with the authorities cited as bearing upon the jurisdiction of equity in like cases. Applying that rule to the facts of this case we have no difficulty in holding with the district court, that the acts threatened, as well as those committed, constitute equitable waste. Indeed, the natural and only inference is that the cutting of the timber is a manifest injury to the inheritance and a wanton abuse of the defendant's rights. It is shown by the evidence of plaintiffs' witnesses, and not disputed, that the reason assigned by the

defendant for the cutting of the timber was that she wanted to turn the wood into cash in order to make payment on certain land which she had purchased in her own right. The witnesses practically agree in the opinion that the value of the land has been materially diminished by reason of the removal of the timber and the consequent destruction of the shelter and protection which it afforded to stock, thus rendering the premises less desirable for the purpose of stock raising. The finding upon the merits of the plaintiffs' cause is clearly right and will not be disturbed. The claim that defendant was required to sell the growing timber to provide funds for payment of current taxes cannot be sustained for reasons already stated, and for the further reason that as between herself and these plaintiffs it was her duty to pay the taxes. (Wood, Landlord & Tenant, sec. 54, and cases cited in note.) Nor does the counter-claim for money advanced to the administrator merit serious consideration, for the reason, among others, that the mortgages mentioned by the defendant are not shown to have been paid with money furnished by her, while, on the other hand, the irresistible inference from the evidence is that they were paid and satisfied with the proceeds of the personal property of the deceased, Stephen T. Disher. There being no error in the record the judgment of the district court will be

AFFIRMED.

FRANK H. STOPPERT V. ELIZABETH NIERLE.

FILED MAY 21, 1895. No. 6438.

1. **Bastardy Proceedings:** JURISDICTION OF COUNTY JUDGE. Proceedings under chapter 37, Compiled Statutes, entitled "Illegitimate Children," are within the jurisdiction of a county judge and may be instituted and hearing had before such judge.

2. ———: EXAMINATION BEFORE JUSTICE OF THE PEACE. Errors committed by a justice of the peace or county judge in excluding testimony during the examination of the complainant in a bastardy case will not affect the jurisdiction of the district court.

3. **Bastardy**: TRIAL. An action under the provisions of our statute in relation to "Illegitimate Children" is, in its nature, a civil proceeding, and the rules governing such proceedings apply to it, and each party is entitled to but three peremptory challenges to jurors.

4. **Continuance**: REVIEW. Motions for change of venue and for continuance are addressed to the sound discretion of the trial court, and unless it appears that there has been an abuse of such discretion, its rulings thereon will not be disturbed.

5. **Bastardy**: CHARACTER OF DEFENDANT: EVIDENCE. The character and reputation of the defendant for chastity and virtue is not an issue in an action of bastardy; and notwithstanding proof of the facts of his having sexual connection with the complainant and of his being the father of her child may affect his reputation for chastity, he cannot invoke the aid of his previous reputation in that respect as tending to disprove such facts.

6. **Statutes**: CONSTRUCTION. Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain their meaning; a mere reading will suffice.

7. **Bastardy**: TRIAL: EVIDENCE. The portion of section 5, chapter 37, Compiled Statutes, entitled "Illegitimate Children," in which appears the statement, "And at the trial of such issue the examination before the justice shall be given in evidence," authorizes the offer and introduction in evidence by either party during trial in the district court of the examination of complainant in an action of bastardy, taken before a justice of the peace or county judge.

8. **Trial**: CREDIBILITY OF WITNESS: INSTRUCTION. An instruction worded as follows: "It is a fundamental principle of law and evidence that if a witness is found to have sworn falsely upon one material point, such witness should be presumed to have testified falsely on every other material point. If you find the plaintiff has testified falsely on one matter material to her case, you are at liberty to disregard her entire testimony for that reason alone,"—was requested to be given by plaintiff in error and the request refused by the trial court. *Held*, Not error, for the reason that the instruction was defective and erroneous, in that its statements in relation to a witness or the plaintiff swear-

ing falsely were not qualified by the words "willfully" or "intentionally," or others of like import, and did not correctly express the rule invoked of *Falsus in uno, falsus in omnibus.*

9. **Assignments of Error:** INSTRUCTIONS. Errors assigned in a group with reference to the giving or refusal to give instructions will be examined no further than is necessary to ascertain that one of the instructions given was correct, or one refused properly rejected.

10. **Bastardy:** WITNESSES: EVIDENCE. In an action of bastardy the defendant is entitled to ask the complainant during cross-examination whether she had sexual connection with other men at or near the time the child was begotten, and to have such questions answered; and it is error to restrict the range of such cross-examination to a number of days less than the period of gestation, especially so when, as in the case at bar, the time excluded by the restriction is the ten days or two weeks immediately prior to the date when the complainant has testified she had the first act of sexual intercourse with defendant, and also within the period of gestation.

11. **Rulings on Evidence:** REVIEW: ASSIGNMENTS OF ERROR. This court will not review the rulings of a trial court admitting testimony unless the particular rulings claimed to be erroneous are definitely pointed out in the allegations of the petition in error.

12. **Bastardy:** EVIDENCE. Evidence of declarations of the complainant in a bastardy suit, in which she claimed the defendant was the father of her child, made during ordinary conversations or out of court and not during her testimony before the justice or county judge or the district court, is incompetent and inadmissible.

12. ———: CHARACTER OF PROCEEDINGS: STATUTES. The purposes of a bastardy proceeding are to compel the father of the child to assist the mother in its support and maintenance and to indemnify the county against its becoming a public charge, and the portion of section 1, chapter 37, Compiled Statutes, 1893, in which it is provided that the party accused and the complainant may make a settlement, in so far as the relief sought is for her assistance and benefit, is but an incident to such object of the law, and is expressed in the title of the act for the maintenance and support of illegitimate children, approved February 25, 1875. (For act see Session Laws, 1875, p. 53.)

ERROR from the district court for Cedar county. Tried below before NORRIS, J.

Wilbur F. Bryant, for plaintiff in error.

Gooding & Weed, contra.

HARRISON, J.

On the 12th day of July, 1892, the defendant in error filed a complaint with the county judge of Cedar county, in which she charged the plaintiff in error with the paternity of her unborn bastard child. A warrant was issued and the plaintiff in error was arrested and brought before the county judge, and on hearing was held to appear before the district court to answer the charge. During the next term of the district court in Cedar county, after some preliminary matters (which will be noticed in their order in so far as objected to and properly assigned as error) had been presented and disposition made of them, the case was tried before the court and a jury and the defendant pronounced guilty by the jury in their verdict, and, after motion for new trial was heard and overruled, adjudged by the court to pay to the complainant the sum of $150 and the further sums of $10 per month until the child should be ten years of age, and the costs, with the further requirement that he give a bond in the sum of $1,200 to secure the performance of the judgment and order of the court, and if such bond was not given, to be committed to jail, etc. To reverse this judgment the case has been brought by proceedings in error to this court.

The first assignment of error in plaintiff's brief is that the court erred in overruling a motion to strike the case from the files,—by which we presume was meant to dismiss it, as that would have been the effect of an order sustaining the motion,—on the ground that the preliminary examination was before the county judge, and that a county

judge has no jurisdiction of a complaint in an action for bastardy. The question of the jurisdiction of a county judge in such a proceeding as this was presented to this court in *Ingram v. State*, 24 Neb., 33, and in the opinion then written it was held: "The county judge has jurisdiction to hear proceedings instituted under chapter 37 of Compiled Statutes, entitled 'Illegitimate Children,'" and we are satisfied with the conclusion reached at that time and will adhere to it.

It is further urged that the trial court should not have admitted in evidence the testimony of the complainant given at the preliminary hearing before the county judge, for two reasons: First, the testimony of the complainant taken at the preliminary hearing can be used by the defendant, but not introduced in behalf of the complainant; second, the county judge erred in sustaining objections to questions propounded to complainant for defendant during the hearing. With reference to the second of the above reasons it will suffice to say that the question raised was presented to this court in the case of *Altschuler v. Algaza*, 16 Neb., 631, the error assigned being, as in the case at bar, that to questions asked the complainant during her cross-examination, at the time she instituted her action before the justice of the peace, objections were made and sustained and the evidence sought to be elicited thus excluded, and it was then said that errors committed by the justice of the peace or examining magistrate in the exclusion of testimony during the examination of the complainant do not affect the jurisdiction of the district court. The first of the reasons as above stated in regard to the admission of the evidence taken at the examination before the county judge we will pass for the present and revert to it hereafter.

It is further assigned as error that the defendant was allowed but three peremptory challenges. The rule in regard to the number of peremptory challenges to which

either party is entitled in a case like the one at bar was announced by this court in *Kremling v. Lallman*, 16 Neb., 280, where it was stated that three was the correct number. We are satisfied with the conclusion reached in that case and the rule established.

It is contended that the trial court erred in overruling the defendant's motion for a change of venue. There were some affidavits filed in support of this motion and also some in opposition, and after an examination of them we do not feel warranted in saying that the trial court was wrong in concluding that the defendant could have a fair and impartial trial in the county where the action was pending, and it was not error to overrule the motion. (*Northeastern Nebraska R. Co. v. Frazier*, 25 Neb., 43.) Such a motion is addressed to the sound discretion of the court, and unless it appears that there was an abuse of such discretion, its ruling upon the same will not be disturbed. (*Smith v. State*, 4 Neb., 277.) There was no unfair exercise of discretion by the trial court in its ruling upon the motion in this case for a change of venue; hence it is approved.

A motion for continuance was filed on behalf of defendant, which was denied by the court, and this action is assigned for error. The disposition of such an application is one which calls for the exercise of the discretionary power of the trial court, and if no abuse of such power appears, there is no error, and, as an examination of the record discloses to us no just cause for complaint in this respect, the action of the district court in denying the motion must be allowed to stand.

During the trial plaintiff in error called a witness to prove his reputation for virtue and chastity, and an objection interposed to the testimony was sustained by the court and the evidence excluded. The plaintiff in error made the offer to prove the facts to establish his reputation in the particulars stated and the court adhered to its former ruling.

The case on trial is in the nature of a civil action, and in such actions, where the reputation in any particular is not in issue and has no direct bearing upon the questions involved, evidence of it is not competent or material. Such testimony is not admissible in an action for damages for an assault or assault and battery. In an action for damages for the alleged willful and malicious setting fire to and burning some stacks of wheat belonging to plaintiff it was held that evidence of defendant's good character was not admissible. (*Barton v. Thompson*, 56 Ia., 571, 9 N. W. Rep., 899.) In such a case, no matter how serious a moral delinquency may be involved in a fact and how much the establishment of the fact may affect a party's reputation, he cannot invoke the aid of his previous reputation to disprove the fact. (*Smets v. Plunket*, 1 Strob. [S. Car.], 372. See, also, *Boick v. Bissell*, 45 N. W. Rep. [Mich.], 55; *Klien v. Bayer*, 45 N. W. Rep. [Mich.], 991; *Norris v. Stewart's Heirs*, 10 S. E. Rep. [N. Car.], 912; *Gough v. St. John*, 16 Wend. [N. Y.], 647.) Character is not in issue in bastardy proceedings. (*Houser v. State*, 93 Ind., 228.) The evidence of character offered by plaintiff in error was not admissible and the court did not err in excluding it.

We will now return to the assignment of error which we passed over, that the court was in error in allowing defendant in error to introduce the evidence taken during the examination before the county judge, the plaintiff in error having objected to such admission. It is claimed by plaintiff in error that the examination of complainant before the justice of the peace in an action of bastardy is directed by the law to be preserved and a transcript made of it and forwarded to the district court with the other papers for the benefit of the defendant in the action, and he may waive its use as evidence during the trial of the cause in the district court, and if he does so, it cannot be introduced by the other party to the action. We are cited

by counsel for plaintiff in error to the case of *Strickler v. Grass*, 32 Neb., 811, as supporting the above contention. There are some expressions used in the opinion in that case that lend some color to such a claim, but as we read the case cited it does not discuss or pass upon the point raised in the case at bar, but discusses and decides an entirely different question. This court has said in an action of bastardy (*Altschuler v. Algaza, supra*): "The evidence of the complainant on the preliminary examination, reduced to writing by the justice and transmitted to the district court, is for the purpose of confirming or impeaching her testimony in the latter court;" but it may be said that the statement last quoted, viewed as a precedent, is subject to the same infirmities as the case of *Strickler v. Grass, supra*, and probably it is open to the same objection. But be this as it may, in section 5, chapter 37, Compiled Statutes, under the statutory provisions of which this action was instituted, appears this sentence: "And at the trial of such issue the examination before the justice shall be given in evidence, and the mother of the bastard child shall be admitted as a competent witness, and her credibility be left to the jury," and the words used are plain and direct in their import and no interpretation of them is necessary to ascertain their meaning. The statement is that "the examination before the justice shall be given in evidence," and to us it clearly authorizes its use by either party and its reception when offered by either. In the case of *Hoff v. Fisher*, 26 O. St., 8, it was said (note that the words of the law as quoted are identical with those employed in our statute): "Section 9 of the bastardy act provides, 'and at the trial of such issues the examination before the justice shall be given in evidence and the mother of the bastard child shall be admitted as a competent witness.' Under this provision, either party may offer the written examination, and if it be lost, its contents may be proved." The trial court did not err in receiving in evidence the exami-

nation of the complainant before the county judge when offered for her.

It is further alleged as error that the trial court refused to give instruction numbered 3, requested by plaintiff in error. The instruction asked was as follows: "It is a fundamental principle of law and evidence that if a witness is found to have sworn falsely upon one material point, such witness should be presumed to have testified falsely on every other material point. If you find the defendant has testified falsely on one matter material to her case, you are at liberty to disregard her entire testimony for that reason alone." It will suffice to say, without further discussing this instruction, that it is too broad and sweeping, and also imperfect in its statement of the rule of law applicable to witnesses, in that it omits the requirement that the false swearing, if any, by the witness should be found to have been willfully or intentionally so. The maxim *Falsus in uno, falsus in omnibus* will only be applied in a case where a witness is shown to have willfully testified falsely to a fact within his knowledge. (*Buffalo County v. Van Sickle*, 16 Neb., 363; 2 Thompson, Trials, sec. 2423.)

Another assignment of error is as follows: "The court erred in instructing the jury as appears in paragraphs 1, 2, 3, 4, 5, 6, and 7 of the instructions of the court given on its own motion. The instruction numbered 1 was a statement by the court of the subject of the trial, and number 2 was in regard to the burden of proof resting upon the complainant, and we cannot discover wherein either of them was objectionable, and this being determined, we need not further consider this assignment, as the instructions to which exceptions were taken are grouped therein.

It is also alleged: "The court erred in instructing the jury as set out in paragraphs 1 and 2 of the additional instructions of the court given on its own motion." The first of the instructions referred to was not defective, hence we need not further consider the assignment, as it comes

within the rule just stated. One allegation of the petition in error is "that the court erred in refusing to allow this plaintiff (the defendant below) to cross-examine the prosecutrix as to her having had sexual intercourse with persons other than the plaintiff in error within the 300 days limit." The record of the portion of the cross-examination during which it is claimed the error assigned occurred discloses that the counsel for plaintiff in error asked the prosecutrix if she had had sexual intercourse with any other person than the defendant Frank H. Stoppert between the 17th of October, 1891, and the 31st day of the same month, and on objection to this question being sustained, asked substantially the same question, except the dates were changed to between the 25th day of October, 1891, and the 31st, and objection being sustained to this, the dates were changed to between the 28th day of October, 1891, and the 19th day of November, and the court sustained an objection on the ground that it called for evidence of acts outside of the period of gestation, or more than 300 days prior to the birth of the child. The court made this statement in sustaining the objection: "I think that is one day too much now according to my count." Prior to this he said in regard to limiting the cross-examination: "If it goes outside the period the objection will be sustained. Under the authority here I shall not allow you to go beyond the 300 days; the supreme court decision here says at the most 300 days." The question was again changed in regard to the dates, to between the 29th of October, 1891, and the 19th day of November, 1891, and the objection to it was then overruled. Counsel for plaintiff in error excepted to each of the adverse rulings. The testimony shows that the complainant gave birth to a child August 13, 1892, and she stated that plaintiff in error had sexual connection with her five times, three times in the field where they were husking corn and twice in the house of his parents with whom she was living; that the acts of intercourse all oc-

curred during the month of November, 1891, the first being on a day of the first part of the month and the others at times during the same month, the exact date of them she was unable to fix, but did state that one was soon after the 19th. The cross-examination of the prosecutrix then as to her intercourse with other men was restricted by the court to a period shorter than that of gestation. This was evidently the result of a wrong calculation in regard to time, as the statement had just been made that the questions might be directed to times within the 300 days and were almost immediately thereafter limited to a time some thirteen days less than indicated, the court, as we have quoted, giving the date beyond which he did not allow the cross-examination upon this point to extend, and as ascertained by its calculation. The plaintiff in error had a right to cross-examine the complainant and during cross-examination to ask her if she had had intercourse with any other men at or near the time the child was begotten, and to have her answer such questions (*Walker v. State*, 6 Blackf. [Ind.], 1; *Benham v. State*, 91 Ind., 82; *Ginn v. Commonwealth*, 5 Litt. [Ky.], 300; *United States v. Collins*, 1 Cranch C. C. [U. S.], 592), and it was error to deny him such right.

One of the allegations of the petition is "that the court erred in admitting in evidence declarations of the prosecutrix made out of court." This assignment of error is not sufficiently definite and specific to entitle the plaintiff in error to have it reviewed, and the error, if any, available for a reversal of the judgment. It does not state what declarations of prosecutrix were admitted in evidence, or on what subject, nor does it refer to any portion of the record in which the testimony with reference to her declarations will be found, nor by what witness the court allowed them to be detailed. (*Wonderlick v. Walker*, 41 Neb., 806; *Cortelyou v. Maben*, 40 Neb., 512; *Minick v. Huff*, 41 Neb., 516.) Under this assignment of error counsel for plaintiff in error argue that the action of the court by which it al-

lowed Maggie Lammers and Chris Speth to give in evidence the statements made to them by prosecutrix before the birth of her child, in which she asserted that the plaintiff in error was its father, was erroneous, and we think it best to determine the question of the admissibility of such evidence. The declarations were statements made by a party to the action, in her own favor and tending to establish her case, and it is not necessary to cite authorities to the effect that, as a general rule, evidence of such statements is not admissible. In some of the states, in actions of bastardy, evidence of such declarations of the mother of the child in regard to its paternity, made at certain times designated, such as during the labor of child-birth, etc., are by statutory enactment made competent evidence, and in our state, as we have seen, the examination of the prosecutrix before the magistrate is made admissible by statutory rule; but under the general rules, and in the absence of statutory permission, evidence of statements of a party to an action in his or her own favor is not admissible in behalf of the party who made them, and are not so in bastardy cases. (*Richmond v. State*, 19 Wis., 326; *Walker v. State*, 6 Blackf. [Ind.], 1.)

There are some assignments of error which relate to the alleged misconduct of a juror in drinking some intoxicating liquor during the progress of the trial, and also alleged misconduct of counsel for prosecutrix during the trial or while making a statement of the case. If there should be another trial, these are matters which would probably not appear again or be drawn in question, and not being necessarily involved in reaching a decision in the case at the present time, we will not discuss them.

It is urged that the verdict is not sustained by sufficient evidence. As a consideration of this would necessitate more or less comment upon the evidence, and as there must be a new trial, we think it best not to enter into a discussion of the weight and sufficiency of the testimony. This

case was submitted October 24, 1893. November 12, 1894, plaintiff in error filed an amended petition in error, and on December 26, 1894, his counsel filed a brief in which it is argued that the act under the provisions of which this action was instituted is unconstitutional. It is contended that the subject-matter of the section of the act wherein it is stated: "If, on such examination, the party accused shall pay or secure to be paid to the complainant such sum or sums of money or property as she may agree to receive in full satisfaction, and shall further give bonds to the county commissioners of the county in which said complainant shall reside and their successors in office, conditioned to save such county free from all charges toward the maintenance of said child, then and in that case the justice shall discharge the party accused out of custody, or [on] his paying the costs of prosecution," (see sec. 1, ch. 37, Compiled Statutes, 1893), insomuch as it provides for a settlement by the accused person with the complainant, is not expressed in the title of the act, and renders it unconstitutional, as violative of section 11, article 3, of the constitution, which is as follows: "No bill shall contain more than one subject, and the same shall be clearly expressed in its title." In this argument we think counsel for plaintiff in error is clearly wrong. The title to the act in question reads: "An act for the maintenance and support of illegitimate children." (See Session Laws, 1875, p. 53.) The evident object of the legislation embraced in the act is to make the moral obligation of the father to assist in the support and maintenance of his child a legal one, and operative in favor and for the benefit of both the mother and the county. "A proceeding under the bastardy act, while in the nature of a civil action, is properly a police regulation requiring the putative father to furnish support for his child and to indemnify the public against liability for its support." (*Ex parte Cottrell*, 13 Neb., 193.) "To compel him to assist in the maintenance of the fruit of his immoral act,

and to indemnify the public against the burden of supporting the child, is the purpose of the proceeding in bastardy." (*In re Wheeler*, 34 Kan., 96; *Musser v. Stewart*, 21 O. St., 353.) The relief sought to be afforded by the law is twofold: to force the father to assist the mother in the support and maintenance of the child, and provide that it shall not become a county charge. It was entirely competent for the legislature to make provision for a settlement and satisfaction of this duty to the extent it affects the rights and is for the benefit of the mother. We can discover no objection to the accused and the complainant making such settlement either before or after the birth of the child, as it must be at either time a matter resting largely in calculation as to the time it will be necessary and the amount. It is but an incident to one of the main objects to be accomplished, viz., the assistance of the father in the support of his offspring, and as such is clearly and fully within the purview of the title of the act under the provisions of which the complainant commenced these proceedings.

There were no other points sufficiently raised by the allegations of the petition in error which we consider it advisable or necessary to discuss or determine now. The judgment of the district court will be reversed for the error committed in restricting the cross-examination of the prosecutrix on the subject, in the manner and to the extent hereinbefore indicated, and the case remanded.

REVERSED AND REMANDED.

GRAND ISLAND BANKING COMPANY, APPELLANT, V. JAMES A. COSTELLO ET AL., APPELLEES.

FILED MAY 21, 1895. No. 6179.

1. **Garnishment of Mortgagee of Chattels:** LEVY OF EXECUTION: ATTACHMENT. By garnishment of a mortgagee in possession of mortgaged chattels such chattels are placed in custody of the law and thenceforward are no more subject to actual seizure and appropriation to the satisfaction of another execution or writ of attachment than if they had actually been levied upon when the garnishment took place.
2. **Chattel Mortgages:** FRAUDULENT CONVEYANCES: GARNISHMENT. The validity of a mortgagee's right to chattels held in his actual possession by virtue of his mortgage may be called in question by a garnishing creditor alleging and proving fraud, as well as by an actual levy on the chattels in defiance of the claims of such mortgagee.
3. **Executions:** VALIDITY OF LEVY. The test of the validity of a levy upon personal property is whether or not the acts of the officer under his writ have been such as would make him liable as trespasser but for the protection afforded by such writ.
4. **Chattel Mortgages:** EXCESSIVE SECURITY: EVIDENCE: FRAUDULENT CONVEYANCES. The disproportion, if one exists, between the value of chattels mortgaged and the amount thereby secured affords no basis for a presumption of law. It is a matter of evidence to be accorded such weight as in the light of surrounding circumstances it is entitled to receive in the determination of a question of fact.

APPEAL from the district court of Hall county. Heard below before HARRISON, J.

The opinion contains a statement of the case.

Abbott & Caldwell, for appellant:

The decree canceling appellant's mortgage should be set aside. The only lien on the mortgaged property superior to that of appellant is the claim for city and county taxes.

The mortgage is not invalid on the ground that the security is excessive. (*Grimes v. Farrington*, 19 Neb., 44; *Smith v. Boyer*, 35 Neb., 46; *Hershiser v. Higman*, 31 Neb., 531; *Whitney v. Levon*, 34 Neb., 443; *First Nat. Bank of Denver v. Lowrey*, 36 Neb., 291; *Thompson v. Richardson Drug Co.*, 33 Neb., 714; *Nelson v. Garey*, 15 Neb., 531; *Bierbower v. Polk*, 17 Neb., 268; *Davis v. Scott*, 22 Neb., 154; *Ward v. Parlin*, 30 Neb., 376; *Puckett v. Richardson Drug Co.*, 20 S. W. Rep. [Tex.], 1127; *Elwood v. May*, 24 Neb., 373; *Rothell v. Grimes*, 22 Neb., 526; *Leffel v. Schermerhorn*, 13 Neb., 342; *Shelley v. Heater*, 17 Neb., 505; *Downs v. Kissam*, 10 How. [U. S.], 102.)

After the appellant was garnished the property was in the custody of the law and not subject to execution or attachment. (*Northfield Knife Co. v. Shapleigh*, 24 Neb., 635; *Ryan v. Parris*, 48 Kan., 765.)

The following cases were cited as to priority of liens: *Chicago Lumber Co. v. Fisher*, 18 Neb., 334; *People v. Bristol*, 35 Mich., 28.

M. B. Reese, also for appellant:

The decisions that guided the court below in finding that appellant's mortgage was void have recently been overruled. (*Jones v. Loree*, 37 Neb., 816; *Kilpatrick v. McPheely*, 37 Neb., 800; *Farwell v. Wright*, 38 Neb., 445; *Kavanaugh v. Oberfelder*, 37 Neb., 647; *Costello v. Chamberlain*, 36 Neb., 45; *Whitney v. Levon*, 34 Neb., 443; *Sherwin v. Gaghagen*, 39 Neb., 238.)

Charles G. Ryan, for Hall county and other appellees:

The lien for taxes is superior to all others. (*Binkert v. Wabash R. Co.*, 98 Ill., 205; *Ream v. Stone*, 102 Ill., 359; *Kirkwood v. Magill*, 6 Kan., 540.)

The levies that were made, subject to appellant's mortgage, with consent of the mortgagee, were valid. (*Evans v.*

Warren, 122 Mass., 303; *Wisser v. O'Brien*, 44 How. Pr. [N. Y.], 209; *Nelson v. Ferris*, 30 Mich., 497.)

Charles B. Keller, for Wood, Brown & Co.:

The security taken by the appellant is excessive and the mortgage is therefore void. (*Thompson v. Richardson Drug Co.*, 33 Neb., 714; *Brown v. Work*, 30 Neb., 800; *Russell v. Lau*, 30 Neb., 209; *Bonns v. Carter*, 20 Neb., 566; *Morse v. Steinrod*, 29 Neb., 108; *White v. Cotzhausen*, 129 U. S., 343.)

The failure to register the mortgage made it fraudulent as to creditors. (*Simon v. Openheimer*, 20 Fed. Rep., 555; *Goll v. Miller*, 54 N. W. Rep. [Ia.], 443; *Steele v. Coon*, 27 Neb., 586; *Pond v. Skidmore*, 40 Conn., 213; *Standard Paper Co. v. Guenther*, 67 Wis., 101; *Sanger v. Freie Press Co.*, 41 N. W. Rep. [Wis.], 436; *Crippen v. Jacobson*, 56 Mich., 386; *Feary v. Cummings*, 41 Mich., 383; *Dyer v. Thornstead*, 29 N. W. Rep. [Minn.], 345.)

The creditors who levied subject to the mortgage are estopped from disputing its validity. (*Simon v. Openheimer*, 20 Fed. Rep., 555; *Russell v. Dudley*, 3 Met. [Mass.], 147; *Tolbert v. Horton*, 31 Minn., 518; *Howard v. Chase*, 104 Mass., 249; *Tuite v. Stevens*, 98 Mass., 305.)

As to what is necessary to constitute a levy see *Johnson v. Walker*, 23 Neb., 744; *Knap v. Sprague*, 9 Mass., 258; *Townsend v. Corning*, 40 O. St., 335; *Haggerty v. Wilber*, 16 Johns. [N. Y.], 287; *Lowry v. Coulter*, 9 Pa. St., 349; *Logsdon v. Spivey*, 54 Ill., 104; *Dresser v. Ainsworth*, 9 Barb. [N. Y.], 619; *Newman v. Hook*, 37 Mo., 207; *Duncan's Appeal*, 37 Pa. St., 500; *Standard Oil Co. v. Bretz*, 98 Ind., 231; *Westervelt v. Pinckney*, 14 Wend. [N. Y.], 123; *Bryan v. Bridge*, 6 Tex., 141; *Allen v. McCalla*, 25 Ia., 464; *Lane v. Jackson*, 5 Mass., 163; *Learned v. Vandenburgh*, 7 How Pr. [N. Y.], 379; *Dworak v. More*, 25 Neb., 739.

As to priority of liens the following cases were cited:

Loring v. Melendy, 11 O., 355; *Neal v. Foster*, 36 Fed. Rep., 29; *Smith v. Lind*, 29 Ill., 30.

Walter J. Lamb, for W. S. Peck & Co.:

A creditor may attack the title of the garnishee to property or effects of the debtor whenever the garnishee holds the same under a transfer fraudulent as to creditors. (*Blue Valley Bank v. Bane*, 20 Neb., 294; *Cowles v. Coe*, 21 Conn., 220; *Lamb v. Stone*, 11 Pick. [Mass.], 527; *Henry v. Murphy*, 54 Ala., 246; *Eyerman v. Krieckhaus*, 7 Mo. App., 455.)

The possession of property by the mortgagee under a mortgage of chattels after default, and the right he has over the goods, are utterly inconsistent with the possession of such goods at the same time by the sheriff under execution. (*McConnell v. Denham*, 34 N. W. Rep. [Ia.], 298; *Chicago Lumber Co. v. Fisher*, 18 Neb., 334; *Townsend v. Corning*, 40 O. St., 335; *Rickards v. Cunningham*, 10 Neb., 417; *Chittenden v. Rougers*, 42 Ill., 105; *Sparks v. Compton*, 70 Ind., 393.)

All creditors who levied their attachments and executions subject to the bank mortgage recognized its validity, and until it was attacked by third parties were conclusively estopped from denying the validity of the mortgage, and so they are postponed to the levy by garnishment of W. S. Peck & Co. (*Kellogg v. Secord*, 3 N. W. Rep. [Mich.], 868; *Nelson v. Ferris*, 30 Mich., 499.)

When creditors pursue different remedies each is entitled to the precedence in law given under the remedy selected by him. (*Rockhill v. Hanna*, 15 How. [U. S.], 189.)

Fowler, Smith & Musgrave, for John V. Farwell & Co.:

The creditors who failed to attach or garnish are not in a position to assail the mortgage. After garnishment the property was *in custodia legis*. The creditors who attempted to levy execution, in violation of the rights of the mortgagee

and those who attached and garnished, acquired no lien on the property. (*Healey v. Butler*, 66 Wis., 9; *Luckland v. Garsch*, 56 Mo., 267; *Henry v. Murphy*, 54 Ala., 246; *Coble v. Nonemaker*, 78 Pa. St., 501; *Shaver Wagon & Carriage Co. v. Halsted*, 43 N. W. Rep. [Ia.], 623; *Johnson v. Hersey*, 73 Me., 291; *Morris v. House*, 32 Tex., 492; *Brainard v. Van Kuran*, 22 Ia., 261; *Sperry v. Gallaher*, 77 Ia., 107; *Strohm v. Hayes*, 70 Ill., 41; *First Nat. Bank of Stevens' Point v. Knowles*, 67 Wis., 373; *Cornish v. Russell*, 32 Neb., 297.)

Those who garnished have a valid lien. (*Northfield Knife Co. v. Shapleigh*, 24 Neb., 635.)

The equity in mortgaged chattels in possession of the mortgagee can only be reached by garnishment. (*Peckinbaugh v. Quillin*, 12 Neb., 586; *Brunham v. Doolittle*, 14 Neb., 214; *Chicago Lumber Co. v. Fisher*, 18 Neb., 338.)

W. H. Thompson, for Cushing, Olmstead & Snow and others, as to the effect of appellant's failure to file its mortgage, cited: *Hildreth v. Sands*, 2 Johns. Ch. [N. Y.], 35; *Hughes v. Cory*, 20 Ia., 399; *Blannerhassett v. Sherman*, 105 U. S., 100; *Walton v. First Nat. Bank*, 22 Pac. Rep. [Col.], 440; *Steele v. Coon*, 27 Neb., 597; *McQuade v. Rosecrans*, 36 O. S., 442; *Russell v. Winne*, 37 N. Y., 593.

W. H. Platt, for Tootle, Hosea & Co.

Hall, McCulloch & English, for Steppacher, Arnold & Co.

R. R. Horth and *J. H. Woolley*, for other appellees.

RYAN, C.

This action was brought on February 11, 1891, in the district court of Hall county by the Grand Island Banking Company against James A. Costello, sheriff of said county, and the firms of Wood, Brown & Co. and Steppacher, Arnold & Co., to restrain the levy of an execution issued

on a judgment rendered in favor of each of the firms named against Charles A. Wiebe. The property consisting of a stock of dry goods, carpets, clothing, etc., was in the possession of the Grand Island Banking Company by its agent, J. W. Thompson, under a chattel mortgage previously made by Wiebe, the owner thereof, to said banking company. Prior to the attempted levies many suits had been begun against Wiebe, aided by attachments, under which the banking company had been garnished. There also had been commenced proceedings in aid of execution against Wiebe. By consent of the banking company there were alleged levies of executions in favor of various judgment creditors of Wiebe, made subject to the above chattel mortgage by J. W. Thompson aforesaid, claiming in making such levies to be acting in the capacity of deputy sheriff. The statements of appellant as to the number, description, and amounts of the processes which issued against Wiebe are not questioned, and therefore these descriptions will be accepted as correct for the purposes of this general statement, rather than to resort to an actual count, comparison, and computation for the purposes of accurate verification. The mortgage was made on February 4, possession thereunder was taken the next day, and before another day the mortgagee was garnished on claims to the amount of $2,412.61, followed the next day by garnishments to the amount of $4,063.38. There issued from the county court sixty-six executions for the collection of different sums, amounting in the aggregate to $23,312.60. From the district court two attachments and garnishments issued for $10,673.44. There issued from the county court three attachments and garnishments amounting to $517.66, and four garnishments in aid of executions to the amount of $3,863.55. The firm of Wood, Brown & Co. and the firm of Steppacher, Arnold & Co. on the 10th of February, 1891, notwithstanding existing garnishments of the mortgagee and the claims of existing levies expressly

subject to the mortgage, required an actual levy by seizure of certain mortgaged property to be made by the sheriff, which brought on this litigation. Subsequently every other creditor of Wiebe seems to have been made a party defendant, and thenceforward there were united efforts, under pleadings in the nature of cross-petitions, to set aside the mortgage above referred to, and, severally, each claimant sought to appropriate as large a proportion of the mortgaged property as possible. We are relieved of the necessity of passing upon the right to resort to these proceedings by a stipulation during the trial of the case in this language: "It is agreed between the parties to this suit that the entire controversy touching the property of Charles A. Wiebe, and the right of the parties thereto in this suit, shall be finally determined by the court in this action." (*Vide Sherwin v. Gaghagen*, 39 Neb., 238.) While this cause was pending in the district court the merchandise mortgaged was sold on foreclosure proceedings for $23,700. There was on final hearing a decree which postponed the mortgage of the banking company to all claims except those of Wood, Brown & Co. and Steppacher, Arnold & Co. The garnishments were held entitled to priority over the several levies attempted upon the property described in the mortgage, and superior to the rights of all creditors was declared the right to collect the taxes due from Wiebe; and the banking company was required to distribute the proceeds of the foreclosure sale as above indicated.

1. On behalf of Wood, Brown & Co. and Steppacher, Arnold & Co., counsel for these two firms in argument say that on February 6, 1891, the stock mortgaged was in possession of the mortgagee; that the only attempts of the sheriff to levy had been, in terms, subject to the interest of the Grand Island Banking Company under its mortgage; that no actual seizure of any portion of the property was in fact made under any writ, the levy in each instance being simply indorsed as made in the manner above indi-

cated. The nature of the levies in favor of the two firms just indicated first became known to their attorneys on February 6, whereupon these attorneys, as they now state, recognizing that these levies were ineffectual and inadequate, being mere pen and ink levies, and an attempt to levy a writ upon a mere equity, upon demand indemnified the sheriff and demanded that he take manual possession of a sufficient amount of Wiebe's goods to satisfy the two aforesaid claims. This the sheriff was proceeding to do on February 10, when this suit was commenced to enjoin the making of such seizure and levy, as well as the removal of the property or interference with the possession or control of the bank over the same. As there had previously been several garnishments of the Grand Island Banking Company there are presented by the contentions of Wood, Brown & Co. and Steppacher, Arnold & Co. two questions, one of which is, the effect of the alleged levies previously made; the other, what rights had been acquired by garnishments of the banking company. It was held by the district court that illegality of the mortgage could be attacked by garnishing creditors of Wiebe by alleging and proving fraud, whether the writs of garnishment were issued on attachments or after judgment, and that a like attack might be instituted by a levy on the goods of an execution or attachment, if made regardless of the mortgage. It is important that there should be kept in remembrance the fact that the mortgagee was, at the time of all the occurrences now under consideration, in the actual, undisputed possession of the property sought to be affected. There were alleged levies thereon which consisted merely in minuting that such levies were made in each instance subject to the mortgage of the Grand Island Banking Company. One of the important rights of the banking company was the right to maintain undisturbed the possession which it then held. For making such an alleged levy the banking company could not maintain an action of any kind whatever

against the sheriff. The test of the validity of a levy upon personal property is whether or not the acts of the officer under his writ have been such as would make him liable as a trespasser but for the protection afforded by the writ. (*Westervelt v. Pinkney*, 14 Wend. [N. Y.], 123; *Bryan v. Bridge*, 6 Tex., 141; *Allen v. McCalla*, 25 Ia., 464.) It sometimes happens that while, in fact, a levy is invalid, an officer by his return may be estopped to deny its validity; but even this is not true in this instance. As against the alleged levies expressly subject to the mortgage of the Grand Island Banking Company in possession an actual levy of the writs in favor of Wood, Brown & Co. and Steppacher, Arnold & Co. would have created the better lien upon the property mortgaged. The alleged levies subject to the mortgage of the Grand Island Banking Company formed no basis for a contest with that company, for the return, which alone justified the attaching creditor's interference with the property, prohibited such interference as against rights conferred by the mortgage.

In this case the question of the most practical importance to Wood, Brown & Co. and Steppacher, Arnold & Co. is whether or not the existing garnishments of the Grand Island Banking Company conferred rights over which the levy of an attachment on behalf of either of said two firms could not prevail. In *Faulkner v. Meyers*, 6 Neb., 414, LAKE, C. J., said: "There were several instructions, requested by the plaintiffs in error, refused. These related to the right of an ordinary creditor by attachment to subject the interest of a mortgagor of goods and chattels in the hands of the mortgagee to the payment of his debt. As abstract propositions of law these instructions were in the main correct, but having no application to the case on trial were very properly refused. There is no doubt, however, that the equity of redemption in property so circumstanced may be reached by attachment. The plain orderly course to pursue in such case is by garnishment, whereby whatever

may remain of the mortgaged goods beyond that which shall be found necessary to satisfy the mortgage debt and interest and the costs of sale can be ordered paid over to the attachment creditor." In *Peckinbaugh v. Quillin*, 12 Neb., 586, LAKE, C. J., said: "The claim of the plaintiffs in error that the mortgagor had an interest in the mortgaged property subject to sale on execution, and, therefore attachable, cannot be sustained." In *Burnham v. Doolittle*, 14 Neb., 214, the holding in *Peckingbaugh v. Quillin* was qualified to the extent that it was held that the interest which a mortgagor of chattels might have in them might be reached by seizure under a writ of attachment at any time while in his possession, and by means of the process of garnishment if they had passed into the hands of the mortgagee. In *Chicago Lumber Co. v. Fisher*, 18 Neb., 334, REESE, J., said of the language used by LAKE, C. J., in the case of *Burnham v. Doolittle, supra:* "If by this language the learned judge intended to say that, under all circumstances, where property is in the possession of the mortgagor an execution or order of attachment may be levied upon the property itself and the property sold, the mortgagee being thus, in many instances, wholly deprived of his security, we cannot agree with him. But if he intended to say that the interest—*i. e.*, the equity of redemption—might be seized upon as an interest, then we should not differ, perhaps." In the cases thus far reviewed there was considered only the proper method of procedure where there existed no intention to question the validity of the mortgage under which the garnishee was in possession. In *Reed v. Fletcher*, 24 Neb., 435, COBB, J., used this language: "Drake, in his valuable work on Attachments at section 251, sixth edition, says: 'So it has been held that garnishment has the effect to place the property in the garnishee's hands in the custody of the law, and that an officer has no right after the garnishment to take the property from the garnishee.' To this he cites three cases. The two first fully sustain the text; the third,

being out of the library, has not been examined." The volume referred to as being out of the library has been returned, and an examination of the third case cited by Drake is found to be equally in point with the other two. In *Northfield Knife Co. v. Shapleigh*, 24 Neb., 635, the case of *Reed v. Fletcher, supra*, was cited with approval, and it was furthermore held, if necessary to render effectual the garnishment, that a receiver would be appointed. It may now be accepted as being without question the law of this state, that, by garnishment of a mortgagee in possession of chattels mortgaged, such chattels are placed *in custodia legis*, and that thenceforward the possession of the garnishee cannot be interfered with by a direct levy of an execution or writ of attachment upon the property in the hands of the garnishee so as to postpone the rights of the party in whose favor the garnishment had been made. As between the attachment and execution creditors who secured garnishments on the one hand, and the firms of Wood, Brown & Co. and Steppacher, Arnold & Co. and such creditors of Wiebe as procured levies subject to the interest of the Grand Island Banking Company on the other hand, the decree of the district court must stand.

2. The attachment and execution plaintiffs in whose suits against Wiebe the Grand Island Banking Company had been garnished, by their pleadings attacked the mortgage under which the agent of the Grand Island Banking Company held possession, as fraudulent in respect to creditors of the mortgagor. On the 15th day of January, 1891, Mr. Wiebe, already owing the Grand Island Banking Company about $12,000, borrowed of it $3,000 more. In the forenoon of February 4, following the above date, Mr. Wiebe called on the cashier of the banking company and urgently requested an additional loan of $5,000. In this interview it was developed that Mr. Wiebe's assets were of the value of $15,000 less than his estimate of January 15 preceding, while his liabilities were in the neighborhood of

$15,000 in excess of that estimate. The only outcome of this conference with the cashier was that Mr. Wiebe was requested to meet the officers of the banking company at its office at 7 o'clock in the evening of the same day, when Mr. Abbott, its vice president and attorney, then out of the city, would be present. The proposed meeting took place at the time and place designated, the representatives of the banking company thereat being George B. Bell, cashier, and George A. Packer, O. A. Abbott, J. W. Thompson, and W. B. Carey, directors. The president, Mr. Peterson, was a non-resident of this state and was absent. Mr. Wiebe was accompanied by W. B. Coggeshall, who, in his testimony, described himself as then being practical manager under Mr. Wiebe. It is impossible to state what transpired at this conference in the order of its occurrence, though we might adopt the narrative of some particular witness. The events will therefore be described without special reference to their order of sequence. At first, the request for an additional loan was presented to the officers of the banking company and refused. Mr. Coggeshall, then addressing Mr. Abbott, inquired if Mr. Wiebe could not sell the stock to him (Mr. Coggeshall), taking notes therefor, which Mr. Wiebe might indorse and turn out to his creditors and in that way get an extension, dispose of his store, and pay a hundred cents on the dollar. Mr. Abbott answered: "No, sir; that cannot be done." Mr. Abbott was then asked if a bill of sale could be made to the banking company—turning over everything to said company and allowing Mr. Wiebe to go ahead and close out his own property and pay a hundred cents on the dollar. To this Mr. Abbott answered as before, and, in further conversation, said that whatever the nature of the security might be, it must tell the truth on its face, so that any one who should see it would know the exact relations of the parties to it. The only proposition acceptable to the bank was formulated by Mr. Abbott, and that was that a chattel

mortgage should be made to the banking company upon the goods and fixtures, likewise that a mortgage should be made upon certain real property. To the question, "What would be done under the chattel mortgage if given?" the answer was, "Take possession at once and proceed to sell strictly according to law." Both Wiebe and Coggeshall objected to this course of procedure, because thereby, they said, not more than fifty per cent of the value of the goods would be realized. Previous to this conversation Mr. Coggeshall had stated that the stock footed up $65,000, and that Mr. Wiebe owed about $53,000, exclusive of one real estate mortgage of $8,000 and another real estate mortgage of $3,600. When the chattel mortgage was demanded with the explanation as to what would be done with it, both Mr. Wiebe and Mr. Coggeshall asserted that the stock would not, at forced sale, bring more than from $15,000 to $18,000. At some time while Mr. Wiebe was considering the only terms which Mr. Abbott would offer, Mr. Packer, one of the directors of the banking company, in the language of Mr. Coggeshall, "told how they treated a creditor of theirs in Troy. He said a fellow failed and they took possession of what he had, and that in ten days they had a compromise, and they had the fellow on his feet again." The language attributed to Mr. Packer by Mr. Coggeshall is quoted from the testimony, for, otherwise, its indefiniteness could not be fully realized. For a like reason the language of Mr. Coggeshall, which, it is argued, disclosed a fraudulent purpose on the part of the officers of the banking company in taking security, is reproduced from the bill of exceptions. Mr. Abbott was cross-examining, when the following interrogatories were propounded and answered:

Q. Now, then, what was said and who said it in reference to Mr. Wiebe's creditors—protecting Mr. Wiebe from his creditors?

A. Well, you know what you said.

Q. I want to know what was said. State what I said; that is what I want. If I said anything just state what it was.

A. Well, I have been stating it here.

Q. What was said about—you said that something was said in your direct examination in regard to helping Wiebe to a settlement with his creditors. Now, I want to know what was said and who said it; what the language was.

A. The plan was suggested by you.

Q. What was the plan that I suggested? What was my language?

A. The plan?

Q. Yes, sir.

A. That he should give a mortgage on everything that he had.

Q. For what purpose?

A. For what purpose?

Q. Yes, sir.

A. Well, to protect the bank first.

Q. Yes, sir, and what else?

A. Then to do what the other fellow—the other fellow could talk to him, not him to the other fellow.

Q. You say that I used that language?

A. I say that was the original plan of that deal.

Q. What I want to know now is what was said and who said it.

A. Who said it?

Q. Yes, and just what each man said.

A. The perfecting of that plan was by you.

Q. Well, just state what was said.

A. Well, I have stated it now as plain as it can be stated.

Q. Do you say that I said that—to protect the bank first and then to compel the creditors to come to Wiebe and not Wiebe to come to them?

A. In the general conversation I will make an affidavit—

Q. Never mind, you are on oath now. I simply asked

you a plain question whether I said those words or whether I did not?

A. Well, I will be responsible for what I say; that that meeting at the bank was for the purpose of seeing what could be done for Mr. Wiebe, and seeing if some arrangement could be provided whereby he could get an extension on his liabilities or perfect some plan whereby he could force a compromise. Now that is as plain as I can make it.

Q. Who suggested it? Where did you first hear it?

A. Where did I first hear it?

Q. Yes, sir.

A. Mr. Wiebe and I through the day consulted with the bank. Not only in the morning but in the afternoon. We consulted each other as regarded the condition of things and went there to the bank that night with the idea and with the intention of fixing some plan—I will reiterate what I have just said, whereby he could get an extension or make a compromise with his creditors.

Mr. Wiebe at the meeting of February 4 finally consented to execute to the bank the chattel mortgage and the real estate mortgage as demanded. There were then produced the existing evidences of indebtedness of Mr. Wiebe, together with an unrecorded real estate mortgage by him given to the banking company about two years before to secure such advances as should be made to him. Mr. Wiebe asked that this real estate mortgage might not be recorded, but that another should be taken in its stead because of certain reasons that he had for desiring this course to be taken. It appears that these reasons were that Mr. Wiebe had obtained credits on the faith of certain statements which ignored the existence of this mortgage rendered possible by the failure to record it. The notes of Wiebe in the bank on February 4 were three in number, one for $10,000, dated January 30, 1891, due March 1, 1891; one for $3,000, dated January 20, 1891, due March 1, 1891; and one for $1,170, dated January 30, 1891, due

March 1, 1891. There was taken from Mr. Wiebe a note for $15,792, of date February 4, 1891, payable to the banking company on demand, with ten per cent per annum interest from date, and the three above described notes were thereupon surrendered to him. Mr. Wiebe gave a chattel mortgage on his stock to secure this note, and he and his wife likewise made a real estate mortgage for the same purpose, and Wiebe then received the old unrecorded mortgage. When all this had been done Mr. Packer remarked that it was as clean a transaction as he ever saw in his whole life. After the mortgage had been given Mr. Wiebe started to leave the room, but immediately came back and said that he had two or three checks out, amounting to about $100; that he owed his clerks some money and had no ready money with which to pay them, and asked that the banking company should pay the outstanding checks and honor those he would give to his clerks. The total amount necessary for these purposes he fixed at $350, and he offered that when these payments were made to give his note for the amount, in respect to which certain notes amounting to the sum of $5,700, held by the bank for collection, should be held as collateral. This proposition was assented to and afterwards the banking company paid out about $456, instead of $350, the amount in advance estimated as being necessary for the purposes indicated. The excess in collaterals over the above amount paid out was not claimed by the bank, but was held subject to such disposition as should be made of them by the district court. On the morning following the above meeting, possession was taken of mortgaged chattels by the banking company, which, until the foreclosure sale, maintained such possession, through its agent, J. W. Thompson, except as said possession was interfered with by the attempted hostile levies of Wood, Brown & Co. and Steppacher, Arnold & Co., hereinbefore mentioned. There was evidence introduced tending to show that very soon after February 4,

1891, probably the next day, Mr. Wiebe confessed judgment in the county court of Hall county in favor of the firm of Abbott & Caldwell for the sum of $500, for services as attorneys at law to be rendered by that firm in the future in his behalf; that Mr. Abbott, of the above firm, who was the attorney who, on the night of February 4, had acted for the banking company as its vice president and counsel, advised Mr. Wiebe what course he should pursue with regard to certain debts he owed; that Mr. Wiebe afterwards had desk room in the office of Abbott & Caldwell; that Mr. Caldwell, Mr. Abbott's partner, advised Mr. Wiebe's collector to take but one or two accounts with him at one time, for fear he should be garnished on claims against Wiebe on some one of his collecting trips and otherwise counseled said collector; that immediately after the stock of Wiebe was taken into the possession of the banking company, Wiebe's creditors were clamorous for confessions of judgment, and that in respect to authorizing such judgments Mr. Abbott was Mr. Wiebe's legal adviser. One witness testified that while so acting Mr. Abbott, as Mr. Wiebe told witness, advised Mr. Wiebe not to confess judgment in favor of any outside creditor. This Mr. Abbott in his testimony denied having done. There was evidence of grave misconduct on the part of Mr. Wiebe, such as secreting his books, taking notes of customers dated anterior to February 4, 1891, etc. These acts, however, are not shown to have been known to, or countenanced by, any one connected with the banking company and hence, in any view, are immaterial as respects that company.

The evidence, aside from the disproportion alleged between the value of the goods and property mortgaged and the debt secured thereby, by which it is claimed that the existence of a fraudulent intent on the part of the mortgagee was established, has been fully set out, even to tediousness, that it may appear how unsatisfactory was this

part of this proof. There was due the banking company the full amount for which security was taken. There was no secret trust. As soon as practicable after the execution of the chattel mortgage possession thereunder was taken and thenceforward retained. The evidence of Mr. Coggeshall, while it intimated that there existed a secret purpose in making the mortgage, aside from securing the amount due from Mr. Wiebe, disclosed no fact or utterance showing that any of the officers of the banking company was aware of such purpose. It is probable that Mr. Wiebe and Mr. Coggeshall, after the fruitless application to the cashier for a further advance of $5,000, in view of the conference which was appointed to be had in the evening, considered various plans which might be advantageous to Mr. Wiebe. This practically was what Mr. Coggeshall's testimony amounted to, and this theory is rendered probable by the promptness with which there was advanced at the meeting, first, a proposition that Wiebe should take Coggeshall's notes on long time for his stock, with the approval of the bank, followed, when rejected, by another proposition, which was that the banking company itself should purchase. Since each of these was declined, the banking company, so far as the evidence shows, was free from any participation in the plans or purposes of Mr. Wiebe and Mr. Coggeshall. Mr. Coggeshall's version of what was said by Mr. Packer, as has been already intimated, was not very clear. Mr. Coggeshall's exact language was:

The principal thing he said was—he told how they treated a creditor of theirs back in Troy.

Q. What did he say?

A. He said a fellow failed and they took possession of what he had, and that in ten days they had a compromise and they had the fellow on his feet again. That was the sum and substance of it.

Passing over the very evident misuse of the word "cred-

itor" for "debtor" Mr. Packer simply stated, in effect, that a man failed owing Mr. Packer and someone else, who took possession of what he had, and in ten days they had a compromise and the fellow on his feet again. In the first place this language does not seem specially to have been directed to Mr. Wiebe, and, if it was intended as an inducement to Wiebe, it was at variance with the straightforward, uncompromising terms proposed and exacted by Mr. Abbott, who, as all the witnesses concede, had charge of, and directed the transaction of, this business for the banking company. Mr. Wiebe was not sworn, and it was therefore not shown that he heard this statement of Mr. Packer. Of all the witnesses who testified as to the occurrences at this meeting, and there were six of them, Mr. Coggeshall was the only one who mentioned this language. It would therefore seem that it must not of necessity be conjectured that Mr. Wiebe heard it, since, apparently, it was addressed to no one in particular. The other remark of Mr. Packer, that that was as clean a transaction as he ever saw in his whole life, if accepted literally, was proof of the absence of fraud rather than its existence. The assumption that it was spoken ironically could be entertained only upon the hypothesis that the transaction was so obviously corrupt that therefrom the irony would be apparent. Whether or not corruption existed is the very question to be determined, hence this language does not aid our investigation. The existence of an unrecorded mortgage to secure advances to be made to Mr. Wiebe for two years previous to the date whereon the new mortgage was executed was an unusual circumstance. The failure to record an instrument of this kind impairs its operation to the extent prescribed in section 16, chapter 73, Compiled Statutes, which is in the following language:

"Sec. 16. All deeds, mortgages, and other instruments of writing which are required to be recorded, shall take effect and be in force from and after the time of delivering

the same to the register of deeds for record, and not before, as to all creditors and subsequent purchasers in good faith without notice; and all such deeds, mortgages, and other instruments shall be adjudged void as to all such creditors and subsequent purchasers without notice, whose deeds, mortgages, and other instruments shall be first recorded; *Provided*, That such deeds, mortgages, or instruments shall be valid between the parties."

The record of an instrument of the character above indicated is to impart notice of its existence. It might be that the withholding from record of a mortgage of real property would be so obviously part of a plan to deceive that greater force should be imputed to it than prescribed by the section just quoted. No such condition is, however, found in this case. It is true Mr. Wiebe's misrepresentations as to the unincumbered condition of his property were to some extent rendered plausible by the absence from the record of his mortgage. But this action was in no way founded upon such mortgage. The banking company was not aware, so far as the evidence shows, that Mr. Wiebe was making statements which ignored the existence of its mortgage. If it had been and nevertheless had taken no steps to correct the misinformation given by Mr. Wiebe in his efforts to establish his right to credit, the banking company might have been estopped, as against parties so deceived, from asserting its mortgage. But this would have been on the theory that the banking company was, in effect, a participant in the deception practiced. No case has come within our knowledge which holds that the mere failure to file a mortgage for record raises a presumption that such mortgage is void, and nothing short of this would sustain the contention of the appellees. It is quite possible that each member of the firm of Abbott & Caldwell may have manifested too much interest in the affairs of Mr. Wiebe after his store had been closed. In none of these transactions, however, did either of these gentlemen assume to

act for the banking company. They, as attorneys at law, accepted of business tendered by Mr. Wiebe, and, that they might be paid therefor, obtained his confession of judgment for prospective fees. They also acted for some of his creditors in obtaining judgment against him by confession, and thereon procured to be made certain so-called levies of executions subject to the mortgage of the banking company. Whatever of impropriety there may have been in any of these proceedings was chargeable individually to Messrs. Abbott & Caldwell, as attorneys at law, and was in no way imputable to the banking company, which was a corporation exclusively engaged in the business of banking.

From the unsubstantial character of the above evidence it is quite apparent that the finding that the chattel mortgage was invalid was based upon other facts than those above discussed. At the time of the entry of the decree in the district court (November 15, 1892) there had, within a comparatively recent time, been delivered by this court certain opinions which were generally understood to have established the doctrine that the mere fact that the value of the property mortgaged was in excess of the amount secured, with probable depreciations in value and such costs and outlays as must necessarily be expended in making collection from the security pledged, *ipso facto*, invalidated the mortgage. Doubtless this understanding of the doctrine established by this court was largely responsible for the finding adverse to the validity of Wiebe's chattel mortgage to the banking company. Mr. Coggeshall, a witness for the defendants, estimated the actual value of Mr. Wiebe's stock on February 4, 1891, at $37,000. The invoice of date February 1, 1891, showed its value was $43,000. Mr. Coggeshall's testimony was that it sold to the very best advantage as it was sold, and that $23,700, the amount actually paid on foreclosure sale, was all that at such sale it could reasonably be expected to bring.

There was evidence that the value of the real property mortgaged contemporaneously with the chattels was $8,000, so that, if this sum is added to the price for which the goods sold ($23,700) the real and personal property actually mortgaged was of a value about double the amount thereby secured. Under these conditions the opinions in the cases of *Bonns v. Carter*, 22 Neb., 517, filed in the July term, 1887, *Morse v. Steinrod*, 29 Neb., 108, filed March 11, 1890, *Brown v. Work*, 30 Neb., 800, filed November 25, 1890, and *Thompson v. Richardson Drug Co.*, 33 Neb., 714, filed January 5, 1892, without doubt greatly conduced to the defeat of the banking company's mortgage in the district court. Of the above cases, *Bonns v. Carter* was expressly overruled in *Jones v. Loree*, 37 Neb., 816, filed October 4, 1893. The right of a debtor in good faith to prefer certain *bona fide* creditors to the exclusion of others, unless perhaps with the above exceptions, has been uniformly recognized by this court. (*Lininger v. Raymond*, 12 Neb., 19; *Grimes v. Farrington*, 19 Neb., 48; *Nelson v. Garey*, 15 Neb., 531; *Bierbower v. Polk*, 17 Neb., 268; *Costello v. Chamberlain*, 36 Neb., 45; *Kilpatrick-Koch Dry Goods Co. v. McPheely*, 37 Neb., 800; *Jones v. Loree*, 37 Neb., 816; *Farwell v. Wright*, 38 Neb., 445; *Kavanaugh v. Oberfelder*, 37 Neb., 649; *Sherwin v. Gaghagen*, 39 Neb., 238; *Hewitt v. Commercial Nat. Bank*, 40 Neb., 820.)

In the case of *Kilpatrick-Koch Dry Goods Co. v. McPheely, supra*, the following language was used: "We are not prepared to say that a mortgage would be fraudulent solely because the value of the property mortgaged was two or even three times greater than the debt. Whether it would be, would be a question of fact for a jury or trial court, and not a question of law. A debtor has a right to prefer his creditors; to pay part in full to the exclusion of others, and he has a right to secure the debts of a part of his creditors to the exclusion of the others; and this is true whether he be insolvent, or in failing circum-

stances, or not. All that the law requires of him is that he should act honestly; that his disposition of his property should not be made for the fraudulent purpose of hindering, delaying, or defrauding his creditors; and whether an act of a debtor in the disposition of his property was fraudulent, is always a question of fact and not a question of law. Section 20, chapter 32, Compiled Statutes, provides: 'The question of a fraudulent intent * * * shall be deemed a question of fact and not of law.'"

In an opinion prepared by IRVINE, C., in the case of *Kilpatrick-Koch Dry Goods Co. v. Bremers*, 44 Neb., 863, filed at this term, another phase of this question was under consideration, and the history of the decisions of this court in connection therewith were fully considered, closing with the following language: "If we should hold that the taking or giving of inadequate security constituted the transaction fraudulent, we would practically hold that a debtor could never safely secure his creditor. The argument has always been the other way, and it has often been said that the giving and taking of security in value greatly in excess of the debt is evidence tending to prove fraud. It would not do to say that because a debtor cannot give adequate security he must refrain from giving any, or leave the transaction open to attack as constituting a fraud in law."

As was pointed out in *Kilpatrick-Koch Dry Goods Co. v. McPheely, supra*, the statute of this state therein referred to provides that the question of fraudulent intent shall be deemed a question of fact and not of law. This statutory provision directly negatives the proposition that from the taking of security in excess of the amount to be secured the law implies a fraudulent intent. As pointed out by Commissioner IRVINE, the disproportion, if one exists, is but a matter of evidence, to be given such consideration as in the light of surrounding circumstances it may be entitled to receive in determining a question of fact. We cannot believe that with this proposition considered as above indi-

cated there was sufficient evidence to sustain the finding that the chattel mortgage made by Mr. Wiebe to the Grand Island Banking Company was fraudulent or invalid. It follows as a consequence of this view that the costs and expenses of foreclosing plaintiff's chattel mortgage should be allowed, since they were provided for by the terms of the mortgage. There was evidence that this amount was $883.85, but in the supplemental petition the amount was fixed at but $866.35, which must control. We conclude, therefore, that, inferior only to the claim established for taxes, the Grand Island Banking Company is entitled to receive payment of the amount secured by its chattel mortgage at the date of the foreclosure sale, and the sum of $866.35, expenses incidental to such foreclosure, and that after such payments have been deducted the remaining funds derived from said foreclosure sale, and the collateral notes and the collections therefrom made by said banking company, should be applied upon the claims of other creditors of Charles A. Wiebe in the same order of priority, between themselves, as was decreed in the district court, and that the Grand Island Banking Company should recover its costs. That a decree may be entered in this case conformably to the views above expressed the judgment of the district court is reversed.

REVERSED AND REMANDED.

HARRISON, J., not sitting.

CITIZENS NATIONAL BANK OF GRAND ISLAND v. E. A. WEDGWOOD.

FILED MAY 21, 1895. No. 6151.

1. **Replevin:** FINDINGS: VALUE OF PROPERTY. Where, by a special finding on sufficient evidence, there was fixed the value of replevied property upon which the mortgage of the plaintiff was operative, a judgment rendered on a general verdict limited to the same amount will not be disturbed.
2. **Trial:** SPECIAL FINDINGS: REVIEW. A special finding will not be assumed to be in conflict with the general verdict of a jury, unless clearly so made to appear.
3. ———: ———: ———. A special finding, though clearly unsustained by the evidence, must be disregarded when the fact established by it is clearly irrelevant to the issues on trial.

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

Abbott & Caldwell, for plaintiff in error.

W. H. Thompson and *W. H. Platt, contra.*

RYAN, C.

This case was begun in the district court of Hall county by the Citizens National Bank for the recovery of possession of a stock of drugs, etc., claimed by virtue of a chattle mortgage executed by one Zimmer, the owner thereof, to C. Ipsen, by whom the notes and said mortgage were transferred to said bank. There was on the first trial a verdict in favor of the bank, whereby its special interest as mortgagee was fixed at $1,137.25, and from a judgment upon said verdict error proceedings were prosecuted to this court. There was, thereupon, a reversal of the judgment of the district court, and it was held that a mortgage on goods created a specific lien upon the property mort-

gaged and none other. Another trial in the district court resulted in a special findings by the jury that the value of the goods replevied was $1,526.10, and that the plaintiff was entitled to the possession of $750. The difference between $1,526.10 and $750 was found in favor of the defendant in error, the sheriff of Hall county, whose interest therein was founded upon the levy of certain writs of attachment against one Heimberger, who had, since the making of the mortgage, become owner of the property in controversy.

The description in the mortgage was of an entire stock of drugs, etc., described as being in a drug store known as the Ipsen drug store. There was no provision evincing an intention to subject to the lien of the mortgage any goods or other article afterwards placed in the said stock, hence such accretions were not subject to said mortgage and this was what, in fact, was decided upon the former hearing in this court. To fix definite data upon which to establish the rights of the respective parties, the district court submitted to the jury special interrogatories, which were so answered as to enable this to be done. It is complained by the plaintiff in error, however, that certain of these interrogatories were answered in such a way as to afford no proper basis for the general verdict, besides being contradictory of each other. There were special findings to the effect that the stock replevied was in part the stock mortgaged, and that the interest of plaintiff in the stock was $750. It is insisted that this last special finding was irreconcilable with still another, that the replevied stock comprised plush goods, etc., of the value of $200 purchased after the execution of the bill of sale from Zimmer to Heimberger. The mortgage under which the Citizens National Bank claimed its rights was dated July 28, 1884, and was made by Mr. Zimmer, who executed the above mentioned bill of sale to Heimberger October 4, 1886. The interrogatory as to the plush goods purchased referred

to such time as had elapsed after the last mentioned date, and, therefore, of necessity excluded the interim between July 28, 1884, and October 4, 1886, a period of over two years. It is therefore very clear that by this special finding as to the purchase of plush goods, etc., there was nothing settled as to the amount in value of goods purchased by Zimmer before he sold out to Heimberger, consequently the exclusion from the operation of the mortgage of goods in excess of $750 in value was not of necessity in conflict with the finding of purchases to the amount of $200 in value. The special finding, therefore, that plaintiff's interest was but $750, was contradictory of no other finding. It was in harmony with the general verdict and was not without the support of sufficient evidence to sustain it. It is quite clear that the face of the notes secured by mortgage held by plaintiff was $950, irrespective of interest which had accumulated, consequently the special finding that there was due on said notes only $750 was unsupported by the evidence. We do not, however, regard this as at all material, for this action was not for the recovery of a judgment against the maker for the amount of these notes. It was one for the possession of mortgaged property which plaintiff claimed as against the rights of parties on whose behalf levies of attachments had been made. As has already been pointed out, these rights were settled by the special findings of the jury, the mistake in respect to the amount due plaintiff from one not a party to the suit was therefore immaterial to the merits of the controversy. The judgment of the district court is

AFFIRMED.

HARRISON, J., not sitting.

SUSAN L. THOMPSON, APPELLEE, V. FREEMAN A. FIELD ET AL., APPELLANTS.

FILED MAY 21, 1895. No. 6529.

Review. Findings of fact made by the district court upon conflicting evidence, on appeal will not be disturbed.

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

Dryden & Main, for appellants.

Gaslin, Newman & Hallowell, contra.

RYAN, C.

This action was brought for the foreclosure of a mortgage securing payment of a note for $6,000, of date August 15, 1889, made by appellants to Charles O. Norton, by whom said note and mortgage were assigned to plaintiff. Two years before the date above given, Mr. Norton had loaned to a Mr. Wood the sum of $3,000, at ten per cent interest per annum, for five years, secured by a mortgage upon the same property as described in the mortgage whereof a foreclosure was had herein. Subsequently, Mr. Wood sold the mortgaged property to Mr. Field, who, about August 15, 1889, had so improved it that it was deemed ample security for a larger loan. Mr. Field, being unable to borrow elsewhere the desired sum upon the property, applied to Mr. Norton, who at first refused, but afterwards consented to make a loan of $6,000, taking the already mortgaged property as security. He would not, however, forego the advantage of a first-class loan having three years to run at ten per cent interest per annum without compensation, and between himself and Mr. Field it was arranged that in addition to payment of $3,000 there

should be paid Norton $300 in consideration of his satisfaction of the existing mortgage. This was the explanation of the payment of $300 made by both Mr. and Mrs. Norton, each of whom testified as from actual knowledge of the transaction. Mr. Field on the other hand testified that the sum of $300 above referred to was exacted from him as advance interest on the $6,000 borrowed, and if this was true, his defense of usury was without doubt established. The district court, however, found as a fact that there was no usury in the transaction, and it can hardly be contended that there was no evidence upon which this finding could be based. Under such circumstances the judgment of the district court cannot be disturbed. There was a contention that the transfer from Mr. Norton to plaintiff was such as would protect her, even though there existed a defense against the note in the hands of the original payee. We have not found it necessary to the determination of this case to consider this question, for, as has already been seen, there was no such defense established by the proofs. The judgment of the district court is

AFFIRMED.

BEATRICE RAPID TRANSIT & POWER COMPANY ET AL. V. GERMAN NATIONAL BANK OF BEATRICE.

FILED MAY 21, 1895. No. 6227.

Verification of Pleading: CORPORATIONS. The fifth subdivision of section 120 of the Code of Civil Procedure authorizes the verification of pleadings for a corporation by its attorney at law as such, irrespective of the consideration that a summons might or might not legally be served upon such attorney.

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

J. E. Cobbey, for plaintiff in error, cited: *Hershiser v. Delone*, 24 Neb., 382; *Speer v. Craig*, 16 Col., 478; *Tulloch v. Belleville Pump & Skein Works*, 31 Pac. Rep., [Col.] 229.

George A. Murphy, contra, cited: *Pottinger v. Garrison*, 3 Neb., 223; *Harral v. Gray*, 10 Neb., 188; *Dorrington v. Minnick*, 15 Neb., 400; *Buck v. Reed*, 27 Neb., 67.

RYAN, C.

The defendant in error obtained judgment in the district court of Gage county upon two causes of action stated in its petition, which was verified in the following language: "George A. Murphy, being first duly sworn, on oath deposes and says that he is the attorney for the plaintiff, which is a corporation; that he has read the foregoing petition and knows the contents thereof, and that the facts therein contained are true as he verily believes." The district court overruled a motion to strike from the files the said petition for the reason assigned that it was not verified as required by law, and to compel plaintiff to verify its petition as by law required. No ground for the reversal of the judgment of the district court is argued except the alleged error of the district court in this ruling. It is provided by section 120 of the Code of Civil Procedure that the affidavit of verification "can be made by agent or attorney only: * * * Fifth—When the party is a corporation, in which case it may be made by the attorney, or any officer or agent upon whom a summons could be legally served." It is contended by counsel for plaintiffs in error that the words "upon whom a summons could be legally served" should as well be held to qualify the word "attorney," as officer or agent. It may be as argued, that the attorney as such is not more likely to know the facts of which he affirms the truth than would an officer or agent. This argument, if it has any force, should

be addressed to the legislature. If plaintiff's construction of the above language as to authority to verify is sound, there could be no verification by an attorney at law as such. It could only be by such an attorney as the law provides shall be created for insurance companies by their powers of attorney. The obvious meaning of the fifth subdivision of section 120 of the Code of Civil Procedure is that verification of a pleading on behalf of corporations may be made by their attorneys at law, or by an officer or agent upon whom summons could be legally served, which latter class embraces such agents for the above purpose as are so constituted by power of attorney and are therefore called attorneys. The judgment of the district court is

AFFIRMED.

CITY OF BEATRICE V. ELLEN LEARY.

FILED MAY 21, 1895. No. 6303.

1. **Surface Water:** MUNICIPAL CORPORATIONS: NEGLIGENCE: DAMAGES. The Big Blue river flows south through the city of Beatrice and crosses Court street at right angles. The plaintiff's property is situate on the north side of this street and west of the river. Mary and Scott streets are south of and parallel to Court street. Cedar street extends north and south and opens into Court street immediately south of the plaintiff's property. A draw, having its origin in the hills some miles southwest of plaintiff's property, meandered north and east to Cedar street, thence north to Court street, and there emptied into a ditch or drain extending down Court street to the river. This draw, in connection with the ditch in Court street, was a natural conduit through which the surface waters from rains and melting snows on a large area of country found their way to the Blue river. The city of Beatrice, on the petition of the plaintiff and other property owners, graded and paved said Court street and filled up the ditch therein, thus damming the draw in front of plaintiff's property. To carry off the waters that were accustomed

to go down said draw the city built dikes across it at Scott and Mary streets and cut ditches down said streets from the draw to the river. During the heavy rains in the spring of 1892 the waters came down said draw to Court street, and being there obstructed by the filled ditch, overflowed the street and flowed on plaintiff's premises and damaged them. She sued the city, alleging that it had negligently omitted to provide suitable outlets for the waters that were accustomed to come down said draw after having filled the ditch in Court street, and that such negligence was the proximate cause of the damage to her property. *Held*, (1) That the evidence sustained the finding of the jury that the plaintiff's property was damaged by the overflowing waters which came down the draw to Court street and were unable to escape to the river by reason of the ditch in Court street being filled and the draw thereby obstructed; (2) that the overflow of the waters which damaged plaintiff's property was brought about by the act of the city in filling the ditch in Court street and failing to provide sufficient outlets down Mary and Scott streets or elsewhere to carry the waters from the draw into the river; (3) that such negligence on the part of the city was the proximate cause of the injury sustained by the plaintiff.*

2. ———: DAMAGES. The doctrine of this court is the rule of the common law, that surface water is a common enemy and an owner may defend his premises against it by dike or embankment; and if damages result to adjoining proprietors by reason of such defense he is not liable therefor.

3. ———: ———: NEGLIGENCE. But this rule is a general one and subject to another common law rule, that a proprietor must so use his own property as not to unnecessarily and negligently injure his neighbor.

4. ———: ———: ———. And, therefore, every proprietor may lawfully improve his property by doing what is reasonably necessary for that purpose, and unless guilty of some act of negligence in the manner of its execution, will not be answerable to an adjoining proprietor, although he may thereby cause the surface water to flow on the premises of the latter to his damage; but if in the execution of such enterprise he is guilty of negligence,

*For further discussion of the law relating to surface water, negligence, and damages, see *Morrissey v. Chicago, B. & Q. R. Co.*, 38 Neb., 406, *Lincoln Street R. Co. v. Adams*, 41 Neb., 737, *Anheuser-Busch Brewing Association v. Peterson*, 41 Neb., 897, *Bunderson v. Burlington & M. R. R. Co.*, 43 Neb., 545, and *Lincoln & B. H. R. Co. v. Sutherland*, 44 Neb., 526, and cases cited.

which is the natural and proximate cause of injury to his neighbor, he is accountable therefor. *Lincoln & B. H. R. Co. v. Sutherland*, 44 Neb., 526, and cases there cited followed.

5. ——: ——: ——: EVIDENCE. The city had the right to take such steps and perform such acts as in its judgment were necessary to protect its street from surface waters; but while it had this right, it was charged with the duty of exercising it with ordinary care. It was bound to know that this draw was the natural conduit through which the surface waters were wont to find their way to the river, and when it filled up the ditch in Court street into which this draw emptied it was charged with the duty of constructing sufficient ditches and outlets to carry the surface waters coming down the draw to the river.

6. **Municipal Corporations:** DRAINAGE: NEGLIGENCE: DAMAGES. It seems that negligence may be imputed to a municipal corporation and it may be made liable for damages resulting therefrom if its council and mayor, acting in good faith, adopt an insufficient or defective scheme or plan of drainage.

7. ——: ——: ——: ——. The act of the city in building dikes at Scott and Mary streets, and cutting ditches along those streets to the river, were ministerial acts.

8. ——: ——: ——: ——. Whether such ditches were properly constructed, and were of sufficient capacity for the purposes intended, were questions of fact; and whether their construction in the manner that they were constructed amounted to negligence on the part of the city was also a question of fact.

9. **Estoppel:** DAMAGES. The plaintiff by petitioning the city to grade and pave Court street did not estop herself from claiming damages as the result of the negligent omission of the city to provide suitable outlets for carrying off the water from the draw.

10. **Instructions.** Instructions in a case should be few in number and should present to the jury the law applicable to the issues in the case in simple language and terse sentences. Numerous instructions or instructions with long and involved sentences are more likely to confuse the jury and lead it astray than to enlighten it and direct it to the material points of the case.

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

E. O. Kretsinger, for plaintiff in error.

George A. Murphy, contra.

RAGAN, C.

The Big Blue river runs south through the city of Beatrice, crossing Court street at right angles. The property of Mrs. Ellen Leary, consisting of some city lots and a dwelling house thereon, is situate on the north side of Court street and some distance west of where said street crosses said river. Cedar street opens into Court street immediately south of Mrs. Leary's property. One block south of Court street and parallel thereto is Mary street, and one block south of Mary street and parallel thereto is Scott street. The country to the south and west of Mrs. Leary's property inclines to the north and east to the river. In the summer of 1891, and prior thereto, a draw or swale, heading in the foot-hills of said river, some miles southwest of where the river intersects Court street, meandered from the hills in a northeasterly direction and entered Cedar street south of Scott street, thence along Cedar street into Court street immediately south of the Leary property, and there opened into a ditch or gulley extending down Court street to the Blue river. It seems from the record that the ditch was an artificial channel that had been made to take the place of the draw which had once extended down Court street to the river. In the summer and autumn of 1891 the city of Beatrice graded and paved Court street west of the river to a point west of the Leary property, and in doing so filled up the ditch in Court street through which the waters from the draw or swale above mentioned had been accustomed to find their way to the river. The draw was not a running stream as that term is commonly understood, although it would seem from the evidence that there was some water in some portions of it during most of the year. The draw was in fact a natural conduit through which the surface waters resulting from rains and melting

snows on a large area of country found their way to the Blue river. Mrs. Leary brought this suit in the district court of Gage county against the city of Beatrice. She alleged that in the spring of 1892 the waters came down in this swale or draw from the southwest along Cedar street to Court street and, being unable to escape to the river, overflowed said street and flowed on and damaged her property. The ground of negligence alleged by her against the city, and made the basis of her action, was that the city in grading and paving Court street filled up said ditch and failed to provide any outlet for the waters which were accustomed in times of rains or freshets to flow down in said swale or draw and thence escape by said ditch into the river. The city, in addition to a general traverse of the material allegations of the petition as to its negligence, pleaded as a defense to the action that the grading and paving of Court street were done upon the petition and request of the abutting property owners of said street—Mrs. Leary being among the number of said petitioners; and that by reason of her petitioning the city to grade and pave said street in the manner it did she was estopped from claiming damages against the city resulting from said paving and grading. A further defense was that the damages sued for were the result of an unprecedented and violent rain storm and flood of such a character as to be, in contemplation of law, the act of God. Mrs. Leary had a verdict and judgment, to reverse which the city has prosecuted to this court a petition in error.

1. The first contention of the city is that the damages awarded Mrs. Leary are excessive and appear to have been given under the influence of passion or prejudice. This contention cannot be sustained. The damages awarded are less than the damages testified to, and therefore the amount of the damages raises no presumption that the jury was influenced by passion or prejudice in making the award.

2. The second contention is that the verdict is not sustained by sufficient evidence. Two arguments are made in support of this assignment: (1.) That the city, prior to its paving and grading Court street, adopted a plan or scheme for the draining of the waters which were accustomed to come down said draw and ditch into the river; and to carry out this plan the city constructed dams or dikes across the draw at Scott and Mary streets and dug ditches along the sides of said streets from the draw to the river. The sufficiency of these dikes and ditches to accomplish the purposes for which they were constructed was passed upon by the jury, and we cannot say that they came to an incorrect conclusion. (2.) The principal argument, however, under this head is that the finding of the jury that the damages sustained by Mrs. Leary were not the result of the act of God, is wrong. The evidence on this subject was conflicting, and some of it as extraordinary as the freshet or rain storm was alleged to be. A large number of witnesses testified on behalf of Mrs Leary that they had lived in the vicinity of Beatrice for a number of years and that the freshet or rain which injured her property, while it was a great rain, was no greater than other rains they had known there, or, in substance, that the rain was not an unprecedented flood, a cloud burst, or water spout. On the other hand, witness after witness in behalf of the city testified that it was the most violent flood they had ever known. The testimony of two of these witnesses and their names deserve a place in the piscatorial history of the state. One Frank Thompson testified that just prior to the rain he had crossed the draw in question on a pony and immediately after crossing the draw it began to rain, and before he could recross the draw the water had risen in it so high that the pony was compelled to swim, and the flood carried the pony and his rider over a wire fence; that after he had succeeded in crossing the draw he went down to the city—presumably on his pony—and that the flood carried him over more

wire fences; that the draw where he was when the rain began was twelve feet deep and forty feet wide, and that it was filled with water to the top of its banks in one second. The other witness, Schultz, had a barn near Scott street and the draw. He testified that the water rose in the draw up to the top of the roof of the barn and did so in five or six minutes. The record does not disclose whether or not the barn was washed away. It is asking too much of this court to disturb the verdict of a jury, based on evidence like the above. We are not fitted by our profession or training for such a task. Only a jury of the vicinage could find the straight and narrow way of truth and dry land in such storms and flood and Cimmerian darkness as this. The district court told the jury that if they believed from the evidence that the damage done to Mrs. Leary's property was the result of excessive, extraordinary, and unusual cloud bursts, rain storms, and floods, these would constitute under the law an act of God for which the city was not liable, unless they found from the evidence that the negligence of the city contributed in a "large degree along with the act of God" to the damage of the plaintiff. This instruction was correct. (*Republican V. R. Co. v. Fink*, 18 Neb., 89.) The evidence shows that Mrs. Leary's property was damaged by the freshet in the spring of 1892; that she sustained damages equal to the amount awarded by the jury; that her property was damaged by the waters that came down this draw to Court street, and by reason of the draw being there obstructed and the ditch in the street having been filled, were unable to escape to the river, and overflowed on her property; that this overflow was brought about by the act of the city in damming the draw and filling the ditch in Court street and failing to provide sufficient outlets or ditches down Mary and Scott streets or elsewhere to vent these waters. We therefore reach the conclusion that the finding of the jury, that the negligence of the city was the proximate cause of the in-

jury sustained by Mrs. Leary, has sufficient evidence in the record for its support.

3. Another assignment is that the verdict is contrary to law. Three arguments are made to support this assignment.

It is first insisted that the city had the lawful right to pave and grade Court street, and that in doing so it had a right to defend itself and its property against surface water, the common enemy, by filling the ditch in said street and diking or damming the draw that emptied into said ditch; and that it is not responsible for any damages that Mrs. Leary may have sustained resulting from its actions in that respect. The doctrine of this court is the rule of the common law, that surface water is a common enemy and that an owner may defend his premises against it by dike or embankment, and if damages result to adjoining proprietors by reason of such defense he is not liable therefor; but this rule is a general one and subject to another common law rule, that a proprietor must so use his own property as not to unnecessarily and negligently injure his neighbor; and, therefore, every proprietor may lawfully improve his property by doing what is reasonably necessary for that purpose, and, unless guilty of some act of negligence in the manner of its execution, will not be answerable to an adjoining proprietor, although he may thereby cause the surface water to flow on the premises of the latter to his damage; but if in the execution of such enterprise he is guilty of negligence which is the natural and proximate cause of injury to his neighbor he is accountable therefor. (*Lincoln & B. H. R. Co. v. Sutherland*, 44 Neb., 526, and cases there cited.) The city had the right to grade and pave Court street. It had the undoubted right to fill the ditch therein and to dike or dam the draw that emptied into said ditch. In other words, it had the right to take such steps and perform such acts as in its judgment were necessary to protect its street from surface waters; but while it had this

right it was charged with the duty of exercising it with ordinary care. It knew and was bound to know that this draw was the natural conduit from which the surface waters from a large area of surrounding country were wont to find their way to the Blue river; and when it diked this draw at Court street and filled up the ditch in said street it was charged with the duty of constructing sufficient ditches and outlets to carry the surface waters coming down said draw to the river.

Another argument under this assignment is this: Sometime in the spring of 1891 Mrs. Leary and other property owners along Court street petitioned the city of Beatrice to grade and pave said street. The argument is that the city having complied with this petition, Mrs. Leary is now estopped from claiming damages resulting from such grading and paving. It must be remembered, however, that the basis of Mrs. Leary's action against the city is not that her property was damaged simply because the city graded and paved Court street, but her cause of action is founded —and founded only—upon the alleged negligent omission of the city to provide suitable and sufficient outlets for the surface waters of the draw after the city had dammed it and filled the ditch into which it emptied. To sustain his contention counsel cite us to *Hembling v. City of Big Rapids*, 50 N. W. Rep. [Mich.], 741, where it was held: "Where plaintiff joined in a petition to the city council to grade and improve a street abutting his lots, paid his assessment for the improvement voluntarily without objecting to the improvement or the assessment, he is afterwards estopped from claiming damages by reason of the improvement, damming the water course across the street, and causing the water to flow his lots." To the same effect are *City of Pontiac v. Carter*, 32 Mich., 164, and *Collins v. City of Grand Rapids*, 54 N. W. Rep. [Mich.], 889. Whatever may be said of these decisions, they are of no force in this state under our constitution, which expressly provides that

private property shall neither be taken nor damaged for public use without just compensation. It may be that if the city in grading and paving Court street left Mrs. Leary's property either so far above or below grade as to damage it, that she, having petitioned the city to bring the street to grade, would be thereby estopped from claiming damages; but that point is not before us and we do not decide it. It would be going very far indeed to hold that because Mrs. Leary petitioned the city council to grade and pave this street that she thereby waived her cause of action against the city for damages it might do to her property in performing the grading and paving in a negligent manner.

The third argument is that the judgment is contrary to law, because the city adopted a plan for carrying the waters of this draw into the Blue river by building dikes, as already stated, across the draw at Scott and Mary streets and constructing ditches along said streets from the draw to the river; that the city in adopting this plan was exercising legislative functions, and that the city is not liable for any damages that have resulted, although the plan adopted was defective, as it is not liable in the absence of bad faith for a mere error of judgment. The authorities on this question are in hopeless conflict. On the one hand, it is held that the adoption of a plan of drainage by a city is a judicial act on the part of its governing body and that, therefore, the city is not responsible in damages if the plan adopted is insufficient or defective. On the other hand, it is held that the duty of a municipal corporation to provide drains and sewers is ministerial in its character and not judicial; and that municipal corporations are liable for the safety, sufficiency, and the skillful construction of its sewers and system of drainage. In *City of Indianapolis v. Huffer*, 30 Ind., 235, it was held: "An incorporated city is not ordinarily liable for consequential injuries to private property resulting from the grading and improvement of

its streets, if, in making such improvements, reasonable skill and care be used to avoid the injuries. The skill and care which is incumbent relates as well to the plan as to the execution of the work—in the case of a sewer, to its capacity, as well as to the mechanism in its construction." We think this is the better rule. But to sustain the judgment in this case it is not necessary to decide whether negligence can be imputed to a city and it made liable for damages resulting therefrom, because its council, acting in good faith, erred in the plan or scheme of drainage adopted by it. If the city of Beatrice, in adopting the plan it did adopt for conveying the surface waters from the draw in question to the Blue river, exercised legislative functions, if the plan adopted was defective and imperfect, and if the city is not liable because of the adoption of such defective plan, still the building of the dikes at Scott and Mary streets, the cutting of the ditches along those streets to the Blue river, were ministerial acts; and if the city in building said dikes and in constructing said ditches negligently omitted to construct them on sufficient capacity to carry off the waters that were accustomed to flow down said draw, and damages resulted to the plaintiff as the proximate result of such negligent omission, the city was liable. Whether the ditches were properly constructed and were of sufficient capacity for the purposes intended were questions of fact; and whether their construction in the manner that they were constructed amounted to negligence on the part of the city was also a question of fact.

4. Some criticisms are indulged by counsel with reference to the instructions given and refused. We have carefully examined the points made by counsel, and reach the conclusion that no error prejudicial to the city was committed by the court in the giving or refusing of instructions. Without desiring or intending any reflection whatever upon the learned judge who tried this case or of the eminent counsel engaged therein, we deem it our duty to say

that we think the jury in this case was instructed too much. At the request of the plaintiff the court gave the jury twelve instructions; at the request of the city, fifteen; and in addition to these there were six paragraphs or instructions in the charge given by the court to the jury on its own motion. Instructions in a case should be few in number and should present to the jury the law applicable to the issues in the case in simple language and terse sentences. Numerous instructions, or instructions with long and involved sentences, are more likely to confuse the jury and lead it astray than to enlighten it and direct it to the material points of the case. The judgment of the district court is

AFFIRMED.

CHRISTIAN CHRISTENSEN, APPELLANT, V. CITY OF FREMONT ET AL., APPELLEES.

FILED MAY 21, 1895. No. 7616.

1. **Municipal Corporations:** POWERS: ELECTRIC LIGHTING SYSTEM. The power conferred upon cities of the second class having over 5,000 inhabitants, to provide for and regulate the lighting of the streets, implies the power to erect and maintain an electric lighting system for that purpose.

2. ———: ———: ———. From the power to provide for and regulate the lighting of streets, however, no power can be implied to erect or maintain a lighting system for the purpose of supplying light to private buildings.

3. ———: ———: ———. The latter power is conferred on such cities by Session Laws of 1889, chapter 19.

4. ———: ———: ———: APPROPRIATIONS. That act, in providing for the levy of a tax and the issuing of bonds for erecting and maintaining a lighting system, provides how money must be raised for the purpose when it is not already available; but where a city already has in its general fund sufficient unappro-

priated funds, it may appropriate and use those funds for the purpose of erecting a lighting system.

5. ——: ——: ——: ——. A city of the second class having more than 5,000 inhabitants may make special appropriations for improvements at other times in other ordinances than the annual appropriation bill, provided such appropriations first receive the sanction of a majority of the electors either by petition or at an election.

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

E. F. Gray, for appellant.

Frank Dolezal and *J. E. Frick, contra.*

See opinion for authorities upon the questions discussed.

IRVINE, C.

This was an action by the appellant, a citizen and taxpayer of the city of Fremont, against that city, a city of the second class containing more than 5,000 inhabitants, and its officers, seeking an injunction to restrain the defendants from proceeding with the proposed erection of an electric light system, and from using the general fund and occupation tax money for the purpose of erecting such system. The case was heard in the district court on the petition, answer, and reply, without any evidence. The district court dismissed the action. No evidence having been introduced, the question is were the defendants entitled to a decree on the pleadings?

The answer contains no denials. It consists solely of affirmative matter, most of which is denied in the reply. The petition, with so much of the answer as the reply does not deny, must, therefore, be taken as a statement of the facts. The purpose of brevity at least will be subserved if we state the facts so found in narrative, without reproducing the pleadings. In February, 1895, the city

found itself with something over $18,000 in its treasury in excess of the moneys which had been appropriated by the general appropriation bill of the current fiscal year, passed in July, 1894. A portion of this money was in what is known as the "general fund," collected under Compiled Statutes, chapter 14, article 2, section 52, subdivision 1, empowering such cities to levy a tax for general revenue purposes. The remainder of the money was derived from occupation taxes, levied under subdivision 8 of the same section, and not devoted to any special purpose. In February, 1895, the council passed an ordinance appropriating $18,000 from these funds for constructing an electric light plant. This ordinance was passed in pursuance of a petition of a majority of the legal voters of the city sanctioning such action. Other steps were taken leading to the advertising for bids for the construction of the plant, and the city was about to proceed therewith and make payment out of the moneys referred to when these proceedings were begun.

The appellant contends, in the first place, that the city is without power to construct such works with the fund referred to, and, in the second place, that if it had the power, the manner of its proposed exercise is unlawful. For a consideration of the first question only two facts besides those already stated are material. The first is that the funds which it is proposed to expend seem to be accumulations resulting from overtaxation for prior years. The second is that while the ordinance lying at the foundation of the proceedings provides by its terms only for the construction of an electric light plant "for lighting the city," the petition avers, and the answer does not deny, that the purpose is not only to construct a plant for lighting the streets and city property, but also to furnish light to the inhabitants of the city for hire, and that for this purpose the cost of the plant will be $10,000 more than the cost of a plant simply to light the streets and public buildings.

The city of Fremont is governed by the provisions of article 2, chapter 14, Compiled Statutes, relating to cities of the second class having more than 5,000 inhabitants. Section 52 of that article contains a partial enumeration of the powers vested in such cities. Subdivision 51 of that section gives to such cities power "to provide for and regulate the lighting of the streets, and the erection of lamp posts." Subdivision 17 of the same section, as originally enacted, authorized the city to make contracts with and authorize any persons, company, or association to erect gas works and give such persons, company, or association the exclusive privilege of furnishing gas to light the streets, lanes, and alleys of said cities for any length of time, not exceeding twenty-one years. In 1891 the latter section was amended so as to include electric lights as well as gas. In 1889 an act was passed (Session Laws, 1889, ch. 19, sec. 1) providing that "any city of the second class in this state shall have the power, and is hereby authorized, to establish and maintain a system of electric lights for such city, and the city council shall have the power to levy a tax, not exceeding five mills on the dollar in any one year, for the purpose of establishing, extending, and maintaining such system of electric lights." By section 2 of this act it was provided that if the tax authorized would be insufficient for the purpose, bonds might be issued on petition and vote to that end. Subsequent sections provided for the construction of the works and for their management after construction. There is no other legislation, so far as we are aware, bearing directly upon the matter.

As a starting point for the consideration of the question presented we may adopt the language of Judge Dillon, that a municipal corporation "possesses, and can exercise, the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the

corporation—not simply convenient, but indispensable." (1 Dillon, Municipal Corporations [4th ed.], sec. 89.) This language has been so often quoted by courts of last resort, including the supreme court of the United States, that it may now be taken as the accepted formula in regard to municipal powers. Judged by this statement, we have no hesitation in declaring that the power to provide for and regulate the lighting of streets and the erection of lamp posts fairly implies the power to erect gas works or an electric light plant to be used by the city for the purpose of lighting the streets. (*State v. City of Hiawatha*, 53 Kan., 477; *City of Crawfordsville v. Braden*, 130 Ind., 149; *Mauldin v. City Council of Greenville*, 33 S. Car., 1.) On the same principle, it has been held that a grant of power to establish and regulate markets implies the power to purchase and to hold land for the purpose of a market. (*Ketchum v. City of Buffalo*, 14 N. Y., 356.) And the simplest and most obvious application of the principle is perhaps found in the apparently self-evident proposition, that a grant of power to prevent and suppress fires and to raise money for supporting the fire department implies the power to purchase engines and apparatus. (*Green v. City of Cape May*, 41 N. J. Law, 45.) Our attention is called to the case of *Spaulding v. Peabody*, 153 Mass., 129, holding that under somewhat similar grants of power a city may not erect and maintain works for the manufacture and distribution of electric light for lighting the streets. But this case is based to a large extent on a consideration of peculiar Massachusetts statutes and a narrow construction theretofore placed upon them by the court. The case is opposed to an otherwise practically uniform array of authorities. The reasoning on the general question is far from satisfactory, and while it is still a recent case, it has encountered already considerable adverse criticism. It is by no means so clear that from the power to provide for the lighting of streets any power is implied to maintain a plant for the

purpose of furnishing light for private buildings. It has been said that under an express power to erect gas works or water works the uniform rule is that a city is not limited to furnishing gas or water for use in public places, but may furnish the same for private use. (*Thomson-Houston Electric Co. v. City of Newton*, 42 Fed. Rep., 723.) But a power in express terms to erect a lighting plant for the city and a power merely to provide for lighting the streets are very different in their effect. The former power might imply a right to maintain the plant for all purposes for which such plants are generally used, while the latter grant might reasonably be restricted to its terms.

In the *City of Crawfordsville v. Braden*, 130 Ind., 149, it was held that in the absence of any express power a municipality has the inherent power to light its streets, and to determine the means to be adopted for that purpose, extending to the construction and maintenance of works therefor. Having gone so far, the court proceeds to hold that having the power for that purpose, the city may also maintain works to furnish light for private buildings. The reasoning resorted to in support of the last conclusion is far from convincing. The court says that to light residences and places of business of the inhabitants is a legitimate exercise of the "police power." Elsewhere, in the opinion, the police power is referred to as a term "difficult to precisely define or limit." If the view of the Indiana court is to prevail, it might better be said that it is a term without definition or limitation. The result of some of the cases relating to the police power arouses the suspicion that courts have sometimes been disposed to seek in this term an excuse for sustaining acts seemingly conducive to the general welfare where no satisfactory legal reason for such action can be found. We think the case under discussion illustrates the danger of seeking that refuge. The court finds the police power involved in the lighting of houses from the fact that an incandescent electric light is

safer to property and more conducive to health than the ordinary light. The argument is, in brief, thus: A municipality possesses inherently the police power. The police power exists for purposes of public health and safety. The incandescent electric light is safer and more wholesome than other lights. Therefore, without any grant of power in the premises, a city may maintain electric light works for the purpose of selling light to its inhabitants for use in their business houses and residences. No further comment on this case seems necessary.

In *Mauldin v. City Council of Greenville*, 33 S. Car., 1, it was held that a general grant of power to hold property, and to establish ordinances respecting the streets, for the security and convenience of the city, for preserving life and property therein, and for securing the peace and good government of the same, conferred express power to purchase and implied power to maintain an electric light plant for lighting the streets and public buildings, but not for furnishing light to private residences and places of business. It was said that powers are given solely for the purpose of government and not to enter into private business of any kind outside of the scope of government.

Other recent authorities to which our attention has been directed throw little light on the precise question we are now considering. Thus, in *Metcalfe v. City of Seattle*, 1 Wash., 297, no question of power was involved. The only question was the construction of a statute limiting indebtedness and as to the number of voters required on a proposition submitted. The case of *Thomson-Houston Electric Co. v. City of Newton*, 42 Fed. Rep., 723, construes an Iowa statute granting power to establish and maintain electric light plants as extending to the furnishing of light to the inhabitants; and the case of *Smith v. City of Nashville*, 88 Tenn., 464, holds that a power to provide the city with water-works implies a power to furnish water to the inhabitants for private use.

Following the rule stated by Judge Dillon, it is quite clear that a power to provide for and regulate the lighting of streets does not expressly authorize the maintenance of a plant to light private buildings for pay. It is equally clear that the exercise of such a power is not indispensable to the fulfillment of the purposes of the corporation. Nor can we say that such a power is implied in, or incident to, the express power to provide for lighting the streets. We are constrained to agree with the supreme court of South Carolina, that while the power to light the streets authorizes the erection and maintenance of a plant for lighting the streets, it does not authorize one for supplying light to private buildings. The act of 1889, above referred to, extends the grant of power to the purpose in question. It authorizes the establishment and maintenance of a "system of electric light for such city." The cases already cited, of *Thomson-Houston Electric Co. v. City of Newton* and *Smith v. City of Nashville*, would be applicable under that grant. But the later sections of the act provide for fixing and collecting rates to be charged the inhabitants for the use of lights and so render the object of the act clear beyond question. We have, then, the city empowered by the act of 1889 to erect and maintain a plant for all the purposes here contemplated. This act authorizes a levy of a tax to create a special fund for the purpose, and if such tax be insufficient the issuing of bonds after a petition and election on the question. The city of Fremont does not propose to levy a tax, neither does it propose to issue bonds. On the other hand, it proposes to use the moneys already accumulated from general taxation, and from occupation taxes. We have thus elaborated on the grant of powers because the conclusions reached convince us that in the absence of the act of 1889 the city could not have devoted any revenue to the purpose of maintaining a plant to furnish light for private consumers. Its right to do so is derived solely from the act of 1889, which contains authority to provide means

therefor in a special manner. The precise question then is, whether this manner of payment is exclusive, or whether, on the other hand, moneys already being available from other sources, they may be devoted to this purpose. The money in the general fund was collected under subdivision 1, authorizing the levy of taxes for general revenue purposes. Subdivision 8, authorizing occupation taxes, makes no special disposition thereof, and moneys so collected are, therefore, available for any general municipal purpose.

In *Merrill Railway & Lighting Co. v. City of Merrill*, 80 Wis., 358, a tax for general city purposes, not exceeding two per cent of the assessed valuation, was authorized. It was elsewhere provided in the charter that in addition to the amount limited for general city purposes special taxes might be levied for certain designated purposes, among them "gas purposes," but that no such tax should be levied until recommended by the council and approved by a vote of the people. It was held that the lighting of streets was a general municipal purpose, and that without a vote and without a special tax, the two per cent tax might be used for that purpose. This case does not extend so far as the one before us, because it was not contemplated to use any portion of the tax except for a public municipal purpose. But we think the general principle is applicable. If the city of Fremont did not have in its treasury money available for the purpose contemplated, then the act of 1889 provides how the money might be raised; but if it has money in its treasury available for the purpose, we see no reason why an indebtedness should be incurred, or additional taxation imposed. The act of 1889, in so far as it relates to taxation and bonds, provides for the raising of money when it is necessary to raise it; but we do not think that the means there provided must be resorted to when money is already available. The funds which it is proposed to expend are available for any municipal purpose for which a special tax is not necessary, or a special form

of taxation provided. All the occupation tax seems to be available for any purpose for which the general fund is available. If a special tax were levied for this purpose it would be collected in the same manner as the general fund has been collected; if bonds were issued, they would have to be paid by taxes collected in like manner. The money being now in the treasury collected for general revenue purposes, and the act of 1889 conferring upon the city complete power to erect and maintain such a plant as is contemplated, we think the power exists to use the accumulated fund to pay therefor.

We are thus brought to a consideration of the second contention, to-wit, the power being conceded, has the city proceeded in the proper manner to execute it?

Section 39, article 2, chapter 14, Compiled Statutes, is as follows: "The city council shall, within the last quarter of each fiscal year, pass an ordinance, to be termed the 'annual appropriation bill,' in which such corporate authorities may appropriate such sum or sums of money as may be deemed necessary to defray all necessary expenses and liabilities of such corporation, not exceeding in the aggregate the amount of tax authorized to be levied during the then ensuing year; and in such ordinance shall specify the objects and purposes for which such appropriations are made, and the amount appropriated for each object or purpose. No further appropriations shall be made at any other time within such fiscal year unless the proposition to make such appropriation has been first sanctioned by a majority of the legal voters of such city, either by a petition signed by them, or at a general or special election duly called therefor; and all appropriations shall end with the fiscal year for which they were made; *Provided*, That the fund arising from 'road taxes,' as in this chapter provided, shall be deemed specially appropriated, and shall not be included in the annual appropriation ordinance; *And provided further*, That no warrant shall be drawn, account allowed,

or debt contracted with reference to such fund unless there shall be money in the treasury for the payment thereof; *And provided further*, That nothing herein shall be construed to prohibit the council from appropriating other money in the annual appropriation bill for the use of streets, grades, and bridges."

Section 40 is as follows: "Before such annual appropriation bill shall be passed the council shall prepare an estimate of the probable amount of money necessary for all purposes to be raised in said city during the fiscal year for which the appropriation is to be made, including interest and principal due on the bonded debt and sinking fund, itemizing and classifying the different objects and branches of expenditures, as near as may be, with a statement of the entire revenue of the city for the previous fiscal year, and shall enter the same at large upon its minutes, and cause the same to be published four weeks in some newspaper published or of general circulation in the city."

Section 41, so far as it is applicable, is as follows: "The mayor and council shall have no power to appropriate, issue, or draw any order or warrant on the treasury for money, unless the same has been appropriated or ordered by ordinance, or the claim for the payment of which such order or warrant is issued has been allowed, according to the provisions of this chapter, and appropriations for the class or object out of which such claim is payable has been made as provided in section 41 (39). Neither the city council, nor any department or officer of the corporation, shall add to the corporation expenditures in any one year anything over and above the amount provided for in the annual appropriation bill for that year, except as herein otherwise specially provided; and no expenditure for any improvement, to be paid for out of the general fund of the corporation, shall exceed in any one year the amount provided for such an improvement in the annual appropriation bill."

In June of 1894 an estimate was prepared in accordance with section 40, and a tax levy made. In July the annual appropriation bill was passed. Neither the estimate, the levy, nor the appropriation bill included the electric lighting plant. In February, 1895, however, a petition of a majority of the legal voters of the city sanctioning such action having been presented, an ordinance was passed appropriating the money which the city now seeks to expend for this purpose. It is argued that this is not a lawful appropriation, and the argument is based on that part of section 41, to the effect that no expenditure for any improvement to be paid for out of the general fund of the corporation shall exceed the amount provided for such an improvement in the annual appropriation bill. We think that this clause should be read in connection with that preceding, to the effect that nothing shall be added to the corporation expenditures above the amount provided for in the annual appropriation bill except as is otherwise specially provided, and the whole section in connection with section 39, authorizing appropriations outside the appropriation bill, when sanctioned by a majority of the legal voters, either by petition or at an election. The requisite petition was presented in this case, and we think it authorized the special appropriation.

The cases of *City of Blair v. Lantry*, 21 Neb., 247, and *McElhinney v. City of Superior*, 32 Neb., 744, are not in point, because in those cases there had been no appropriation whatever.

JUDGMENT AFFIRMED.

WILLIAM R. COX V. O. H. BARNES.

FILED MAY 22, 1895. No. 5657.

1. **Attorney and Client.** It is a well settled rule that an attorney is bound to the most scrupulous good faith, when acting for his client. He must be loyal to the interests intrusted to his care. The members of a firm of attorneys cannot represent opposite sides of the same cause without the knowledge and consent of the clients.
2. **Judgment:** COLLATERAL ATTACK. After a firm of attorneys had been employed by a defendant a new member was taken into such firm, to whom the client revealed the evidence upon which he relied to defeat the action, and subsequently such attorney was employed by, and rendered assistance on the trial to, the adverse side, with full knowledge of the defendant and without objections. A judgment was rendered in favor of the plaintiff. *Held*, In an action on such judgment in another state the defendant could not set up as a defense thereto that the judgment was obtained by the fraudulent conduct of the attorney, but that on calling of the original cause for trial, the defendant should have moved the court to exclude the attorney from appearing for and assisting the adverse side.

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

Wigton & Whitham, for plaintiff in error.

Benjamin Lindsay, *W. W. Quivey* and *Powers & Hays*, *contra.*

NORVAL, C. J.

On the 13th day of January, 1890, in a cause pending in the district court of Montague county, Texas, a judgment was rendered in favor of O. H. Barnes, and against William R. Cox, for $1,650 debt and $73.75 costs of suit. This action was brought upon said judgment in the district court of Pierce county, this state. The petition is in

the usual form. The amended answer, for a defense, avers that the judgment declared upon was obtained by the plaintiff by fraud and undue means. The allegations of fraud set up in the answer are as follows: "That plaintiff, after the commencement of the action upon which said judgment was obtained, fraudulently, corruptly, and for the purpose of influencing defendant's attorneys against defendant's interests, and preventing their performing and causing them to neglect their duties toward defendant in the trial and defense of the said action so that plaintiff might obtain said judgment, employed and procured the services of one J. M. Chambers, an attorney at law, and a member of the firm of Stephens, Herbert & Chambers, who were at the time the employed attorneys of defendant in the action, to assist plaintiff in the trial and prosecution of said action and the procuring of said judgment, well knowing that said Chambers was one of the said firm of Stephens, Herbert & Chambers, and that said firm were defendant's attorneys as aforesaid, and agreed to and did pay said Chambers therefor the sum of $100 for the benefit of said firm of Stephens, Herbert & Chambers." The answer further charges that by reason of the fraudulent employment of Chambers and said undue and corrupt influence on the part of plaintiff, the defendant was prevented from having a fair and impartial trial of the issues in said court; that defendant did not discover the said fraudulent acts and conduct until the trial had begun, and that they were not fully known until after the rendition of the judgment; that the defendant was not indebted to the plaintiff in any sum whatever in the suit in which said judgment was obtained, but had a complete defense to the action. The plaintiff for reply denied all charges of fraud made in the answer. At the close of the defendant's testimony the court, on motion of the plaintiff, instructed the jury to return a verdict against the defendant for the full amount claimed, which was accordingly done, and from a judg-

ment entered thereon, and an order overruling a motion for a new trial, the defendant prosecutes error.

The question presented for determination in this cause is whether the court below erred in directing a verdict for the plaintiff. In other words, was the Texas judgment procured by fraudulent means? The charge of fraud consists in the employment by Barnes of one J. M. Chambers as an attorney to assist in the trial of the case. It appears from the testimony contained in the bill of exceptions that the law firm of Potter & Edleman brought the suit for Barnes in the Texas court, and the firm of Stephens & Herbert, attorneys, of Montague, Texas, was originally employed by Cox to make his defense; that afterwards, in the spring of 1889, which was several months prior to the trial, the said Stephens and Herbert formed a partnership with J. M. Chambers, under the firm name of Stephens, Herbert & Chambers, by the terms of which agreement Chambers was to assist in the disposition of the unfinished business of the old firm, where he was not then adversely interested, and was to receive a part of the fees for so doing; that Stephens & Herbert, together with J. G. Johnson, of Kansas City, Missouri, represented Cox in the trial, and that J. M. Chambers assisted Potter & Edleman in the prosecution of the case. There is some conflict in the proofs as to the time when Chambers was employed by Barnes. Some of the testimony is to the effect that he was retained prior to the formation of the firm of Stephens, Herbert & Chambers, while there is other evidence tending strongly to show that he was not engaged until the day the case was called for trial in January, 1890. It does, however, appear that Barnes was aware at the time of the employment of Chambers that the latter was a member of the firm of Stephens, Herbert & Chambers, and that Stephens & Herbert were Cox's attorneys. Also, there is in the record testimony to the effect that a few days prior to the trial, Cox went to Montague to confer with his attorneys,

and while there Mr. Stephens introduced Mr. Chambers to him as his partner, and thereafter Cox consulted with Chambers as well as Stephens about the case, disclosing to them the papers and evidence he intended to use on the trial. The authorities agree that an attorney, when once employed in a case, is bound to the most scrupulous good faith; that he must be loyal to the interests of his client; that where the client has conferred with his attorney or revealed to him the evidence upon which he relies for the prosecution of the cause or for making his defense to the action, as the case may be, the attorney, after acquiring such knowledge, or after having opportunities for knowing the facts, will not be permitted to sell out his client's interests or to accept a retainer from or render assistance to the adverse party. If he do so, without the knowledge or consent of his client, the judgment thus obtained may be set aside on the ground of fraud. (*Haverty v. Haverty*, 35 Kan., 438; Black, Judgments, sec. 344.) In the case at bar Cox had a right to expect that Chambers would assist in the trial of the case, notwithstanding he became a member of the firm after Stephens & Herbert were employed by Cox; or, at least, he was justified in believing that Chambers could not lend his assistance to the other side. It is undisputed that Cox was present in the Texas court during the entire trial, and that neither he nor his attorneys made any objection to Chambers appearing in the case for Mr. Barnes, although he was fully advised of such appearance at the very commencement of the trial. Cox should have then and there called the attention of the court to the fact and had Chambers excluded from taking part in the case on the other side. He could not sit idly by, omit to bring the facts to the knowledge of the court, and take the chances on obtaining a favorable verdict, and, if unsuccessful, set up in another court in a suit upon the judgment that such judgment was procured by fraud. He should have moved the Texas court to exclude Cham-

bers from assisting in the case. Not having done so, he cannot now be heard to complain. (*Wilson v. State*, 16 Ind., 392; *Gaulden v. State*, 11 Ga., 47.) The district court did not err in directing the verdict, and the judgment is

AFFIRMED.

EMMA KLECKNER V. W. W. TURK ET AL.

FILED MAY 22, 1895. NO. 6230.

1. **Corporations**: VALIDITY: COLLATERAL ATTACK. Where parties in good faith organized as a corporation and substantially complied with the conditions prescribed as precedent to the commencement of business by the law governing the formation of corporations, such as the adoption of articles of incorporation and filing the same with the county clerk of the county in which the business was to be conducted, and have entered upon the discharge of corporate functions and so continued for a considerable length of time, although if challenged by the state in a proper proceeding it might be declared illegal, such organization was not vulnerable to a collateral attack by a person who contracted with it in its corporate capacity and thus acknowledged and recognized its corporate existence, the object of such attack being to recover upon the contract, against the stockholders of the corporation individually, or to render them liable thereon as members of an unincorporated association or partnership.
2. **Statutes**: CONSTRUCTION: PENALTIES. A liability which is created by statute to follow as a consequence of the doing or omission of some act, and the extent of which is not measured or limited by the damage caused by the act or omission, is in the nature of a penalty and the statute penal in its character.
3. **Corporations**: PENAL STATUTES. The liability imposed by section 139, chapter 11, General Statutes, 1873, was for the omission to do acts not conditions precedent to the commencement of business by a corporation, and such liability existed solely by reason of the legislative enactment of such section and was in the nature of a punishment and consequently penal.
4. **Statutes**: PENALTIES. Section 136, chapter 11, General Statutes,

1873, was penal. *Globe Publishing Co. v. State Bank of Nebraska at Crete*, 41 Neb., 175, followed.

5. ———: REPEAL. Sections 136 and 139 of chapter 11, General Statutes, 1873, were repealed by an act approved April 6, 1891.

6. **Corporations: LIABILITY OF STOCKHOLDERS.** When an organization has become a corporation *de facto*, but failed to perform some requisitions of the law under which it was created, not conditions precedent to its beginning the exercise of corporate rights and powers, but essentials to its becoming a technical *de jure* corporation, its existence could not be collaterally attacked by persons contracting with it, in order to render the stockholders liable on such contract individually or as partners, but it was its duty to comply with the requirements of section 136, chapter 11, General Statutes, 1873, while in force, and its members will not be heard to allege its lack of a *de jure* character to avoid liability for failure to comply therewith.

7. **Statutes: ABATEMENT OF ACTIONS.** As a general rule, the repeal of a statute which confers the right to an action, the remedy provided existing solely by and through such statute, or the repeal of a penal statute, abates a suit pending to enforce the remedy provided or destroys any right of action which has accrued thereunder; but in states where a general saving clause has been enacted it enters into such repeal and renders it conditional or inoperative upon the law, inasmuch as it might affect accrued rights of action or pending suits.

8. **Constitutional Law: STATUTES.** The passage of a statute to operate as a general saving clause and which shall have the force and effect to continue rights and remedies unless a repealing statute contains an expression of the intention that such rights and remedies shall not be saved or continued, is within the power of the legislature.

9. ———: ———. The act of the legislature approved April 6, 1891, entitled "AN act to amend section 136 and section 139 of chapter 16, Compiled Statutes, 1889, and to repeal said original sections," is not unconstitutional on the ground that the subject-matter of the portion of the act, which makes its provisions operative as to actions pending or accrued, is not expressed in or not sufficiently stated in the title.

10. **Judgment: TRIAL: PRACTICE.** In a judicial district having two judges, Judge Bush heard and overruled a demurrer to a petition and defendants answered. During the trial of the cause, which was conducted by Judge Babcock, the defendants

objected to the introduction of any testimony on the ground that the petition did not state a cause of action. This objection was overruled. After the reception of the evidence Judge Babcock instructed the jury to return a verdict for defendants, stating as a reason for so doing that the pleadings, evidence, and law would not sustain a different verdict. *Held*, To be correct practice, and not erroneous on the ground that it reversed the ruling of Judge Bush upon the demurrer to the petition, as another element entered into the consideration of the case by Judge Babcock, viz., the evidence.

11. Pleading: AMENDMENTS: REVIEW. Amendments to pleadings should always be permitted when in furtherance of justice, but their allowance rests largely in the discretion of the trial court, and this court will not interfere with the exercise of such discretion unless there has been an abuse of it.

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

Frank Martin and *C. Gillespie*, for plaintiff in error:

Failure to publish the notice required by sections 130 and 131, chapter 16, Compiled Statutes, is a fatal defect; without such notice there can be no valid incorporation; it is a condition precedent to the creation of a valid corporation. (*Heinig v. Adams & Westlake Mfg. Co.*, 81 Ky., 300; *Kaiser v. Lawrence Savings Bank*, 56 Ia., 104; *Clegg v. Hamilton*, 15 N. W. Rep. [Ia.], 865; *Eisfeld v. Kenworth*, 50 Ia., 389; *Bigelow v. Gregory*, 73 Ill., 200; *Heuer v. Carmichael*, 47 N. W. Rep. [Ia.], 1034; 1 Beach, Private Corporations, sec. 12; *Abbott v. Omaha Smelting Co.*, 4 Neb., 423; *White v. Blum*, 4 Neb., 560; Cook, Corporations [2d ed.], sec. 234.)

The articles of incorporation are fatally defective in failing to state the "highest amount of indebtedness or liability to which the corporation shall, at any one time, be subject, which must in no case exceed two-thirds of the capital stock." (Compiled Statutes, ch. 16, sec. 128; *Heuer v. Carmichael*, 47 N. W. Rep. [Ia.], 1034; Cook, Corporations [2d ed.], sec. 234.)

Plaintiff should have been allowed to amend her petition at the trial. The amendments asked were in furtherance of justice. Section 144 of the Code has broadened out the right of amendment so far, even after judgment, that the denial of the right to plaintiff is alone sufficient to reverse the judgment. (*Hale v. Wigton*, 20 Neb., 83; *Berrer v. Moorhead*, 22 Neb., 687; *Brown v. Rogers*, 20 Neb., 547; *Ward v. Palin*, 30 Neb., 376; *Roberts v. Taylor*, 19 Neb., 184; *Burlington & M. R. R. Co. v. Crockett*, 17 Neb., 570; *Catron v. Shepherd*, 8 Neb., 308; *Keim v. Avery*, 7 Neb., 54.)

In a district where there are two judges their respective rulings should tend to support each other's previous rulings in cases tried. In this case Judge Bush had overruled the demurrer to plaintiff's petition. At the trial Judge Babcock directed the jury that the pleadings, evidence, and the law would not sustain a verdict in plaintiff's favor. This is a practice that cannot be tolerated. A ruling made by one of the judges of the district must be respected by the other, otherwise confusion and uncertainty will be the result. (*Marvin v. Weider*, 31 Neb., 774.)

The plaintiff seeking to collect her debt from the defendants as individuals is not estopped to deny the incorporation of the bank. (Cook, Stockholders [2d ed.] secs. 234, 283, 637; *Abbott v. Omaha Smelting Co.*, 4 Neb., 416; *Garnett v. Richardson*, 35 Ark., 144; *Ferris v. Thaw*, 72 Mo., 446; *Hurt v. Salisbury*, 55 Mo., 310; 1 Beach, Private Corporations, sec. 16; *Bigelow v. Gregory*, 73 Ill., 197; *Indianapolis Mining Co. v. Herkimer*, 46 Ind., 142.)

The repealing act of 1891, repealing sections 136 and 139, chapter 16, is unconstitutional and void. Under our law an ordinary repeal of the sections would have in no manner affected the plaintiff's rights. (Compiled Statutes, ch. 88, sec. 2.) The act was broader than its title, which did not comprehend the retroactive effect which the law was designed to have. It is obnoxious to the provisions of

section 11, article 3, of the constitution. (*City of Tecumseh v. Phillips*, 5 Neb., 305; *Messenger v. State*, 25 Neb., 674; *State v. Lancaster County*, 6 Neb., 474; *Holmburg v. Hauck*, 16 Neb., 337; *Touzalin v. City of Omaha*, 25 Neb., 817; *White v. City of Lincoln*, 5 Neb., 516.)

The repealing act is unconstitutional for the further reason that it seeks to impair the validity of the contract entered into between plaintiff and defendants, of which the law in force became a part, and that it seeks to destroy the vested right of plaintiff to recover her money from any of the defendants. (Constitution, U. S., sec. 10, art. 1; Constitution, Neb., sec. 16, art. 1.) The liability sought to be enforced by plaintiff was not a penalty, and could not be taken away. (*Doolittle v. Marsh*, 11 Neb., 243; *Howell v. Roberts*, 29 Neb., 483; *Coy v. Jones*, 30 Neb., 798.)

E. W. Thomas, R. S. Malony, J. H. Broady, Webster, Rose & Fisherdick, and *W. E. Stewart, contra:*

The Farmers & Merchants Bank of Humboldt was a *de facto* corporation whose legal right to exist could not be questioned, except by the sovereign authority. (*Cory v. Lee*, 8 So. Rep. [Ala.], 694; *Snider's Sons Co. v. Troy*, 4 Am. R. & Corp. Cas. [Ala.], 25; *Lincoln Building Association v. Graham*, 7 Neb., 173; *Abbott v. Omaha Smelting Co.*, 4 Neb., 420; *Porter v. Sherman County Banking Co.*, 36 Neb., 271; 1 Beach, Private Corporations, secs. 13, 14; *Merchants Bank v. Stone*, 38 Mich., 779.)

The liability sought to be enforced is not contractual, but one imposed by statute and penal in its nature. (*Fay v. Noble*, 7 Cush. [Mass.], 188; *First Nat. Bank v. Almy*, 117 Mass., 476; *Stout v. Zulick*, 48 N. J. Law, 599; *Planters & Merchants Bank v. Padgett*, 69 Ga., 164; *Garlside Coal Co. v. Maxwell*, 22 Fed. Rep., 197; *Stokes v. Findlay*, 4 McCrary [U. S. C. C.], 205; *Whitney v. Wyman*, 101 U. S., 392; Taylor, Corporations, 148; *White v. Blum*, 4 Neb., 563.)

Rights and remedies given by statute are lost by unconditional repeal of the statute. (*Bennet v. Hargus*, 1 Neb., 423; *Johnson v. Hahn*, 4 Neb., 146; Sedgwick, Construction of Statutory & Constitutional Law, 100; *Gregory v. German Bank of Denver*, 3 Col., 332; *Sayles v. Brown*, 40 Fed. Rep., 8; *Breitung v. Lindauer*, 37 Mich.. 230; Cooley, Constitutional Limitations [4th ed.], 152.)

G. W. Cornell, also for appellees:

The repealing statute is valid. The saving clause is not of itself a separate subject, but incidental to the matter repealed. The title need not set out the particulars of the amendment. It is sufficient that the subject is fairly expressed in the title. (*State v. Ream*, 16 Neb., 681; *Bonorden v. Kriz*, 13 Neb., 121; *Miller v. Hurford*, 13 Neb., 17; *People v. Mahaney*, 13 Mich., 494; *People v. McCallum*, 1 Neb., 194; *State v. Babcock*, 23 Neb., 128.)

Isham Reavis, also for appellees.

HARRISON, J.

The plaintiff commenced this action to recover of the defendants the sum of $6,052.53 and interest alleged to have accrued thereon. The petition states in substance: "The said plaintiff complains of said defendants, and for cause states that at the date of the written instruments or obligatures hereinafter copied and set forth, and for several years just immediately preceding said dates and for some time thereafter, as hereinafter stated, the said defendants were associated together and doing, operating, and conducting a general banking business in the city of Humboldt, in said Richardson county, state of Nebraska, under the name and style of the Farmers & Merchants Bank of Humboldt, Nebraska, with said defendant Robert C. Lambertson, as the cashier of said bank, authorized for and in behalf of said defendants to receive deposits of money into said bank

and issue drafts or bills of exchange and certificates of deposits therefor."

What is denominated the first cause of action is an allegation of a deposit by plaintiff in the bank of $6,445, December 7, 1888, and the issuance to her by the cashier thereof of a certificate evidencing such deposit, it being, as is shown by the copy in the petition, what is generally known as a "time certificate," and payable in one year after date. There are three credits or payments pleaded, which are stated to have been received since the assignment of the bank. The second cause of action is predicated upon the purchase of a draft by plaintiff of the defendants through the cashier of the bank, in the sum of $200, drawn on the National Bank of Kansas City, and which, it is alleged was duly presented and not paid for want of funds belonging to the bank issuing it to meet it. Certain payments are stated to have been received and credited upon the draft, derived from the assets of the Humboldt bank since the assignment. It is further pleaded:

"4. The said defendants claim that their said bank was a duly incorporated bank under the laws of the state of Nebraska, under the name and style of the Farmers & Merchants Bank of Humboldt, Nebraska; that it was so organized and incorporated on or about the 1st day of July, A. D. 1879. The said corporation or bank of said defendants operated and conducted said bank as above from about the 10th day of July, 1879, to about the 29th day of June, 1889, when said corporation made an assignment, as an insolvent institution or corporation under the general assignment laws of the state of Nebraska, to the sheriff of said county.

"5. The said plaintiff alleges that from the organization of said banking corporation of said defendants, on or about July 10, A. D. 1879, to the said assignment, on or about June 29, A. D. 1889, the said defendants were stockholders and members of said corporation, and are still

so related and connected with the affairs of said assigned bank.

"6. The said plaintiff further alleges that at the time when said plaintiff deposited her said moneys in said bank, and at the times and dates when said indebtedness was contracted and said certificate of deposit or promissory note was delivered to said plaintiff as above stated, and when said draft or bill of exchange was made and delivered to this plaintiff as above stated, and for a long time before and ever since then, the said corporation or banking institution of defendants was insolvent."

Here follows a general allegation of the failure of defendants and their banking corporation "to comply with the laws of Nebraska regulating such corporations, and that by reason of such failure the defendants were rendered individually liable for debts contracted by the corporation, and also allegations of failures in particular, viz.: To publish notice of the organization of the banking corporation; to post up a copy of the by-laws of the corporation in a conspicuous position at the place of business for the inspection of the public; that for more than a year immediately preceding the transaction, as the result of which the liability from defendants to plaintiffs arose," the defendants and their banking corporation did not give an annual notice of all the existing debts of the corporation by publication of a statement in a newspaper, and by reason of the non-compliance in these instances specified the defendants became personally and individually liable for the payment of any debts contracted by the corporation, the bank. Motions to require the plaintiff to make her petition more definite and certain were filed and overruled, demurrers were then interposed which were also overruled. One defendant, Lambertson, elected to stand upon his demurrer and plead no further. The defendant Stuart filed his separate answer, which contained a general denial of the allegations of the petition and a statement that he never owned more than

one share of the stock in the Farmers & Merchants Bank of Humboldt, and on or about April 10, 1887, in good faith and for full value, sold, transferred, and delivered such stock to Robert C. Lambertson, who was at the time the cashier of the bank, and from said date the said Stuart had not possessed any stock in the bank and had no interest therein and was not a stockholder at the time of the alleged transactions between plaintiff and the bank. Mullen and Fergus answered and admitted, and also averred, the incorporation of the bank and its commencement of business under such incorporation during the spring of 1879, and continuance of the banking business for more than ten years and until July, 1889; admitted that they were the owners of stock of the bank; alleged lack of knowledge of the instruments upon which plaintiff declared in her petition, but stated that the draft was dishonored because not presented for payment within a reasonable time; and after some other and further statements of defenses, not necessary to be noticed here, denied each and every allegation of the petition not expressly admitted. The defendants W. N. Nimms and T. J. Frazer filed an answer, which was in substance the same as that of Mullen and Fergus, a summary of which has just been given, except that it contained no affirmative averment of the organization of the bank as a corporation, they contenting themselves with admitting it. Frye in his answer averred the organization of the banking corporation and the time it began business, the length of time it continued therein, his ownership of stock and sale and transfer of the same prior to the time of the occurrences upon which the plaintiff's causes of action are founded, and that he has never since such transfer had any interest in the bank or its business, and after some further allegations, which we need not notice, closed with the usual form of general denial. A portion of a reply filed by plaintiffs was, on motion, stricken out and an amended reply filed, in which there was a denial of the

incorporation of the bank or that it ever became a valid corporation, and an allegation that "the said banking institution, and the said members claiming to be shareholders thereof, wholly and entirely failed and neglected to file a copy of the articles of incorporation of said banking institution in the office of the secretary of state in and for the said state of Nebraska, and no such copy of said articles of incorporation was ever so filed in said office of the said secretary of state as required by said laws." This was followed by a general denial of all the affirmative matter in the answer. There were also replies to the answers of Stuart and Frye, which were, so far as we care to notice them here, general denials. A jury was impanneled and a trial had, and after the close of the evidence and a portion of the argument to the jury had been made by counsel, the court instructed the jury as follows: "The jury are instructed that the pleadings, the evidence, and the law will not sustain a verdict in this case against the defendants, or any of them. You are therefore directed to find a verdict in favor of defendants." The jury, in obedience to the directions of the court, signed and returned a verdict for defendants. A motion for new trial was filed for plaintiff, submitted, and overruled, and the case is presented to this court by plaintiff for review.

The aim of the plaintiff in this action, allowing the allegations contained in her pleadings to be its exponents, seems to have been threefold in reference to the liability which it was sought to establish against the defendants: First, a liability as unincorporated persons, or partners; second, a liability under a provision of the statute for failure to perform certain requisitions of the law in relation to the formation of corporations, not specifically set forth in the section of the statute, but referred to in general terms; third, the accountability provided by statute, arising from the non-performance of a duty specifically stated and required by the section fixing the liability for such failure.

The establishment of the first was dependent upon it appearing in the case that the parties were not incorporated and the bank had no corporate existence. It did appear that the defendants met and organized, elected officers, procured articles of incorporation to be drafted, which were adopted, filed, and recorded in the office of the county clerk of the county in which the bank conducted its business. The bank was then opened and commenced its operations and continued in the general banking business about ten years; and it was during this time, and near the close of it, that the transactions occurred upon which this action is primarily based. Section 126 of chapter 16 (Compiled Statutes, 1893) of our law in relation to corporations and their formation is as follows: "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 recorded in the office of the county clerk of the county or counties in which the business is to be transacted, in a book kept for that purpose;" and it is further provided in section 132 of the same chapter that the corporation may commence business as soon as its articles of incorporation are filed with the county clerk as required by law. It seems to have been contemplated by the lawmakers that the acts prescribed to be performed by the two sections of the law which we have just noticed must precede the commencement of the existence of the corporation as an organization.

"In this state the filing of articles of incorporation with the county clerk is a condition precedent to the existence of any corporate franchise. The law and the articles so filed, taken together, are considered in the nature of a grant from the state, and constitute the charter of the company," (*Abbott v. Omaha Smelting Co.*, 4 Neb., 416,) and in the body of the opinion in that case is the following: "I think, in order to establish such a corporation, it is neces-

sary to show user of a corporate franchise by an association of persons, though the organization may be so defective as to render the franchise wholly invalid in a proceeding against it by the state; or, in other words, it is necessary to show the existence of a charter, or some law under which the assumed powers are claimed to be conferred, and the user of the franchise claimed under such charter or law. In *Buffalo & A. R. Co v. Cary*, 26 N. Y., 77, it is said that 'If the papers filed by which the corporation is sought to be created, are colorable, but so defective that, in a proceeding on the part of the state against it, it would for that reason be dissolved, yet, by acts of user under such organization, it becomes a corporation *de facto*, and no advantage can be taken of such defect in its constitution, collaterally, by any person.'" In the case at bar the conditions precedent had been performed, and there had been a user of the charter thus acquired, for eight or nine years before the occurrences out of which this action arose, and in her contracts with the bank at that time unquestionably the plaintiff dealt with it as a corporation, fully believing it to be such and relying upon the corporation to pay the indebtedness created in her favor by the transactions, and without a thought or expectation of the stockholders being or becoming personally or individually bound thereby or any partnership liability arising therefrom, and she cannot now be heard to say that she made different contracts, with the defendants as partners, and not with the corporation. The defendants did not agree either with her or among themselves to be bound as partners or liable individually. It is just as clear that the plaintiff never intended to contract or supposed she contracted with the stockholders of the bank individually, and to hold the individual members of the company liable personally as partners would not only practically nullify the contracts which were actually made, but would in effect create and enforce new and different contracts which were never contemplated by the

parties. "A very early case involving this principle is the English case of *Henriques v. Dutch West India Co.*, 2 Ld. Raymond [Eng.], 1535, decided about 1730, in which it was held that 'where an action is brought by a corporation they need not show how they were incorporated, for if the name is proper for a corporation the name argues a corporation, and that the plaintiffs were estopped by their recognizance to say there was no such company.'" (27 Am. Law Rev., 211.)

In *Society Perun v. Cleveland*, 43 O. St., 481, in the opinion written by Owen, J., it is said: "The theory that a *de facto* corporation has no real existence, that it is a mere phantom, to be invoked only by that rule of estoppel which forbids a party who has dealt with a pretended corporation to deny its corporate existence, has no foundation, either in reason or authority. A *de facto* corporation is a reality. It has an actual and substantial legal existence. It is, as the term implies, a corporation. * * * Where it * * * has been reputed and dealt with as a duly incorporated body, and valuable rights and interests have been acquired and transferred by it, no substantial reason is suggested why its corporate existence, in a suit involving such transactions, should be subject to attack by any other party than the state, and then only when it is called upon in a direct proceeding for that purpose, to show by what authority it assumes to be a corporation."

In the case of *Gartside Coal Co. v. Maxwell*, 22 Fed. Rep., 197, it was held: "Where persons, supposing in good faith that they are incorporated and are stockholders in a valid corporation, do business as a corporation for a series of years, without the corporate existence being challenged by the state, parties who deal with the company as a corporation cannot hold the stockholders personally liable in case they afterwards discover that the company was not validly incorporated in consequence of some defect or irregularity in the proceedings of the supposed incorporators."

There is no doubt that the state may attack the legality of the existence of any *de facto* corporation by commencing an action with that end in view against its individual members, and oust them from any user of corporate rights. But persons who have contracted with a *de facto* corporation (for such was this bank), as did the plaintiff, and thus recognize and acknowledge its existence as a corporation, may not afterward be heard to deny its corporate capacity, and as to such person or persons, it may be said to be as if it were a corporation *de jure*. We think this doctrine is supported by the greatest weight of authority. (*Globe Publishing Co. v. State Bank of Nebraska*, 41 Neb., 175; *Trumbull County Mutual Fire Ins. Co. v. Horner*, 17 O., 407; *De Groff v. American Thread Co.*, 21 N. Y., 124; *Hackensack Water Co. v. De Kay*, 36 N. J. Eq., 548; *Newburg Petroleum Co. v. Weare*, 27 O. St., 352; *Fresno Canal & Irrigation Co. v. Warner*, 14 Pac. Rep. [Cal.], 37, and cases cited in note; *Greenbrier Lumber Co. v. Ward*, 3 S. E. Rep. [W. Va.], 227, and cases cited in note; *Fay v. Noble*, 7 Cush. [Mass.] 188; *Butchers' & Drovers' Bank v. McDonald*, 130 Mass., 264; *Stafford Nat. Bank v. Palmer*, 47 Conn., 443: *Commissioners of Douglas County v. Bolles*, 94 U. S., 104.)

Having reached this conclusion, it is clear that the plaintiff could not recover in this case against the defendants on the grounds that they were an unincorporated association, or partnership, and we shall now pass to the second branch of the suit, *i. e.*, that the defendants were personally liable because of the failure to comply with certain requirements with respect to the formation of the company. The section of the statutes which it is claimed established the liability is as follows: "If any corporation fail to comply substantially with the provisions of this subdivision, in relation to giving notice and other requisitions of organization, the property of all the stockholders shall be liable for the corporate debts." (Sec. 139, ch. 16, Compiled Statutes, 1887.) In the por-

tion of our law relating to corporations and their organization and creation, under which the defendants formed the company in this case, are several provisions, in which are stated certain things which must be done by a corporation, such as "notice must be published in some newspaper near the principal place of business for four weeks," and "a copy of the by-laws of the corporation, and the names of all the officers appended thereto, must be posted in some conspicuous place, at the place of doing business, subject to public inspection," and some others, the performance of each of which by the bank was negatived in the pleadings of the plaintiff in this action. These, while essential and necessary to be complied with in order to constitute the association of persons a corporation *de jure*, are none of them conditions precedent to the institution of business by the body corporate, and the neglect to comply with them, or either of them, would not entail upon the stockholders any further or special liability other than attached to them by reason of being stockholders, in the absence of statutory provisions fixing a liability for such non-compliance. If the conditions precedent to user of the corporate privileges and powers had not been fulfilled and a contract was made, the partnership or individual liability would be created, but after their fulfillment and user of the charter thus acquired, in the absence of statutory enactment providing for a liability on non-performance of these other and further requirements essential to establish a technical corporation *de jure*, none other than the regular liability of stockholders would exist. This being true, then the liability created by section 139, in so far as it relates and is given for the reason of a lack of the doing by the corporation of those things which were required of it to perfect its organization as a corporation *de jure*, and which were subsequent in point of time to its commencement of business and its right to so do by virtue of all conditions precedent having been performed, is not an enactment of a

liability which before existed or the common law liability, but is additional and entirely statutory in both origin and existence, and we have no doubt that this section of the statute, to the extent of its provisions, destroys the rule which we have discovered to be so prevalent and allows a person to whom a corporation is indebted to make what we think can scarcely be called a collateral attack upon the corporate existence of the organization but a recovery of a corporate debt in the manner and to the extent therein set forth, because of the omission to perform a duty or duties required. If this be true, then the question arises, is the liability contractual or penal? In a note to the case of *Cochran v. Weichers*, 2 Am. R. R. & Corp. Rep. [N. Y.], 382, we find the following quotation from section 908, 2 Morawetz, Corporations: "The statutes imposing this liability establish a new rule of private right,—a rule which, although unknown to the common law, may be founded on sound principles of justice and expediency. The only reason why this liability is called penal appears to be that it does not exist at common law, and is neither created by contract nor given as compensation for a direct and immediate wrong done by the directors to the creditors of the company." And in the same note on page 384 of the report cited, under the head of "Criterion for determining whether such statutes are penal or otherwise," it is stated: "It cannot be denied that a liability which is imposed upon a person as a consequence of the doing or omission of an act and which is not measured by any injury flowing from the act or omission, is in the nature of a punishment. A statute, therefore, which imposes such a liability does, in effect, inflict a penalty and is of a penal character. 'It is the effect, not the form, of the statute that is to be considered,' says the supreme court of Illinois, 'and when its object is clearly to inflict a punishment on a party for violating it—*i. e.*, doing what is prohibited or failing to do what is commanded to be done—it is penal in its character,

and the circumstance that, in punishing, a remedy is likewise afforded to those having an interest in the observance of the statute, is unimportant.' (*Diversey v. Smith*, 103 Ill., 378, 390.) * * * But, as we have already said, it is well settled by authority that certain statutes imposing upon stockholders or officers of a corporation a liability for the corporate debts are to be classed as penal statutes, with the same consequences as though they were penal in the strict sense of the term. So far as we are aware, all such statutes may be divided into two classes, those under which the liability is incurred as a necessary consequence of becoming a stockholder in the corporation, and those under which the liability is incurred only as the consequence of doing or omitting some act specified in the statute. In the former class the liability partakes of the nature of a contract, to which the stockholder assents; in the latter, of the nature of a punishment. There is no logical basis for making any distinction between different statutes of the latter class. They differ in form and degree, but in substance and effect they are the same, and, if any are classed as penal statutes, all should be." Measured by these rules, which we believe to be correct, the section of our statutes under consideration (139) must be classed as penal. The liability given by sections 136 and 139 may be regarded in the nature of a penalty. (*White v. Blum*, 4 Neb., 563.) Section 139 was repealed by an act approved April 6, 1891, during the pendency of this action, and, as a general rule, the right to action given by it being one conferred solely by the statute, and penal, and not having been reduced to judgment before the repeal, the remedy would be abated or blotted out by such repeal. (*Bennet v. Hargus*, 1 Neb., 419; *Globe Publishing Co. v. State Bank*, *supra*, and cases cited; *Carr v. Risher*, 50 Hun [N. Y.], 147; *Union Iron Co. v. Pierce*, 4 Biss. [U. S.], 327.)

The remedy claimed in what we have designated the third branch of the case was afforded by the provision of

section 136 of chapter 16 of the statutes relating to corporations, as it existed at the time this suit was commenced. This was also repealed by the act approved April 6, 1891, during the pendency of the cause, and the remedy thereby afforded, according to the general rule, was destroyed. This section 136 was determined to be penal by *Globe Publishing Co. v. State Bank*, *supra*, and its unconditional repeal to be an abatement of the liability therein fixed. There can be no doubt that, when viewed in the light of the authorities above, the repeal of the two sections quoted would carry with it all actions then pending, or rights of action accrued to any persons by virtue of said sections and not reduced to judgment; but it is insisted by counsel for plaintiff in error that this repeal did not so operate, for the reason that the act by which their repeal was affected was obnoxious to the provisions of section 11, article 3, of the constitution, wherein it is provided that no bill shall contain more than one subject, and the same shall be clearly expressed in its title; that the amending and repealing act of 1891 was, in the substance of its provisions, broader than the objects expressed in its title. The title of the act of 1891 is as follows: "An act to amend section one hundred thirty-six (136) and section one hundred thirty-nine (139) of chapter sixteen (16) of the Compiled Statutes of 1889, and to repeal said original sections." (See Session Laws, 1891, p. 198.) Section 3 of the act contained the repealing clause and stated: "That said original sections one hundred thirty-six (136) and one hundred thirty-nine (139) be and the same are hereby repealed." Section 4 was the emergency clause, but seems to have been made to serve a dual purpose; *i. e.*, to provide that the act take effect immediately after its passage and approval and also to render its provisions applicable to any cause pending or to be instituted. It reads: "Whereas an emergency exists, this act shall take effect from and after its passage and approval, and shall be held and taken to apply in any case now pend-

ing or hereafter brought in any court in this state. Approved April 6, 1891." Judge Cooley, in his work on Constitutional Limitations (5th ed., p. 173), gives as some of the purposes of the provisions in constitutions in regard to titles of laws (for it is found in the constitutions of a large number of the states of the Union with some slight and immaterial variations, mainly in the wording; the general scope, spirit, and intent being the same in all) the following: "To prevent surprise or fraud upon the legislature by means of provisions in bills, of which the titles gave no intimation, and which might, therefore, be overlooked and carelessly and unintentionally adopted. To fairly apprise the people through such publication of legislative proceedings as is usually made, of the subjects of legislation that are being considered, in order that they may have opportunity of being heard thereon by petition or otherwise, if they shall so desire." Judge Gardiner of New York says: "The purpose of the sixteenth section was that neither the members of the legislature nor the public should be misled by the title." (*Sun Mutual Ins. Co. v. Mayor of City of New York*, 8 N. Y., 241.)

In order to more fully comprehend the matter under discussion it is proper here to notice another portion of our statutes. Section 2 of chapter 88, Compiled Statutes, 1893, which was passed and took effect during 1873, is as follows: "Whenever a statute shall be repealed, such repeal shall in no manner affect pending actions founded thereon, nor causes of actions not in suit that accrued prior to any such repeal, except as may be provided in such repealing statute." "The legislature has power to pass a general saving statute, which shall have the force and effect to save rights and remedies, except where the repealing statute itself shows that it was not the intention of the legislature that such rights and remedies should be saved. Though one legislature cannot bind future legislatures and each can make its laws prevail against any that exist, and its inten-

tion in that regard will be law, yet, as all legislatures are presumed to proceed with a knowledge of existing laws, they may properly be deemed to legislate with such provisions of a general nature in view." (Sutherland, Statutory Construction, section 226, and cases cited.) The general saving clause of our statute would have saved all actions pending under the provisions of the sections repealed, or causes of action not in suit, that accrued prior to the passage of the repealing act, if it had not been expressed in or clearly shown by the statute of 1891, which repealed sections 136 and 139, that it was not the purpose of the legislature that such pending actions and those accrued, but not in suit, should be preserved. (*Gilleland v. Schuyler*, 9 Kan., 569; *State v. Boyle*, 10 Kan., 113.) Our legislature did state in the act of 1891, by which the sections under consideration were repealed, their intention that it should apply to cases pending, or afterward brought, and the only question for us to determine at the present time is, whether or not the statements in the title included this object of the act as it is contended they must, in order to free the statute from any objectionable quality under the provision of the constitution invoked by counsel for plaintiff in error, and upon which the argument that the act is unconstitutional is based. It is a well settled rule that in order to justify a court in pronouncing a statute unconstitutional, it must clearly appear that it is so, and unless the act of 1891, or the portion of it which prevented the operation of the general saving clause of our law, was clearly within the mischief sought to be prevented by the constitutional provision, it must be upheld. While the title to an act of the legislature should fairly reflect the elements of the subject of the act, it need not be made an index to all of them that are connected with and incident to such subject. We think the portion of the act in question was sufficiently connected with and subsidiary to the main purpose of the law to bring it within the scope of

such purpose, and to make it germane to the subject-matter of the act; and if so, it was sufficiently expressed in the title. Moreover, we think the sections of chapter 88, *supra*, of which section 2 contained the saving clause, which were passed under the following title: "An act concerning the enacting and repealing of statutes," may be styled (and not inaptly), as were some similar provisions in Kansas, "A set of *quasi*-legislative by-laws," and as they are continually and generally in force and known, or presumed to be known, by the legislator and the public at all times, they could not be misled by the fact that such words were used in the body of the repealing act as made a repeal operative as to pending actions or accrued rights of action, without a specific statement in the title of the act that it would contain such a sentence. Furthermore, the saving clause embodies the authorization for the introduction of a statement in any repealing act which will destroy any effect the general saving clause would otherwise have, wherein it reads, "except as may be provided in such repealing statute," and it seems no more necessary that the appearance of such a statement in the repealing statute should be announced by its title than that the act will contain an emergency clause or provision as to the time it will take effect should be so announced. We conclude that the act passed by the legislature and approved April 16, 1891, entitled "An act to amend section 136 and section 139 of chapter 16, Compiled Statutes, 1889," is not unconstitutional for the reason urged by counsel.

In the judicial district in which the trial of this case was heard there were two judges, one of them (Judge Bush) heard the arguments on demurrers to the petition and overruled them. The trial was conducted by Judge Babcock, the other judge of the district. At the commencement of the introduction of the testimony the defendants objected to the reception of any evidence, on the ground that the petition did not state a cause of action. This was overruled,

and properly so, in strict compliance with the rule announced by the court in *Marvin v. Weider*, 31 Neb., 774, in which it was held: "In a district where there are two judges, a demurrer to an amended petition was overruled by Judge B. and leave given the defendant to answer, which he did. Afterwards the cause came on for trial before Judge A., who sustained an objection to the introduction of any evidence, on the ground that the petition failed to state a cause of action. *Held*, Error. That the ruling of one judge upon a matter directly involved in the case is binding upon the other, unless for cause it is set aside." In the case at bar it appears that after the evidence was closed, and after a portion of the arguments to the jury had been made, the jury were instructed to return a verdict for defendants, as the pleadings, the evidence, and the law would not sustain a verdict against them or any of them. To this the attorney for plaintiff excepted and assigned it as error, arguing that it was holding that the plaintiff had no cause of action, and in effect sustaining a general demurrer to the petition and reversing the ruling of Judge Bush, who overruled such a demurrer, and was contrary to the rule as stated in *Marvin v. Weider, supra.* With this we cannot agree. Another element entered into the consideration of the case by Judge Babcock, viz., the evidence, and we think it was proper and his duty, if, in view of the pleadings, the evidence, and the law applicable thereto, a verdict for plaintiff could not be sustained, to direct the jury to return a verdict as he did, and it was no violation of the rule expressed in *Marvin v. Weider*, invoked by counsel for plaintiff.

It appears that after the close of the testimony and some arguments of counsel the trial judge announced that it was his intention to instruct the jury to the effect as hereinbefore quoted. Counsel for plaintiff then made a motion by which he asked to be allowed to amend the petition and state therein specifically the insolvency of the bank and its

continuance in business after becoming so, and fraud in inducing the plaintiff to deposit her money therein. This motion the trial court overruled, and his action in refusing to allow such amendment is one of the errors assigned in the petition. The provisions of our Code in regard to amendments are very broad and liberal, and this court has announced repeatedly that they must be construed so as to give full operation to such liberal spirit and intent. The petition in this case was, as we have before stated, one to recover upon the contract liability of parties composing an alleged unincorporated association or partnership or upon an alleged twofold statutory liability of the stockholders of a corporation, and after trial of the issues to a jury, and it becoming apparent from the statements of the trial judge that there could be no recovery, leave was asked to so amend the petition as to make the right to recover sound in fraud; not to make the pleading conform to the evidence, for the court had, and we think correctly, upon objection being interposed to this class of testimony when offered, excluded it. Amendments in furtherance of justice should always be allowed, but whether they shall be permitted or not rests largely in the discretion of the court, and this court will not reverse a case for the refusal to allow amendments unless it appears there has been an abuse of such discretion, and we do not think there was any such abuse in refusing to allow the amendment in this case. (*Hedges v. Roach*, 16 Neb., 674; *Clarke v. Omaha & S. W. R. Co.*, 5 Neb., 318.) It follows from the views herein expressed that the judgment of the district court is

AFFIRMED.

WILSON HOXIE ET AL., APPELLANTS, V. BARRETT SCOTT, TREASURER, ET AL., APPELLEES.

FILED MAY 22, 1895. No. 5007.

Township Bonds: VALIDITY OF ELECTION: JURISDICTION OF COUNTY COMMISSIONERS. Under section 14, chapter 45, Compiled Statutes, it is necessary, to confer jurisdiction upon county commissioners to order the holding of an election on a proposition to vote bonds by a township in aid of a work of internal improvement, that a petition should be presented to such commissioners signed by not less than fifty freeholders of such township.

APPEAL from the district court of Holt county. Heard below before CRITES, J.

H. E. Murphy, for appellants.

Seevers & Seevers, *M. F. Harrington*, and *E. W. Adams*, *contra*.

RYAN, C.

The appellants, by their petition filed in the office of the clerk of the district court of Holt county, sought to enjoin the collection from themselves of certain taxes levied to pay upon the interest and a part of the principal of certain bonds issued for Gratton township, in Holt county, by the authorities of said county. These bonds, thirty-six in number, for $1,000 each, were issued August 1, 1890, to the Nebraska & Western Railway Company, or bearer. The facts upon which the cause was determined in favor of the appellees were agreed upon and stated in a written stipulation signed by both plaintiffs and defendants. There seems to be some reliance by appellees upon the conceded fact that before the maturity of the first coupon which fell due these bonds were sold and transferred by the

railroad company to purchasers who bought with only such notice as by the records and the law was of necessity imputable to them. If the status of these purchasers is such that the irregularity hereinafter referred to could not affect their rights as *bona fide* holders of the above bonds, our conclusion will in no way conclude them. If, on the other hand, the result must be such that the validity of the bonds for any purpose, and by whomsoever held, shall of necessity be declared impossible, the question of purchase of these bonds in good faith may incidentally become one of little or no practical importance. We shall not assume to pass upon the rights of holders of the bonds as *bona fide* purchasers, because these parties are not in court. The proposition upon which this appeal must be determined must be considered as though there had been no sale of the bonds by the railroad company, for, under the stipulation of facts which must govern, this is the only proper subject of inquiry. The following language is quoted from this stipulation of facts: "It is admitted by the defendants in this case that the fifty-two names signed to the petition requesting the county board to submit to the electors of Gratton township the proposition to issue these bonds," and that "only thirty-five of said fifty-two persons were actually freeholders in Gratton township," etc. It is not perceived why the word "actually" was used with the word freeholders, for its effect was not to qualify that descriptive term. This is especially true in view of the rule that "if taxes are to be imposed upon the whole body of taxpayers by a vote of a certain proportion of them for the purpose, not of exercising any legitimate function of government, but solely for the purpose of making a gift in aid of an enterprise *quasi*-public in its nature, but still of a business character, it is the duty of courts to see that such power is not abused; that the donees bring themselves within the strict terms of the grant, and that the donors receive precisely what they

bargain for." (*Nash v. Baker*, 40 Neb., 294.) Our concern now is with that part of the stipulation in which the defendants, in effect, conceded that only thirty-five signers of the petition for the election, pursuant to which the bonds were issued, were freeholders. It is required by the provisions of section 14, chapter 45, Compiled Statutes, that the petition presented to the county commissioners for an election to determine whether or not bonds shall be issued in aid of a work of internal improvement must be signed by not less than fifty freeholders of such township. The want of jurisdiction of the county commissioners and other officers clothed with like powers, with respect to similar petitions, to act upon the petition of less than fifty freeholders, or of a certain proportion of qualified electors, is no longer a debatable question in this state. (*State v. School District*, 10 Neb., 544; *State v. School District*, 13 Neb., 82; *Orchard v. School District*, 14 Neb., 378; *State v. Babcock*, 21 Neb., 187; *Wullenwaber v. Dunnigan*, 30 Neb., 877; *Fullerton v. School District*, 41 Neb., 593.) As the county commissioners had presented to them no petition upon which they had jurisdiction to order an election, the bonds were issued without authority of law. The judgment of the district court is therefore

REVERSED.

WINFIELD S. ATWOOD ET AL. V. MARY A. ATWOOD.

FILED MAY 22, 1895. No. 5992.

Partition: FINAL ORDER: REVIEW. In the petition of a widow the prayer was for judgment confirming her share in, and the partition of, certain real estate owned by her deceased husband, and that if division of such lands could not be made in kind between herself and his four children, a sale should be ordered and the proceeds thereof divided according to the respective

rights of the parties. A demurrer having been sustained to an answer, the record merely thereafter reciting "judgment of a partition as prayed for in the petition," is *held* not to disclose a final judgment.

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

Pound & Burr and *L. H. Blackledge*, for plaintiffs in error.

J. W. Cole, contra.

RYAN, C.

This action for petition was brought by the defendant in error in the district court of Hitchcock county against the plaintiffs in error, who, as children of the deceased husband of the defendant in error, were alleged to hold undivided shares in the real estate of which their father died seized. There was filed a demurrer to an answer to this petition, which was sustained, whereupon the record recites there was "judgment of partition as prayed for in the petition." As the above quoted language was all that by any construction could be claimed to amount to a final judgment, it is important to consider what in fact was the prayer of the petition therein contemplated. It was as follows: "This plaintiff therefore prays that judgment may be entered confirming her share of said estate, as set forth in the foregoing petition, and that partition of said described lands may be had according to the respective rights of the parties interested therein, or, if the same cannot be equitably divided, that said premises may be sold and the proceeds thereof divided between the parties according to their respective rights, and that plaintiff may have all other proper and equitable relief." The order of "judgment as prayed for in the petition" left still undetermined what were the rights of the respective parties,

and whether or not a division could be made without a sale of the entire property, and until the settlement of these questions, at least, it could not be claimed that there had been rendered a final judgment. This error proceeding is therefore

DISMISSED.

CITIZENS STATE BANK OF CHADRON, APPELLANT, V. WILLIS F. BELLANGEE ET AL., APPELLEES.

FILED MAY 22, 1895. No. 5966.

Chattel Mortgages: OWNERSHIP: REVIEW: SUFFICIENCY OF EVIDENCE. This appeal involves only questions of fact, and, upon careful consideration of all the evidence, the judgment appealed from is found fully sustained by the proofs.

APPEAL from the district court of Dawes county. Heard below before KINKAID, J.

C. H. Bane and *D. B. Jenckes*, for appellant.

Spargur & Fisher, contra.

RYAN, C.

Under and by virtue of a chattel mortgage made to plaintiff, the Citizens State Bank of Chadron, by Willis F. Bellangee and Grant Bellangee, the said mortgagee replevied from the possession of Harvey L. Cornwell twenty-seven head of cattle. Originally, Mr. Cornwell had shipped in 1887 to James L. Bellangee a larger number of cattle than above named, to be by James kept and cared for on a timber culture claim held by Cornwell in Dawes county. The cattle replevied were a part of those originally sent and their increase. Willis F., Grant, and James

L. Bellangee were brothers; their sister was the wife of Harvey L. Cornwell. While James was breaking out and farming the timber culture claim and caring for the stock under the above mentioned arrangement with Cornwell, Willis F. and Grant were in his employ. It would seem from the evidence that the two brothers last named took advantage of the absence of James to lay claim to the cattle in dispute as purchasers from Cornwell, and by their apparent sole possession their claim was rendered very plausible. The cattle were originally branded with the letters "H. C." and, so described, were originally mortgaged by Willis F. and Grant. Afterwards, they represented to Mr. McFadden, cashier of the Citizens State Bank aforesaid, that from "H. C." they had changed their brand to "F. X. E.," and by reference to this distinctive brand the cattle were described in the mortgage then made under which they were replevied by the bank. There was also brought by the bank against Willis F. and Grant Bellangee and Harvey L. Cornwell, in the district court of Dawes county, an action for the foreclosure of its last mentioned mortgage and for other equitable relief in that connection. The replevin action and that for equitable relief were consolidated by agreement of parties and submitted to the court as one action on all the issues involved. There was judgment in favor of defendant Cornwell, for the dismissal of plaintiff's action with costs, from which judgment plaintiff appeals.

From the necessities of the case, the only matters of evidence available to plaintiff were the statements of Willis F. and Grant Bellangee as to their acquisition of title by purchase from Cornwell, and their possession under claim of ownership. As the whereabouts of these two brothers could not be learned, their testimony was not procured by either party. There was an overwhelming amount of evidence by which it was shown how, when, and of whom Cornwell purchased, the fact that he shipped

the cattle purchased to Chadron, and that as an evidence of his ownership two initial letters of his name, "H" and "C," were branded upon each animal, and that the branding with the letters "F. X. E." was not known to him. There was involved no question other than of fact in the controversy, and as in the light of the evidence the judgment of the district court was clearly right, it is

AFFIRMED.

WILLIAM G. BALL v. SWEN NELSON.

FILED MAY 22, 1895. No. 6527.

Review: TRANSCRIPT. When there are alleged no errors, except such as depend upon the proposition that a demurrer was well taken, the absence of such demurrer from the transcript precludes a consideration of the several assignments of the petition in error.

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

C. C. Flansburg, for plaintiff in error.

John Everson, contra.

RYAN, C.

The record in this case contains a petition entitled "Swen Nelson v. William G. Ball," in which the plaintiff's cause of action alleged was the failure of the Nebraska & Kansas Farm Loan Company to pay to plaintiff the sum of $413.50 due him; the failure of said Nebraska corporation, for more than a year anterior to the incurring of said debt, to publish the notice of its indebtedness required by section 136, chapter 16, of the Com-

piled Statutes previous to the repeal of said section in 1891, and the fact alleged that the defendant was a stockholder in said corporation during its said default of publication as well as of payment. The petition closed with a prayer for a personal judgment against William G. Ball in the amount above named. By affidavit filed in this case it was shown that defendant was a non-resident of this state, and that in the hands of one C. C. Flansburg he had moneys, and that therefore said Flansburg was owing said defendant. There was served upon Mr. Flansburg a notice of garnishment, requiring him to appear in the district court of Harlan county and answer as garnishee on November 1, 1892. We do not find in the record any answer of this garnishee. In one part of the transcript it is recited that a demurrer was overruled, to which ruling the defendant excepted; afterwards in the record, under proceedings of the same date as that whereon the ruling referred to was made, it is recited that the cause came on to be heard on demurrer, which was overruled, and that the garnishee excepted and refused to plead further, whereupon the court entered judgment against the defendant for the sum of $200. From the fact that one of these entries was made in the trial docket and the other in the journal of the same date, it is presumable that they described the same transaction. It is quite likely, too, that the first was simply a memorandum made by the presiding judge, from which the journal entry was prepared. If this is a correct surmise, there could only be considered the journal entry (*Brown v. Ritner*, 41 Neb., 52), and it would necessarily result that we could prosecute no further inquiry, for the defendant could not avail himself of an exception not taken by a party to the action. It is possible that the demurrer was filed for the defendant, but neither of this nor of the grounds of the demurrer have we any means of information, as it was not made a part of the transcript. Under these cir-

cumstances we cannot presume that the district court erred in the ruling made upon whatever demurrer was considered, and as the entire argument of plaintiff in error was directed to this proposition, and no other is presented by the record, the judgment of the district court is

AFFIRMED.

ANDREW P. LEACH ET AL. v. BENJAMIN RENWALD.

FILED MAY 22, 1895. No. 6021.

Necessity of Ruling on Motion for New Trial: REVIEW. No reversal of a judgment can be had where the errors assigned are solely such as are claimed to have occurred during the trial and in the rendition of the judgment against plaintiff in error, if in the district court a ruling upon a motion for a new trial is not shown to have been made.

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

Woolman & Strout, for plaintiffs in error.

George E. Banks, *contra*.

RYAN, C.

This case was tried without the intervention of a jury and judgment was rendered in favor of the plaintiff by the district court of Hitchcock county for the sum of $21.65 and costs. The defendant now seeks a reversal of this judgment against him, and in his petition in error assigns errors occurring at the trial and in rendering judgment for plaintiff in view of the law and evidence. There was filed a motion for a new trial in the district court, upon which the record discloses no ruling. In *Jones v. Hayes*, 36 Neb.,

526, this court held that a review in error of the proceedings of the district court could not be had unless therein had been presented and passed upon a motion for a new trial. This rule has in its support the following cases: *Cropsey v. Wiggenhorn*, 3 Neb., 108; *Gibson v. Arnold*, 5 Neb., 186; *Lichty v. Clark*, 10 Neb., 472; *Smith v. Spaulding*, 34 Neb., 128; *Shrimpton v. King*, 39 Neb., 779; *Brown v. Ritner*, 41 Neb., 52; *Gordon v. Little*, 41 Neb., 250. The judgment of the district court is

AFFIRMED.

CHESTER POWERS ET AL., APPELLANTS, V. ERNEST BUDY ET AL., APPELLEES.

FILED MAY 22, 1895. NO. 6327.

1. **Religious Societies**: REGULARITY OF ECCLESIASTICAL PROCEEDINGS: COURTS: REVIEW. Courts which have no ecclesiastical jurisdiction will neither review nor revise the proceedings or judgments of church tribunals where therein are involved only questions of church discipline. Following *Pounder v. Ash*, 44 Neb., 672.

2. ———: ———: ———: ———. There exists no power in courts of equity to supply lacking remedies for the regulation of the affairs of a church organization within itself. As a voluntary association it alone has the power, and, if necessary, must itself provide means for the adjustment of all matters with respect to its internal polity which do not affect the rights of the citizen or the jurisdiction of the state.

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

Ed. P. Smith, W. P. McCreary, E. B. Esher, and *Ritchie & Esher*, for appellants.

W. A. Bergstresser and *A. H. Bowen, contra.*

RYAN, C.

The appellants as plaintiffs were denied the relief by them prayed in the district court of Adams county. The allegations of their petition pertinent to our review of the decree complained of on appeal were that Shilo church at Kenesaw, in the aforesaid county, was an organization created under the laws of Nebraska in conformity with the rules and government of the Evangelical Association of North America; that said Shilo church had acquired two certain tracts of real property, on one of which was a church building, and the other was used for a parsonage; that one of the plaintiffs, Conrad Schwab, at the time of the filing of the petition, and long before, was, and had been, an ordained minister in said Evangelical Association and a member of the Platte River conference; that at the annual conference of the Platte River Conference District in 1892, presided over by S. C. Breyfogle, an acting bishop in said association, the aforesaid Conrad Schwab was duly elected and thereupon was duly assigned to preach and preside over said Shilo church. It was charged in the petition that notwithstanding the facts stated, the defendants wrongfully refused to recognize the pastoral authority of Rev. Conrad Schwab, and unless restrained would eject him from the aforesaid church property. While this language would imply that Rev. Conrad Schwab was in the possession of said church property, this is rendered perhaps more than doubtful by the following averments found in the petition, to-wit: "Plaintiffs state that the defendants were at one time members of said Evangelical Association, but that they are now in a state of rebellion against the same, against the officers thereof, and refuse to be governed by the laws of said Evangelical Association as set forth in the discipline thereof; that they refuse to recognize any of the acts of the annual conference herein mentioned; refuse to accept the minister thereat assigned, and without

any right whatever have placed in the pulpit of said church the defendant Samuel H. Dunkleberger, who is also in a state of rebellion against the said association, its officers and members, who has no right whatever to preach in said church, or preside over the congregation of said association thereat." Following the above language the averments of the petition were, in effect, that the defendants were seeking to obtain possession of the parsonage building and eject Rev. Conrad Schwab therefrom; that the defendants, with all their power, were trying to destroy the Evangelical Association, teaching doctrines and ideas contrary thereto—inciting to rebellion against said association and authority certain of its members, and to accomplish said purposes were using the property of Shilo church and diverting said property from its proper uses. The prayer of the petition was for an injunction "restraining the defendants from doing, causing to be done, or in any manner counseling others to do, each and every of the wrongs herein complained of," and for general equitable relief. The defendants, with zeal equal to that displayed by plaintiffs, answered to the extent of twenty-one pages of type-written matter, supplemented with eleven like pages of exhibits. In this answer it was asserted that neither of plaintiffs was a member of Shilo church aforesaid; that Conrad Schwab had never been a legally appointed, empowered, or qualified minister of the church described in the petition and had never been appointed by any legal or other conference. It is quite unnecessary to further summarize the contents of the answer, for already it appears that this contest was as to the right of Mr. Schwab as against Mr. Dunkleberger to officiate as pastor of Shilo church. The rival claims of right in this respect are traceable to the dispute which arose in the Evangelical Association of North America concerning the alleged suspension of Bishop Esher by a committee which, over his protest, assumed and exercised jurisdiction,

as it claimed, with the result indicated. Previous to the above final action by the committee, Bishop Esher came to Beaver Crossing, Nebraska, and by virtue of his office of bishop attempted to preside over the annual meeting of the Platte River Conference at that place. This body refused to recognize him as its president, because there then existed charges against him, and, under the provisions of the discipline of the Evangelical Association applicable in cases where no bishop was present, there was elected an elder, who thereupon, with the assent of all present, except Bishop Esher and perhaps one other person, assumed to act as president of this conference, which, among other acts, designated Holdrege as the place for its meeting in 1891. At the meeting held in Holdrege pursuant to above designation, Glenville was selected as the place at which the Platte River Annual Conference should be held in 1892. At this conference at Glenville, Rev. S. H. Dunkleberger was assigned to preach and preside over the congregation at Shilo, and the performance of the duties devolved upon him by this association were those which plaintiffs sought by this action to prevent by injunction. When an elder had been elected president at the annual conference at Beaver Crossing on the assumption that no bishop was present, Bishop Esher protested, and, finding that he was not heeded, withdrew, after denouncing the proceedings as without warrant. In the *Evangelical Messenger*, a journal purporting to be the organ of the above described Evangelical Association, of date February 24, 1891, J. J. Esher, without any official designation, called a meeting of the Platte River Conference for reorganization and for its annual session to be held at Omaha, March 6, 1891. At the meeting thus called Nelson was fixed upon as the place of the annual meeting of the Platte River Conference in the year 1892. It was by this latter convocation that Rev. Conrad Schwab was appointed preacher of said Shilo church, and between this appointee and Rev.

S. H. Dunkleberger trouble at once began, and, though the term of appointment expired in March, 1893, the contest survives in this appeal.

By the pleadings there were presented for determination, *in limine*, the questions whether or not either appointee was a member of the general society known as the Evangelical Association of North America, and whether or not either of the parties litigant was connected therewith or were seceders from and in rebellion against it. If these propositions should be settled in such a manner as to permit of further litigation, the next question presented would be whether or not J. J. Esher was a bishop when the Platte River Annual Conference was held at Beaver Crossing, and if so, what was the effect of the irregularities which in such case must be conceded to have characterized subsequent proceedings. These are questions which must be determined by the proper authorities of the association. While they are insisted upon in this appeal, they are in fact merely incidental to the principal, and probably the only, question which we are asked to decide, and that is, who was the proper preacher to have charge of and preside over Shilo church between a day certain of March, 1892, and a corresponding day in March, 1893?

In *Pounder v. Ashe*, 44 Neb., 672, an opinion has been filed during this term in which it was held that so long as there is no infringement of the rights of a citizen and there is no conflict with the jurisdiction of the state, church associations should be free from the interference of courts where there is drawn in question only the right of such organizations to try and, if need be, expel its members for the violation of a church ordinance or law. It is quite possible that for the final determination of the unhappy controversy, to which this is a mere incident, there exists in the regulations of the Evangelical Association of North America no sufficient provision. This, if it exists, is a deficiency which can be supplied only by the association.

Courts of equity, while they may supply remedies not available in legal actions, have no jurisdiction to supplement the powers of purely voluntary associations when, through improvidence, they in practice are found inadequate. To concede that voluntary associations cannot govern themselves might present a convincing argument against allowing them at all to exist, but by no means affords a justification for placing them under the guardianship of the state through its courts. The separation of church and state cannot be too thoroughly insisted upon, and the contingency which would justify control by the latter of the affairs of the former is scarcely, if at all, imaginable. The necessity for this independence, as well as its actual existence, have been universally recognized and frequently enforced by the civil tribunals of this country. (*Connitt v. Reformed Protestant Dutch Church*, 4 Lans. [N. Y.], 339; *White Lick Quarterly Meeting of Friends v. White Lick Quarterly Meeting of Friends*, 89 Ind., 136; *Shannon v. Frost*, 3 B. Mon. [Ky.], 253; *Gaff v. Greer*, 88 Ind., 122; *Chase v. Cheney*, 58 Ill., 509; *State v. Farris*, 45 Mo., 183; *Watson v. Jones*, 13 Wall. [U. S.], 679; *Pounder v. Ashe*, 44 Neb., 672.)

The decree appealed from which dissolved the injunction obtained by plaintiffs and denied the relief prayed was justified by the views expressed, and the judgment of the district court is therefore

AFFIRMED.

JAMES H. MCMURTRY V. CELINA B. BLAKE ET AL.

FILED MAY 22, 1895. No. 6147.

Contracts: REFUSAL TO CONVEY LAND: DAMAGES. Where one accepts of a conveyance of real property upon the express condition that it is to be by him conveyed to another, his willful re-

fusal to so convey renders him liable for such damages as shall thereby be caused to the party entitled to receive conveyance, either by expenses of litigation rendered necessary, or from the loss of an opportunity to sell such lands at a good price while conveyance is wrongfully withheld.

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

J. R. Webster and *Reese & Gilkeson*, for plaintiff in error.

Stevens, Love & Cochran, contra.

RYAN, C.

In this case there was in the district court of Lancaster county a judgment in favor of Celina B. Blake, the original plaintiff, against James H. McMurtry for the sum of $2,774.67 and costs. To reverse this judgment McMurtry prosecutes error to this court. J. R. Webster was joined as a defendant in error for the reason that, sued with McMurtry, there was a verdict in his favor.

In the earlier history of the difficulties out of which this case grew there was delivered an opinion of this court by its then chief justice (*vide Blake v. McMurtry*, 25 Neb., 290), in which most of the essential features of this action were fully described. In argument, it is intimated that this opinion was based upon a radical misconception of the facts contained in the record at that time under consideration. It is very difficult to imagine how we can treat the opinion referred to as less than conclusive of the correctness of every proposition of fact therein stated, for, by consent of all parties, it, together with its entire syllabus, as well as the compendium of the brief of counsel for each side, were read to the jury. At the risk of reiterating what may be found already well stated in the case referred to, a brief statement of the facts will now be attempted. On the 29th day of April, 1878, Wealthy P. Gregory, with her husband, made a mortgage to R. E. Moore on such

part of the north half of the northwest quarter of section 34, township 10 north, range 6 east, 6th P. M., as was then owned by said mortgagors or either of them. By warranty deed of date of April 25, 1872, which was filed for record on the same day, there had been conveyed five acres of the above tract to R. R. Tingley, by whose warranty deed of date and filed for record January 30, 1879, said five-acre tract was conveyed to Hannah L. Tingley. The title of the defendant in error, Celina B. Blake, was by *mesne* conveyances derived from Hannah L. Tingley. R. E. Moore began foreclosure proceedings on his mortgage, in which proceedings Hannah L. Tingley was made a defendant, and on September 12, 1879, she answered, asserting her title. Under a stipulation of the parties a decree was entered in favor of Moore, from which the five-acre tract owned by Celina B. Blake was omitted. On March 26, 1881, R. E. Moore obtained leave to amend his petition and thereon took a decree, June 25, 1881, which included the five-acre parcel owned by Hannah L. Tingley, without notice to or appearance by her, or her representative. To enforce this decree an order of sale, after some years, issued against the entire eighty-acre tract above described. The defendant in error, who had in the meantime become the owner of the Hannah L. Tingley five acres, thereupon caused to be prepared a petition for an injunction against the sale of the parcel of land of which she was now the owner, and secured a temporary order thereon as prayed. F. M. Hall, an attorney of R. E. Moore, to whom was shown the above petition and order, to prevent interference with the proposed sale by the sheriff, thereupon executed the following instrument:

"LINCOLN, NEB., August 10, 1886.

"In consideration that Celina Belle Blake, at my request, has not enjoined the sale of the below described five acres this day, I agree, on confirmation of sale in Moore v. Gregory, to convey and quitclaim to her the five acres de-

scribed as commencing fifty rods south of the northeast corner of the northwest quarter of section 34, township 10 north, range 6 east, thence west forty rods, south twenty rods, east forty rods, north twenty rods to beginning, a part of lands purchased at sale. F. M. HALL,

"Bidder at Sale."

The entire eighty-acre tract was thereafter purchased by Mr. Hall, but the confirmation of sale was resisted by Wealthy P. Gregory and her husband for the purpose of securing to themselves the benefits of homestead exemptions under the statutes of this state. The resistance on their behalf was conducted by their son, John S. Gregory, Jr., an attorney at law. The manner in which confirmation was finally secured was stated by Mr. Hall thus: "We * * * never did get the sale confirmed at all until after the agreement was made by which I was to deed this whole eighty acres of land to McMurtry, and before I deeded it to McMurtry I cannot say whether the proposition was made by John S. Gregory or McMurtry, but one or the other proposed to me, as a member of our firm, that if I would deed this land to them, after they got a deed to it, they would pay our mortgage, interest, and costs. When that proposition was made I went to General Webster, who represented the parties to this contract to whom I had agreed to deed, and I just laid these facts before him. * * * My understanding both with General Webster and with McMurtry was that my contract would be carried out; that is, if I deeded this land to McMurtry he would convey, according to the terms of my contract with General Webster, to his client. With that understanding I made this deed to McMurtry." In the course of his testimony Mr. Hall said that several times previous to making the deed to McMurtry, Mr. Gregory had offered to pay off the Moore mortgage if witness Hall would turn it over to include the five acres, because he (Gregory) was of the opinion that Mrs. Blake was estopped and concluded

by the foreclosure. This, Mr. Hall said, he declined to do because of his contract with Mrs. Blake.

Mr. McMurtry testified that he owned thirty-one and a quarter acres of the eighty mortgaged to Moore. Further testifying he said: When this sale had been made, which I knew nothing of till after the sale was made, * * * I wished to get my land out of this litigation. I then said to Gregory that I would pay the amount of the R. E. Moore judgment if I could hold my land out of the sale and stop the injunction proceedings. He said if I would take a deed to the land from Mr. Moore and hold it so as to save his mother's homestead and any right he might have, or then might have to this north half of the north-east quarter of 34-10-6, that he would not enjoin or fight the sale of the land at that time. I went and saw Mr. Hall and told Mr. Hall that I would take his place in the contract that he had made exactly as he stated, and would convey this land to Mrs. Blake as soon as the matter could be settled, and in pursuance to that contract I paid Mr. Hall the money for his clients. He told me he would see me later with regard to it. Then General Webster called on me and told me of this contract, and told me what I was doing, and the position I would be in, and said that if I would promise him that I would make no transfer of this five acres of land belonging to Belle Blake and would hold the land subject to any order the court might make on this land that he would consent to this matter. I think this was about the position it was in, and in pursuance of that contract I paid the money—somewhere between $900 and $1,200—and took the deed of Mr. Hall to get my land out of the controversy and to hold the other land till I was ordered to deed it by the court.

(Question by General Webster.) And I brought the action for Mrs. Blake immediately?

A. Yes; the same day. I think the papers were served on me before the deed or about the same time the deed

was made to me for the land—I think the same time—the beginning of the suit by Belle Blake against me for the recovery of the land. The only object I had in the matter was to clear the cloud from my own land.

On his cross-examination Mr. McMurtry testified that he never paid particular attention to the suit in the district court or in the supreme court and knew nothing about it—knew nothing about who it belonged to.

Following his statement that his contract was to deed to Mrs. Gregory was the question if it was not also to deed to Mrs. Blake. Mr. McMurtry testified:

No, sir; the contract with Hall was to deed to Mrs. Blake. The contract with Gregory was that I was to deed to Gregory.

Q. The same land?

A. Yes.

Q. That is the position you were in?

A. That is exactly the position I was in. I was between the devil and the deep sea.

In this uncomfortable dilemma Mr. McMurtry voluntarily remained until released by the judgment of this court at the July term, 1888. (*Vide Blake v. McMurtry*, 25 Neb., 290.) The deed from Mr. Hall and wife to McMurtry was dated March 25, 1887. It was then the duty of Mr. McMurtry to convey to Mrs. Blake. There was no excuse possible for his agreement to convey this land to Gregory thereafter in violation of his undertaking to carry out the stipulation of Mr. Hall that conveyance should be made to Mrs. Blake. Instead of conveying to her, however, Mr. McMurtry saw fit to compel Mrs. Blake to resort to legal proceedings to compel what it was his duty to do. By this course he in his own wrong deprived Mrs. Blake of the power to advantageously dispose of the subject-matter over which she was compelled to litigate. This enforced delay was at his own risk, and, as there was evidence showing that Mrs. Blake in expenditures in the

litigation and the loss of opportunities to sell was damaged the full amount of the verdict, the plaintiff in error has no just cause for complaint.

It is urged, however, that by the evidence of Mr. Blake that Sherwin & Sherwin, a firm of real estate agents, had procured a would-be purchaser for the five acres at a high price the plaintiff in error was taken by surprise, and that, if an opportunity had been afforded, he could have contradicted this statement by the evidence of said real estate agents, as shown by their affidavits filed after the trial. It is worthy of note, however, that when Mr. Blake gave the evidence complained of there was no objection to its character, neither was there any attempt to secure a continuance. Not only was this true, but from an affidavit filed by a member of the firm of Sherwin & Sherwin it appears that the contradictory evidence could not have been made very direct or satisfactory. There was also evidence, on the trial, of J. H. Blair, another real estate dealer, that he, while the land was tied up in litigation, had by authority offered the same price for the disputed land as had been stated by Mr. Blake as the offer through Sherwin & Sherwin. Under these circumstances there was no error in refusing a new trial for the purpose of putting in evidence the statements of the individual members of the firm of Sherwin & Sherwin.

There is no criticism of the instructions either given or refused, neither is there any other question presented by the record. The judgment of the district court is

AFFIRMED.

LYSANDER W. TULLEYS, APPELLANT, V. CHARLES B. KELLER ET AL., APPELLEES.

FILED MAY 22, 1895. No. 7240.

1. **Corporations:** OFFICERS: USE OF NAME AS TRUSTEE. Where the president of a loan company consented that securities in the nature of trust deeds should be made to himself, described as trustee, he thereby gained no right to use such designation to the injury of the company of which he was president and which was in fact the beneficiary named or contemplated in such trust deeds.
2. **Equity Jurisdiction.** One who submits to the determination of a court of equity his claim of a right to employ the designation of himself as trustee to the disadvantage of the beneficiary, and prays the judicial recognition and enforcement of such right, has no cause to complain if such court having taken jurisdiction of the subject-matter for said purpose administers complete relief as between all the parties to such litigation.
3. **Loan Companies:** CORPORATE OFFICERS: USE OF NAME AS TRUSTEE. The facts in this case stated, and *held* to justify the decree entered in the district court.

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

Breckenridge & Breckenridge, for appellant, cited: *Holden v. New York & Erie Bank*, 72 N. Y., 286; *Myers v. Ross*, 3 Head [Tenn.], 59; *Hart v. Farmers & Merchants Bank*, 33 Vt., 252; *National Security Bank v. Cushman*, 121 Mass., 490; *Bank of New Milford v. Town of New Milford*, 36 Conn., 93; *Central Nat. Bank v. Levin*, 6 Mo. App., 543; *Toll Bridge Co. v. Betsworth*, 30 Conn., 391; *New Hope & Delaware Bridge Co. v. Phenix Bank*, 3 N. Y., 166; *Trenton Banking Co. v. Woodruff*, 1 Green Ch. [N. J.], 128; *Porter v. Bank of Rutland*, 19 Vt., 410; *Fulton Bank v. New York & Sharon Canal Co.*, 4 Paige Ch. [N. Y.], 136; *Mechanics Bank v. Schaumburg*, 38

Mo., 228; *Village of Port Jervis v. First Nat. Bank*, 96 N. Y., 550; *Quincy Coal Co. v. Hood*, 77 Ill., 68; *New England Car Spring Co. v. Union India Rubber Co.*, 4 Blatch. [U. S.], 1.

Charles B. Keller, contra, cited: *Walters v. Anglo-American Mortgage & Trust Co.*, 50 Fed. Rep., 316; *Walker v. Anglo-American Mortgage & Trust Co.*, 72 Hun [N. Y.], 334; *Glass v. Tipton, Tetersburg & Berlin Turnpike Co.*, 32 Ind., 378; *Enewold v. Olsen*, 39 Neb., 59; *Meneely v. Meneely*, 62 N. Y., 427; *Smith v. Plank Road Co.*, 30 Ala., 650; *Probasco v. Bouyon*, 1 Mo. App., 241; *Caswell v. Davis*, 58 N. Y., 223; *Holmes v. Holmes, Booth & Atwood Mfg. Co.*, 37 Conn., 278; *Glenn & Hall Mfg. Co. v. Hall*, 61 N. Y., 226; *Koehler v. Dodge*, 31 Neb., 329; *Fitzgerald v. Fitzgerald & Mallory Construction Co.*, 41 Neb., 374.

RYAN, C.

This action was brought in the district court of Douglas county by appellant against the appellees for an injunction restraining the defendants from interfering with the business of L. W. Tulleys, both as an individual and as trustee. It was likewise sought to prevent defendant's use of the name of L. W. Tulleys and of the name of Burnham, Tulleys & Co. The defendants Keller and Weldon were joined with the Anglo-American Mortgage & Trust Company simply because one, as its attorney at law, and the other, as its manager, was acting in its behalf in the matters of which complaint was made. By its answer, in the nature of a cross-petition, the Anglo-American Mortgage & Trust Company prayed that plaintiff L. W. Tulleys might be enjoined from advertising and doing business as "successor to L. W. Tulleys, trustee," and from interference with the right of such defendant to the use of the designation "L. W. Tulleys, trustee," and that plaintiff

might be restrained from the use of the above designation of himself in respect to papers, securities, and titles taken by plaintiff for which funds loaned by the mortgage and trust company had been used while plaintiff was president of said defendant. There was also in the said answer a prayer that plaintiff might be enjoined from interfering with said defendant's use of the firm name of Burnham, Tulleys & Co. in respect to commission notes and mortgages which had been taken in the name of said firm, but which in reality belonged to said mortgage and trust company, and that in such cases as plaintiff while president of said mortgage and trust company had appropriated its funds to payments for foreclosing commission mortgages in which L. W. Tulleys as a member of the firm of Burnham, Tulleys & Co. had or claimed an interest. There was also a prayer that a commissioner might be appointed by the court to make such conveyances as should be found necessary in case plaintiff should fail to execute them within such time as should by the court be fixed for that purpose. There was also a prayer for general equitable relief. It is not attempted to set out or epitomize the pleadings, for thereby would be involved much needless repetition. To avoid misapprehension, however, it is perhaps necessary to state that there was in an answer of all the defendants a denial of the averments of the petition, and that, by reply, a like issue was joined upon each of the averments of the answer. On final hearing, the plaintiff was denied relief and the prayer of the mortgage and trust company was for the most part granted. While this case has been pending in this court there has been filed an opinion upon application for an order for an additional supersedeas bond. (*Vide Tulleys v. Keller*, 42 Neb., 788.)

For some time prior to June 1, 1888, the firm of Burnham, Tulleys & Co., of which firm plaintiff was a member, was engaged in loan business, taking only real estate security. Its principal office was at Council Bluffs, Iowa,

where its membership was A. C. Burnham, L. W. Tulleys, and J. N. Brown. It had a branch office at Sioux Falls, South Dakota, where, in addition to the above membership, there was included J. V. McDowell. For such sums as were loaned bonds were taken, payable, principal and interest, to C. K. Hesse. To secure each bond a trust deed of the real property offered as security was required to be executed to "L. W. Tulleys, trustee." Where a commission for effecting a loan was not paid in cash it was secured by a mortgage subject to the above described deed of trust, the firm of Burnham, Tulleys & Co. being named as the mortgagee. Mortgages of this class were throughout this case described as commission or second mortgages. It was claimed by the plaintiff on the argument that the business of Burnham, Tulleys & Co. during the years 1886, 1887, and up to its discontinuance, about June 1, 1888, was very prosperous. This was denied by the defendant. It is difficult from the evidence before us to determine satisfactorily what was, in fact, the financial condition of Burnham, Tulleys & Co. at the date last above mentioned. There is found in the bill of exceptions a letter of Burnham, Tulleys & Co., of date November 13, 1886, addressed to P. L. Johnson at Hastings, Nebraska, in which occurs this language: "We may need $5,000 to $10,000 more money from C. B. Nat'l Bank, but, as we have already borrowed there, in order to get a further loan we will have to use different names. If agreeable, send us a note similar to the enclosed, signed by your brother and yourself, but make out the amount on a blank you have in Hastings. We send the enclosed as a sample. It looks better to have two names. We will guaranty the note and hold you harmless as to its payment. Your early attention will oblige," etc. In a letter of Burnham, Tulleys & Co., addressed to A. C. Burnham at his residence, Champaign, Illinois, of date January 17, 1888, there are contained these statements: "We have arranged for a ninety days'

extension on the $25,000 note due at the Chemical Nat'l to-day. * * * The frequent calling for papers at the east is materially affecting our business, and, doubtless, in a measure is the reason of calling in of funds. In December we sent back quite a large amount. The business is practically at a standstill, and what we did in December and January will not pay expenses. We deem it advisable to acquaint you with this condition." The extension above arranged with the Chemical National Bank, it will be noted, expired after the middle of April, 1888. Before this extended loan fell due there were sent out circular letters, of which the following is a sample:

"A. C. Burnham. L. W. Tulleys. J. N. Brown.

"OFFICE OF BURNHAM, TULLEYS & CO.,
"COUNCIL BLUFFS, IOWA, April 2, 1888.

"*Alfred Walker & Co., Farm Loans and Real Estate, 85 Orange St., New Haven, Conn.*

"Realizing the advantage of permanence and perpetuity in a business conducted under a corporate form, the American Mortgage & Trust Co. has been organized under the laws of the state of Iowa, to succeed the old and well known firm of Burnham, Tulleys & Co., which has been placing western farm mortgage loans for more than twenty-five years, and has now many millions upon its books. The proposed capital is $500,000, a large part of which has been taken by ourselves. If it were practicable we should take it all, as from our past experience in the business we feel sure it will be a profitable investment. We offer a limited amount of stock to our friends at par and fifty cents per share. Under our articles of incorporation and the laws of this state the stock is full paid and non-assessable. The company will be under the management of the members of said firm, and will adhere to the same conservative methods which have characterized their past record. It needs no argument to demonstrate the value of our plant or that the stock will pay handsome

dividends. The new form will increase our facilities, both east and west, for a more extended business, and with a larger business will come increased profits. As the amount we have to dispose of is limited, we offer it to all our friends and customers, and subscriptions will be accepted in the order of the priority of their receipt. Subscriptions should be accompanied by twenty-five per cent of the amount subscribed. The balance will be called in between now and June first, as the directors may elect. As soon as the amount to be sold is taken we reserve the right to reject subscriptions in excess."

Almost immediately after the incorporation of the American Mortgage & Trust Company it was found advisable to adopt an additional distinctive designation, and the result was the incorporation of the Anglo-American Mortgage & Trust Company. Neither party questions that this change was simply for the purpose indicated and all concede the substantial identity of these corporations. From the deposition of L. W. Tulleys we learn that up to June 1, 1888, or thereabouts, when the firm of Burnham, Tulleys & Co. was succeeded in business by the corporation last above named, the capital stock of said firm was owned by A. C. Burnham. It is not very clear just what is meant by this statement, but we assume that Burnham alone had advanced the funds necessary for carrying on the business of said firm. For whatever this interest may have been, it was arranged between Mr. Burnham and his partners, Tulleys, Brown, and McDowell, that they should give to him their notes to the amount in the aggregate of $100,000. There had been earned by the firm of Burnham, Tulleys & Co. about $140,000, which was evidenced by commission mortgages, book accounts, taxes advanced, and foreclosure expenditures made, etc. Of this amount $40,000 in par value was the distributive share of A. C. Burnham. When he took the notes of his partners in exchange for the stock of Burnham, Tulleys & Co. they as-

signed their share of the $140,000 profits above referred to ($100,000) to Mr. Burnham as collateral security to their aforesaid notes. From the evidence as an entirety, and from the assertion of counsel for appellant that Burnham was worth a million, when he contends that Burnham, Tulleys & Co. were not insolvent, in connection with his failure to mention in that connection what financial standing Burnham's partners had, it is difficult to avoid the conclusion that just at this point of time the only solvent member of the firm of Burnham, Tulleys & Co. went out of the farm loan business. In the contract whereby was assigned the above collaterals it was stipulated between Mr. Burnham and his partners that the commission notes turned out as collateral should remain with Tulleys, Brown, and McDowell for collection without expense to Burnham, and that the said collections should be applied on the notes to which the notes so entrusted were collateral, when the aggregate collections so made amounted to five or ten thousand dollars. By this arrangement there were placed in the hands of Tulleys, Brown, and McDowell assets of the nominal value of almost $100,000. Of this amount Mr. Tulleys testified that $66,000 was made up of mortgages, the remainder was composed of tax certificates, notes, etc. In order to make up the even $100,000 there were required between three and four thousand dollars, of which Mr. Burnham put up his share in cash; his partners made their notes to the Anglo-American Mortgage & Trust Company for their proportion. In this manner, as we understand it, were L. W. Tulleys, J. N. Brown, and J. V. McDowell provided with means wherewith to pay for $100,000 of the stock of the projected mortgage and trust company. These gentlemen were not satisfied, however, with this $100,000 subscription. They took stock in addition to the amount of $100,000 par value and paid for it in the good-will of the firm of Burnham, Tulleys & Co. It is possible that hereinbefore we were mistaken in assuming that the capital stock

of the firm of Burnham, Tulleys & Co. owned by Mr. Burnham, and transferred to his partners, included this good-will. For this our mistake, if such it was, we can offer only the apology that in no transaction preceding the exchange for stock, of this good-will, was it at all mentioned—most certainly it was not in the circular letters issued April 2, 1888. Against these subscriptions for $200,000 of capital stock there were stock subscriptions by eastern parties for about $110,000 at par value, for which payments were made in cash, and this last amount in fact constituted the entire assets of the Anglo-American Mortgage & Trust Company available in the business for which it was incorporated.

After the organization of the Anglo-American Mortgage & Trust Company its management was entrusted to Tulleys, Brown, and McDowell, as its officers. Indeed, in view of the amount of stock held by them, this could not have been otherwise intended. On December 7, 1888, J. V. McDowell, secretary of this mortgage and trust company, wrote to its vice president asking his advice as to making a dividend of three and one-half per cent on its capital stock. With this letter a statement of the condition of the corporation was submitted, in which there was mentioned not a single cash item, unless the term "interest, $1,120.39," amounted to such mention. The affairs of the corporation under the management of L. W. Tulleys, president, J. V. McDowell, secretary, E. H. Walters, treasurer, and J. N. Brown, vice president (the latter residing in New York), grew worse and worse. It is not shown how the change of the directory and the managing officers of this corporation was brought about, but it had become practically an assured fact in November, 1891. The affairs of the mortgage and trust company were then in such a condition that the stock which had actually been paid for in cash at par was scaled down fifty per cent. Messrs. Tulleys, Brown, and McDowell at the same time, and as part of the same transaction, gave up the stock which had been is-

sued to them in consideration of the good-will of the firm of Burnham, Tulleys & Co. While trouble was brewing in the fall of 1891, Mr. Burnham, upon the suggestion of one or more of the managing officers of the mortgage and trust company, withdrew the collaterals which he had received from Tulleys, Brown, and McDowell and entrusted them to Mr. Hesse, with instructions to keep them in certain safety deposit vaults named by Burnham. About January 22, 1892, Edward H. Walters, treasurer, and John V. McDowell, secretary of said mortgage and trust company, entered into a conspiracy with L. W. Tulleys, its president, in pursuance of which said Walters and McDowell filed in the circuit court of the United States for the district of Nebraska a bill in equity, the object and prayer of which was to have appointed a receiver to wind up the affairs of the Anglo-American Mortgage & Trust Company, of which the place of business then was, and since August 1, 1888, has been, in Omaha. L. W. Tulleys, as president of said company, entered its voluntary appearance, and on its behalf consented in writing to the appointment of a receiver as prayed. Upon application to the same court the affairs of the company were taken out of the hands of this receiver April 10, 1892, on account of the collusion whereby his appointment had been brought about. (*Vide Walters v. Anglo-American Mortgage & Trust Co.*, 50 Fed. Rep., 316.) Mr. Tulleys, after the appointment of the aforesaid receiver, continued to be the president of the Anglo-American Mortgage & Trust Company, until the annual meeting of the stockholders about June 1, 1892. From the commencement of the corporate existence of the mortgage and trust company the real estate securities were taken in the form of trust deeds, in each of which L. W. Tulleys was named as trustee. On account of the necessity of using some blanks on hand at the time of the incorporation of the mortgage and trust company until new blanks could be prepared, the name of Clarence

K. Hesse was retained as beneficiary in the trust deeds. After proper blanks for the purpose had been obtained, and thenceforward, the name of the Anglo-American Mortgage & Trust Co. was substituted for that of Mr. Hesse as beneficiary. It was explained by Mr. Tulleys in his deposition that this use of trustee and beneficiary was for the purpose of enabling transfers of the secured bonds simply by the blank indorsement thereof by the beneficiary, who was therefore presumably the payee named in each bond. This method of doing business had the disadvantage that it required in ordinary transactions that Mr. Tulleys should execute a release whenever a loan was paid off. In his deposition Mr. Tulleys testified that the mortgage and trust company in the fall of 1891 decided to do nothing more than wind up the business on hand. From this indefinite time thus named Mr. Tulleys is shown to have refused to execute releases as required upon payment of each loan, but to have insisted as a condition precedent, in some cases, that the commission mortgages made to Burnham, Tulleys & Co. should be paid by the holder of the bond, or, in other cases where by foreclosure Mr. Tulleys had acquired the absolute title to the land conveyed as security to him as trustee, that the deficiency judgment existing should be assigned as he directed, etc. In every instance of foreclosure the entire expense thereof was, by President Tulleys and his associate officers in the management of the Anglo-American Mortgage & Trust Company, charged to that company, although the most, if not the entire benefit thereof, accrued to the holders of the mortgages which had been made to Burnham, Tulleys & Co. Mr. Tulleys, in his deposition, avowed that he refused to execute releases or conveyances without the claims originally held by Burnham, Tulleys & Co. being provided for, "because," he said, "I considered myself trustee for the holder of the first mortgage and trustee for Burnham, Tulleys & Co." From these considerations it is quite evident that Mr. Tulleys, from the time he foresaw that his

control of the Anglo-American Mortgage & Trust Company's affairs must soon cease, acted in the interest of the holders of the second mortgages without regard to the rights of the corporation of which he was president, and that his position of trustee enabled him to do this effectively. At the same time he was not unmindful of his own individual interests and future prospects, as is evident from the testimony of E. H. Walters. This witness testified that he was elected treasurer of the Anglo-American Mortgage & Trust Company in June, 1889, from which date he was also a director of said company; that when the receiver was appointed the commission notes, which meantime by order of Mr. Burnham had been by Mr. Hesse turned over to Tulleys, McDowell, and Walters, were taken by this witness to Council Bluffs, Iowa, where such as are unpaid still remain; that when the receiver was appointed, about January 22, 1892, Mr. Tulleys, president, left the office of the mortgage and trust company, and that seven days before this time witness had left said office. When pressed as to having taken steps looking to the organization of a business in Council Bluffs this witness very guardedly answered and repeated that there were no such steps taken prior to the date at which he severed his connection with the company. He also admitted that after his employment by the mortgage and trust company had ceased, he secured information from the mortgage and trust company's books, which was afterwards used by Mr. Tulleys and himself, under the name of "L. W. Tulleys, trustee;" that immediately after this witness left the mortgage and trust company's employment, he and Mr. Tulleys commenced corresponding with investors and got orders from them to take charge of their business. This was done at Council Bluffs, Iowa, under the name of "L. W. Tulleys, trustee." There are embodied in the bill of exceptions several letters which need not be further described, for their object has already been sufficiently indi-

cated by the testimony of the witness just referred to. As early as June 6, 1891, the bank account of the Anglo-American Mortgage & Trust Company with the Omaha National Bank was discontinued in that name, and thenceforward stood in the name of "L. W. Tulleys, trustee." There are several other matters that might be adverted to which illustrate the methods and purposes of the plaintiff in this action, but time and space forbid further reference to them. It is sufficient to say that they illustrate the same purposes attempted to be accomplished by the same means as have already been described. After Mr. Tulleys and his associate, Mr. Walters, had embarked in business in Council Bluffs, there were remittances received at the Anglo-American Mortgage & Trust Company's office in its line of business, which were payable to "L. W. Tulleys, trustee." These were indorsed by the manager of the affairs of the mortgage and trust company with the name of "L. W. Tulleys, trustee" and collected for said company. In various other ways the right of Mr. Tulleys to use the designation "L. W. Tulleys, trustee," was denied and prevented by the Anglo-American Mortgage & Trust Company in respect to its business matters. This Mr. Tulleys resented, and to prevent its continuance he commenced this action for the relief hereinbefore indicated.

It is obvious from an examination of the petition that no relief was sought in respect to such indorsements of the name of "L. W. Tulleys, trustee," as had already been made; indeed, this would be out of the question, for Mr. Tulleys does not claim that there had been misappropriated funds owned by him. The injunction sought was in effect to restrain this mortgage and trust company from transacting its own business. This officer, who has been recreant to his duties and who has sought to misappropriate that good-will of a corporation, for which in his official capacity he had formerly been an instrumentality in procuring to be paid the sum of one hundred thousand dollars,

now has the hardihood to ask a court of equity to assist him in the further betrayal of his trust. He, with apparent sincerity, claims that in the designation "L. W. Tulleys, trustee," he has a sole proprietary right, which the courts are bound to protect, irrespective of all other considerations. The word "trustee" itself excludes the idea of proprietorship therein for his own sole benefit. It indicates that he is acting in a trust capacity, which fact of necessity implies the existence of a beneficiary, and the proofs conclusively show that that beneficiary was and still continues to be the Anglo-American Mortgage & Trust Company. It is the province of a court of equity to enforce trusts of this character rather than to render them nugatory. It is insisted by appellant, however, that not even a court of equity has jurisdiction to decree in favor of one party the right to use the name of another. It is not necessary to consider what jurisdiction the district court might have possessed if the mortgage and trust company had brought original action for the same relief as was prayed in its answer. By invoking in aid of his alleged exclusive proprietary interest in the designation "L. W. Tulleys, trustee," the powers of a court of equity, the appellant waived the right to question that court's jurisdiction to administer complete equity between the parties litigant as to the subject-matter involved. (*Swift v. Dewey*, 20 Neb., 107; *Buchanan v. Griggs*, 20 Neb., 165.) In *Sherwin v. Gaghagen*, 39 Neb., 238, it was said: "The rule is that where the party, having the right to object, voluntarily submits to the jurisdiction of a court of equity, the cause will be retained for trial on its merits and the proper relief awarded." The answer of the Anglo-American Mortgage & Trust Company, in the nature of a cross-petition, in effect prayed that Lysander W. Tulleys, the plaintiff, should be enjoined from a misuse of the designation "L. W. Tulleys, trustee," to his own advantage, and that, as a member of the firm of Burnham, Tulleys & Co., he should

be restrained from a misuse of the said trusteeship for the benefit of the firm last named to the disadvantage of the Anglo-American Mortgage & Trust Company, and that, by conveyances to be ordered by the court, such abuses as had already been perpetrated in the name of "L. W. Tulleys, trustee," should be corrected. This was in relation to the same subject-matter as was presented by Tulleys in his petition, and the decree conformably to the prayer of the answer was within the rule above laid down. It follows that the judgment of the district court is

AFFIRMED.

DEWEY & STONE ET AL. V. JOHN KAVANAUGH ET AL.

FILED MAY 22, 1895. No. 5844.

1. **Attachment:** DELIVERY BOND: APPROVAL. Sections 206 of the Code of Civil Procedure construed, and *held*, (1) that a delivery bond executed in pursuance of said section is not designed to have, nor does it have, the effect of discharging the attachment; (2) such a bond, when executed and approved, takes the place of the attached property; (3) such bond can be approved only by the officer holding the writ of attachment.
2. **Clerk of District Court:** APPROVAL OF DELIVERY BOND: ACTION ON OFFICIAL BOND; LIABILITY OF SURETIES. Where a clerk of a district court approved a delivery bond executed in pursuance of said section and thereupon directed the officer holding the writ of attachment to return the attached property to the persons in whose possession it was when he attached it, and the officer did so, and the plaintiffs in the attachment suit recovered a judgment and an order sustaining the attachment, and neither said property nor its appraised value in money was forthcoming to answer said judgment, and the plaintiffs in attachment sued the clerk and the sureties on his official bond for approving said delivery bond because in fact some of said sureties thereon had not signed the same, *held*, (1) that it was no part of the duty of the clerk of the district court to approve

such bond, and that his doing so was not an act done by virtue of his office, and that, therefore, the sureties on his official bond were not liable for such act of the clerk; (2) that the mere facts that the clerk approved the bond and directed the sheriff to release the attached property, in the absence of evidence of fraud or deceit practiced by the clerk, were not alone sufficient to render him liable to the plaintiffs in attachment for the loss sustained by reason of the clerk's approval of the bond and the release of the property by the sheriff in obedience to the order of the clerk.

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

Batty, Casto & Dungan, James R. Hanna, Wright & Wright, and *G. W. Scott,* for plaintiffs in error.

M. B. Gearon and *T. J. Doyle, contra.*

RAGAN, C.

Dewey & Stone and others brought this suit in the district court of Greeley county against John Kavanaugh, the clerk of the district court of said county, and the sureties on his official bond. A general demurrer was sustained to the petition and the action dismissed. The correctness of the ruling of the district court in sustaining this demurrer is the only question presented here.

The petition alleged, in substance, that in September, 1891, the plaintiffs in error brought certain actions in the district court of said Greeley county against a copartnership by the name of Jordan & McCarthy. These actions were brought for the recovery of money. Attachments were issued and levied upon the goods and chattels of the said Jordan & McCarthy. On the 28th of May, 1888, the sheriff of said county returned the several writs of attachment in his hands, showing that he had levied them on the goods and chattels of Jordan & McCarthy, and that he then had the said goods in his possession by virtue of their seizure under

said attachment writs; that on the 7th of June, 1888, the clerk of the district court received from Jordan & McCarthy a bond in words and figures as follows:

"Whereas, * * * the sheriff of Greeley county, Nebraska, did on the 15th day of May, 1888, on an order of attachment issued out of the district court of Greeley county, * * * attach certain goods and chattels in the hands of Jordan & McCarthy in a case pending in said district court wherein Dewey & Stone et al. * * * are plaintiffs and Jordan & McCarthy are defendants, which property is appraised at the sum of $1,362.99, and which property is now delivered to Jordan & McCarthy at their request: Now, that Jordan & McCarthy, as principals, and Daniel Ford and P. H. McCarthy, as sureties, do hereby undertake to the plaintiffs in the sum of $2,725.98 that said property to-wit, a certain stock of hardware and furniture now in the store of Jordan & McCarthy in Greeley Center, Nebraska, or its appraised value in money, shall be forthcoming to answer to the judgment of the court in this action.

JORDAN & MCCARTHY,
"By E. J. JORDAN.
"DANIEL FORD.
"P. H. MCCARTHY.
"MICHAEL MCCARTHY."

and that Kavanaugh, in his official capacity as clerk, on said day duly approved said bond; that said Kavanaugh on said date, after the approval by him of said bond, issued to the sheriff of said Greeley county an order in writing in words and figures as follows:

"STATE OF NEBRASKA, } ss.
"GREELEY COUNTY. }

"To the sheriff of said county: Whereas, the defendants Jordan & McCarthy have executed to the plaintiffs a bond as provided in section 206 of the Code of Civil Procedure, in double the amount of $1,362.99 as stated in the bond, which has been approved by me, to the effect that the de-

fendants shall perform the judgment of the court: You are therefore commanded to restore the property attached in said action, or the proceeds thereof, to the said Jordan & McCarthy, or their agents or attorneys, and make due return of this order. Signed this 7th day of June, A. D. 1888.

"JOHN KAVANAUGH,
"*Clerk of the District Court.*"

That the sheriff of said county, in pursuance of said order, restored the goods and chattels which he had attached to the said Jordan & McCarthy, and on the 7th of June, 1888, made due return on the writs of attachment in his hands to that effect; that such proceedings were afterwards had in the suits of the plaintiffs in error against Jordan & McCarthy that the plaintiffs in error obtained judgments against the said Jordan & McCarthy for certain sums of money and also a judgment against the said Jordan & McCarthy sustaining the attachments against their goods and chattels, and an order that said goods be sold to satisfy the said judgments; that all said judgments remained wholly unsatisfied at the time of bringing of this suit; that the said Jordan & McCarthy had failed to have the attached property forthcoming to answer the judgments of the district court pronounced in said suits, and the said Jordan & McCarthy had failed to pay into court or to the plaintiffs in error, or to any one for them, the appraised value of said attached property in money; that Jordan & McCarthy and each of them were insolvent; that execution had been issued on the judgments obtained by the plaintiffs in error against the firm of Jordan & McCarthy and been returned wholly unsatisfied; that the plaintiffs in error had instituted suit in the district court of Greeley county against Jordan & McCarthy as principals and the parties whose names were signed as sureties to the bond or obligation executed by them and approved by the clerk of the district court on the 7th of June, 1888; that said suit resulted in a finding and judgment of said court that Daniel Ford, P. H. Mc-

Carthy, and Michael McCarthy, the parties whose names were signed as sureties to the bond of Jordan & McCarthy of June 7, 1888, and approved by the clerk, never in fact executed said bond. The petition then alleged in effect that Kavanaugh, the clerk, by approving the bond and sureties of Jordan & McCarthy dated June 7, 1888, when in fact the sureties to said bond did not sign the same, had been guilty of official misconduct, had become liable to the plaintiffs in error on his official bond for the appraised value of said attached property.

The bond which the clerk approved was executed in pursuance of and under the provisions of section 206 of the Code of Civil Procedure, which provides: "The sheriff shall deliver the property attached to the person in whose possession it was found, upon the execution by such person, in the presence of the sheriff, of an undertaking to the plaintiff, with one or more sufficient sureties, resident in the county, to the effect that the parties to the same are bound in double the appraised value thereof, that the property or its appraised value in money shall be forthcoming to answer the judgment of the court in the action." It was not the duty of the clerk of the district court to approve this bond, and his act in approving this bond was not one done by virtue of his office. It was the duty of the sheriff to hold in his possession the property he had attached at the suit of the plaintiffs in error against Jordan & McCarthy, unless they had given him a bond, with sureties approved by himself, to have said property or its appraised value in money forthcoming to answer the judgment of the court; or unless Jordan & McCarthy had procured the dissolution of the attachment by the execution of a bond in pursuance of sections 219 and 220 of the Code of Civil Procedure. The execution of the bond provided for by said section 206 was not designed to have, nor did it have, the effect of discharging the attachments. The case and all its proceedings stood precisely as if such bond had not

been given. The only effect of the bond was to have it take the place of the property; and such bond could be approved, and approved only, by the officer holding the writ of attachment. (*Cortelyou v. Maben*, 40 Neb., 512.) Until such officer had approved such bond he was without authority to release said property or deliver it to Jordan & McCarthy. He may have been misled by the order made by the clerk of the district court, but that order affords no protection whatever to the sheriff. He was bound to know the law. Kavanaugh, by approving the redelivery bond of Jordan & McCarthy, in effect certified not only that the parties whose names appeared on said bond as sureties actually signed it in his, Kavanaugh's, presence, but that they were financially responsible; but it was no part of Kavanaugh's duty as clerk of the district court to approve this bond and, therefore, the act was not one done by virtue of his office, and consequently the sureties on his bond are not liable for his act or misconduct, if it was misconduct, as sureties on official bonds are answerable only for such acts of their principals as are done by virtue of their office. (*Ottenstein v. Alpaugh*, 9 Neb., 237.)

Counsel for plaintiffs in error insist that Kavanaugh at least was liable to them, and for that reason that the demurrer should have been overruled; but it is to be remembered that this is not an action against Kavanaugh for any wrong or deceit practiced by him by which the plaintiffs in error were damaged, and the petition contains no averments of fact which show or tend to show that Kavanaugh in anything that he did was actuated by other than honest motives. From anything that appears in this petition Kavanaugh thought he had authority to approve this bond and order the sheriff to release the property, and the mere facts that Kavanaugh approved the bond and directed the sheriff to release the attached property are not alone sufficient to render Kavanaugh liable to the plaintiffs in error. The petition, therefore, does not state a cause of action

against either Kavanaugh or the sureties on his official bond. The district court was right in sustaining the demurrer, and its judgment is

AFFIRMED.

HARRISON, J., not sitting.

FRANK MIZERA, APPELLANT, V. S. W. AUTEN ET AL., APPELLEES.

FILED MAY 22, 1895. No. 6277.

Schools and School Districts: ERECTION OF BUILDING: APPROPRIATION OF FUNDS: AUTHORITY OF DIRECTORS. Certain sections of chapter 79, Compiled Statutes, 1893, entitled "Schools," construed, and *held*, (1) that the electors of a school district, and they alone, at their regular annual meeting, or at a special meeting called for such purpose, have power to direct the building of a school house; (2) that the district board of a school district has no power or authority of law to appropriate the funds of a school district to the erection of a school house, unless first authorized so to do by a vote of the electors of such school district; (3) that when a school district owns a school house site and has the money in its treasury sufficient to build a school house, which money was raised for that purpose, the electors of such school district, at any regular annual meeting, or at a special meeting called for that purpose, may direct the building of a school house on the school site, and that such school building be paid for out of the funds on hand for that purpose; (4) that the electors at such meeting may designate the school board to act as the agent of the district to superintend the construction of such school house; (5) that if no one is designated by the electors of the school district to superintend the construction of a school building directed to be built, then the school board of such district has authority to make contracts and superintend the erection of the school building ordered; (6) that the electors of a school district are not obliged to select the members of the school board as agents to superintend the construction of a building ordered to be built, but may select such person or persons as, in their judgment, will best subserve the interests of the school district.

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

H. Gilkeson and *Frick & Dolezal*, for appellant, cited: *School District v. School District*, 12 Neb., 242; *People v. Peters*, 4 Neb., 254; *Ward v. School District*, 10 Neb., 296; *Zottman v. City of San Francisco*, 20 Cal., 96; *City of Leavenworth v. Rankin*, 2 Kan., 357; *Maher v. State*, 32 Neb., 355; *McCracken v. City of San Francisco*, 16 Cal., 591; *Cross v. Mayor of Morristown*, 18 N. J. Eq., 305.

Simpson & Sornborger, contra.

RAGAN, C.

Briefly, the material facts in this case are: On the 27th day of June, 1892, the electors of school district No. 14 of Saunders county, at their regular annual meeting held on that day, voted the erection of a school house on the school grounds belonging to said district, such school house not to exceed a specified sum, there then being in the treasury of said district sufficient funds to build such school house, which funds had been previously raised for that purpose. At such meeting the electors of said district by a vote appointed S. W. Auten, Moritz Ladenburger, and Jasper Swan, three electors of said district, a building committee, and instructed them to advertise for bids for building such school house, and to build a school house on the grounds belonging to the district. The gentlemen appointed as such building committee entered into a contract with one Michael Sorrick, in and by which the latter contracted to furnish the material and build a school house on the school district grounds. The contract between the building committee and Sorrick did not expressly recite that the building committee was acting for and on behalf of the school district. Sorrick also gave a bond to the building committee, naming them individually, as obligees to com-

ply with his contract in reference to furnishing the material and building the school house. Sorrick began the erection of the school house according to his contract with the building committee and had the building well under way when on the 20th of September, 1892, Frank Mizera brought this suit to the district court of Saunders county against said building committee and said contractor to enjoin the further building and completion of said school house on said school grounds. The district court on a final hearing of the case dissolved the temporary injunction which had been granted by the county judge and dismissed Mizera's petition, from which decree he has appealed.

1. The principal argument relied on here for a reversal of the decree appealed from, and the one upon which all the other arguments of appellant depend, is thus stated by his learned counsel: "That the appointment of the building committee was wholly void, because not authorized by any law, because the electors of said school district could authorize no one to build a school house except the district board of that school district." In other words, the argument is that the members of the school board of a school district are the only persons that the electors of such district at their annual meetings can authorize to act as agents of the school district to superintend the building of a school house therefor; and if the electors of a school district at their annual meeting duly appoint any other persons than the members of the school board to superintend the erection of a school house for said district, that such appointment is absolutely void; that such persons are incompetent in law to be the agents of such school district for such purpose. This question involves the construction of certain portions of chapter 79, Compiled Statutes, 1893, entitled "Schools." By section 2 of subdivision 1 of said chapter the school districts of this state are declared to be bodies corporate and to possess all the usual powers of corporations for public purposes. And in subdivision 2 of said chapter, in

section 10, it is provided: "The said qualified voters [of a school district] shall also have power, at any annual or special meeting, to direct * * * the building * * of a school house." And by section 12 of said subdivision it is provided that the legal voters at such annual meeting may determine the amount of money that "shall be expended for the building * * * of school house in said district." And by section 13 of said subdivision it is provided that the moneys on hand collected from tax levies or from the sale of bonds for the purpose of building a school house "shall be expended under the direction of the district made at the annual meeting, or in absence of such direction then such tax [moneys] shall be expended as the district board of the district may direct." And by section 6 of subdivision 5 of said chapter it is provided: "They [the school district board] shall purchase or lease such site for a school house as shall have been designated by the district, in the corporate name thereof, and shall build, hire, or purchase such school house 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." Reading and construing these several sections together we reach the following conclusions: (1) That the electors of a school district, and they only, at their regular annual meeting or at a special meeting called for such purpose, have power to direct the building of a school house; (2) that the district board of a school district has no power or authority of law to appropriate the funds of a school district to the erection of a school house, unless first authorized so to do by a vote of the electors of such school district; (3) that when a school district owns a school house site and has the money in its treasury sufficient to build a school house, which money was raised for that purpose, the electors of such school district, at any regular annual or at a special meeting called

for that purpose, may direct the building of a school house on the school site, and that such school building be paid for out of the funds on hand for that purpose; (4) that the electors at such meeting may designate the school board to act as the agent of the district to superintend the construction of such school building; (5) that if no one is designated by the electors of the school district to superintend the construction of the school building directed to be built, then the school district board of such district has authority to make contracts and superintend the erection of the school building ordered; (6) that the electors of such a school district are not obliged to select the members of the school board as agents to superintend the construction of the building ordered to be built, but may select such person or persons as in their judgment will best subserve the interests of the school district. The courts must presume that the legislature in the passing of a law takes into consideration existing facts and conditions. Under our statutes both men and women are eligible as members of our school boards. Persons abundantly qualified by reason of their training and experience as educators to manage the schools and superintend the education of the young might, of all people in the district, be the least competent to superintend the erection of a building. Whether this fact was present in the mind of the legislature and led to the adoption of the law as it now stands, by which the electors of a district are not limited to the selection of the members of the school board as agents to superintend the construction of buildings, is not material. It is sufficient to say that while the law makes the school board the agents of the district for the purpose of employing teachers, conducting the schools, and caring for and controlling the property of the school district, it does not prohibit the electors of the district from appointing from among their number a committee or agents to superintend the construction of a school building, nor compel such electors to make

the members of the school board such agents or building committee. The decree of the district court is

AFFIRMED.

CHARLOTTE BUCKINGHAM, APPELLANT, V. JACOB ROAR, ADMINISTRATOR, ET AL., APPELLEES.

FILED MAY 22, 1895. No. 5642.

1. **Witnesses:** HUSBAND AND WIFE. Neither husband nor wife can be examined in any case as to any communication made by the one to the other while married, nor shall they after the marriage relation ceases be permitted to reveal in testimony any such communication made while the marriage subsisted. (Code, sec. 332.)

2. ———: ———: EVIDENCE. A husband and wife by their joint deed conveyed certain real estate of the husband to his son. The wife then brought an action against the son and husband to cancel the conveyance, so far as it operated to release her dower interest in the real estate conveyed, on the alleged ground that she was induced to join in said conveyance by misrepresentation and fraud. *Held*, (1) That the husband was only a nominal defendant and had no interest adverse to the wife in the result of the action; (2) that notwithstanding the husband was made a defendant to the suit the wife was a competent witness in her own behalf; (3) that neither the husband nor the wife could testify as to any conversation which occurred between them with reference to the subject-matter of the suit; (4) that the testimony of the husband which tended to sustain the conveyance was incompetent, being adverse to the interest of the wife.

3. **Review:** TRIAL TO COURT: ADMISSION OF INCOMPETENT TESTIMONY. Where incompetent testimony is given on the trial of an equity case this court, in reviewing such case on appeal, will presume that such testimony was not considered by the district court.

4. **Witness:** HUSBAND AND WIFE. *Niland v. Kalish*, 37 Neb., 47, *Skinner v. Skinner*, 38 Neb., 756, and *Greene v. Greene*, 42 Neb., 634, distinguished.

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

F. I. Foss and *J. D. Pope*, for appellant, cited: *Hager v. Reed*, 11 O. St., 626; *American Savings Bank v. Harrington*, 34 Neb., 597.

Palmer & Hendee, contra, cited: *Stewart v. Lispenard*, 26 Wend. [N. Y.], 255; *Blanchard v. Nestle*, 3 Den. [N. Y.], 37; *Staples v. Wellington*, 58 Me., 453; *Wamsley v. Crook*, 3 Neb., 350; *Ransom v. Schmela*, 13 Neb., 77; *Magenau v. Bell*, 13 Neb., 248; *Housel v. Cremer*, 13 Neb., 300; *Kimball v. Kimball*, 16 Mich., 211; *Grand Gulf Railroad & Banking Co. v. Bryan*, 8 S. & M. [Miss.], 275; *Kelton v. Hill*, 59 Me., 259; *Hollister v. Young*, 41 Vt., 160.

Robert Ryan, also for appellees.

RAGAN, C.

On the 7th day of February, 1891, John Buckingham was the owner of a farm of 240 acres, situate in Saline county, Nebraska, and also the owner of a house and lot in the village of Friend, in said county, on which lot he at that time resided with his family. On said date Buckingham conveyed to his wife the house and lot in the village of Friend, and he and his wife united in a deed of conveyance of the farm to one David T. Buckingham, a son of John Buckingham. Subsequently, David T. Buckingham conveyed eighty acres of the land to his brother Perry E. Buckingham, and another eighty acres to his brother Ira Buckingham. In October, 1891, Charlotte Buckingham, the wife of John Buckingham, brought this suit in the district court of Saline county, making her husband, John Buckingham, and his sons, David T. Buckingham Perry E. Buckingham, and Ira Buckingham, and their wives, defendants. The object of Mrs. Buckingham's action was

to have the conveyance of the 7th of February, 1891, made by herself and husband to David T. Buckingham, set aside in so far as she was concerned. Mrs. Buckingham asked to have this conveyance annulled because she alleged that she was procured to join in the execution of said deed by misrepresentation and fraud. In substance, her statement of the facts in reference to this misrepresentation and fraud is as follows: On the 6th of February, 1891, she and her husband had some trouble; her husband threw her outdoors, she fell on the ice and broke her arm; on the 7th of February, 1891, her husband deeded her the said house and lot in the village of Friend, gave her some notes, amounting to about $100, all in satisfaction and discharge of the injuries she had sustained by reason of the assault made on her by her husband on the 6th of February; that at that time there was a windmill and some other chattels on the lot in Friend which the husband was to have and remove, and he represented to Mrs. Buckingham that in order to obviate all future questions as to the ownership of these chattels she should sign a writing setting out that he was the owner of the chattels and had the right to remove them; and that at the time she signed the deed sought to be set aside she supposed she was signing the writing giving her husband the title and possession to the chattels on said lot. After the action was brought and personal service had upon John Buckingham it appears that he went to Freeport, Illinois, to be treated for cancer, and while there his deposition was taken and filed in this case. Before the case was tried John Buckingham died and one Jacob Roar, his administrator, was, by order of the court and the consent of all parties, made a defendant to the action. The district court found the issues in favor of the defendants and dismissed Mrs. Buckingham's petition, and she has appealed.

It will be seen from the foregoing statement that the only issue of fact involved in this case was and is whether

Mrs. Buckingham, at the time she executed the deed of February 7, 1891, with her husband to David T. Buckingham, knew that she was signing a deed for the 240 acres of land. On the trial Mrs. Buckingham was sworn and testified in her own behalf, and the deposition of John Buckingham was offered in evidence, but the record does not disclose whether the deposition was read. The argument of the appellant here is that we should consider all the evidence of Mrs. Buckingham in connection with the other evidence in the case, and if this be done that the decree of the district court must be reversed. We cannot stop to quote the evidence in this case, nor any considerable portion of it, and it must suffice to say that if the entire deposition of John Buckingham be excluded from consideration, and the entire evidence of Mrs. Buckingham be considered together with the other evidence in the case, the decree of the district court is still supported by sufficient competent evidence. Mrs. Buckingham was a competent witness for herself in this case. Her action was in effect one brought against the sons of John Buckingham to set aside, so far as she was concerned, the conveyance of herself and husband of the 7th of February. It is true her husband was a nominal defendant to this action, but he had no interest whatever in the result of it. The action did not seek to set aside the conveyance so far as John Buckingham was concerned, nor did he by his answer ask to have that conveyance set aside. We repeat that the only object of the action was to have set aside the release of the dower rights of Mrs. Buckingham in the land resulting from her execution of the conveyance. This statement does not conflict with section 331 of the Code of Civil Procedure, which declares, with certain exceptions, that the husband can in no case be a witness against the wife, nor the wife against the husband, nor with the construction placed on said section in *Niland v. Kalish*, 37 Neb., 47, *Skinner v. Skinner*, 38 Neb., 756, and *Greene v. Greene*, 42 Neb., 634.

On the trial Mrs. Buckingham testified to the communications, conversations, and agreements had between herself and husband on the 7th of February, 1891, just prior to the execution of the deed which she seeks to annul by this action. All this testimony was incompetent. Section 332 of the Code of Civil Procedure provides: "Neither the husband nor wife can be examined in any case as to any communication made by the one to the other while married, nor shall they, after the marriage relation ceases, be permitted to reveal in testimony any such communication made while the marriage subsisted." While therefore we think that section 331 of the Code did not render Mrs. Buckingham an incompetent witness in this case, we are quite clear that all the evidence given by her as to what transpired between herself and husband on the 6th of February and on the 7th of February, just prior to the execution of the deed by them to David Buckingham, was incompetent and should not be considered by us; and we have no doubt that this is the view taken by the district judge, and that he did not consider such testimony in making up his finding. It is argued here by counsel for the appellees that the testimony of Mrs. Buckingham as to the conversations, communications, and transactions between herself and husband immediately preceding and which led up to the conveyance sought to be impeached by this action were incompetent by reason of section 329 of the Code, which provides: "No person having a direct legal interest in the result of any civil action or proceeding, when the adverse party is the representative of a deceased person, shall be permitted to testify to any transaction or conversation had between the deceased person and the witness," etc. But the provisions of this section alone would not preclude Mrs. Buckingham from testifying to the transactions and conversations had between herself and husband, for the reason that the adverse party to Mrs. Buckingham's suit was not her husband's administrator, but his sons.

The husband, John Buckingham, had he been living at the time of the trial, could not have testified as to the facts set out in his deposition, as these facts militated against the claims of the wife in this suit; and for that reason the deposition cannot be considered by us, and we presume was not considered by the district court. The decree of the district court is

AFFIRMED.

RYAN, C., not sitting.

TRAVELERS INSURANCE COMPANY V. ANDREW J. SNOWDEN.

FILED MAY 22, 1895. No. 5696.

Insurance: ACCIDENT POLICY: VALIDITY OF EXCEPTION CLAUSE: INSTRUCTIONS. An insurance company issued a policy describing the occupation of the insured as "cattle dealer, or broker and shipper, not tender or drover, not on ranch or farm." Among the provisions of the policy was one to the effect that the insurance did not cover injuries resulting "from any of the following causes, or while so engaged or affected: * * * Violating law; violating rules of a corporation; * * * voluntary exposure to unnecessary danger; entering or trying to enter or leave a moving conveyance using steam as a motive power; riding in or on any such conveyance not provided for the transportation of passengers; walking or being on a railway bridge or road-bed. (Railway employes excepted.)" The answer set up that the injuries were within the exceptions of the policy. The court refused to instruct the jury that the plaintiff could not recover for injuries so sustained, while entering or trying to enter a moving conveyance using steam as a motive power, or if he received the injury while riding in or upon such conveyance not provided for the transportation of passengers. There was evidence tending to show that the injuries were sustained under such circumstances. *Held*, (1) That it was competent for the parties to contract that the insurance should not extend to injuries so received; (2) that it was error to refuse the instructions

referred to; (3) that on this branch of the case there was no issue of negligence involved, the question being whether the injuries were within the contract of the parties, not whether the plaintiff was conducting himself in a prudent manner when they were sustained.

ERROR from the district court of Buffalo county. Tried below before HAMER, J.

The facts are stated by the commissioner.

Charles Offutt and *Charles S. Lobingier*, for plaintiff in error:

The exception clauses relied upon are not only valid but commendable. They are enforceable under the general principle of the law of contracts. (2 Parsons, Contracts, 494*, 500*, 505*; *Robertson v. French*, 4 East [Eng], 135; *Universal Life Ins. Co. v. Devore*, 83 Va., 267; *Schuylkill Navigation Co. v. Moore*, 2 Whart. [Pa.], 491; May, Insurance [2d ed.], sec. 172; *Shader v. Railway Passenger Assurance Co.*, 66 N. Y., 441; *Standard Life & Accident Ins. Co. v. Jones*, 10 So. Rep. [Ala.], 530.)

Particularly the courts have enforced the clauses which except death from the "violation of law" (*Duran v. Standard Life & Accident Ins. Co.*, 22 Atl. Rep. [Vt.], 530; *New York Accident Ins. Co. v. Clayton*, 59 Fed. Rep., 559—both violations of Sunday law—*Travelers Ins. Co. of Hartford v. Seaver*, 19 Wall. [U. S.], 531), "voluntary exposure to unnecessary danger" (*Travelers Ins. Co. v. Jones*, 17 Ins. L. J. [Ga.], 784; *Hull v. Equitable Accident Association*, 42 N. W. Rep. [Minn.], 936; *Tuttle v. Travelers Ins. Co.*, 134 Mass., 175; *Sautelle v. Railway Passenger Assurance Co.*, 18 Ins. L. J. [N. Y.], 892; *Morel v. Mississippi Valley Life Ins. Co.*, 4 Bush [Ky.], 535; *Hill v. Travelers Ins. Co.*, 17 Can. L. J., 44; *Wright v. Sun Mutual Life Ins. Co.*, 29 U. C. C. P., 221), "entering or trying to enter a moving conveyance" (*Miller v. Travel-*

ers Ins. Co., 39 Minn., 548), and "violating the rules of a corporation" (*Bon v. Railway Passenger Assurance Co.*, 56 Ia., 664).

The court erred in its instructions in substituting the tests of negligence for the terms of the contract which excepted voluntary exposure. (*Hull v. Equitable Accident Association*, 42 N. W. Rep. [Minn.], 936; *Miller v. Travelers Ins. Co.*, 39 Minn., 548; *Damont v. New Orleans & C. R. Co.*, 9 La. Ann., 441.)

H. M. Sinclair, contra, cited: *Marx v. Travelers Ins. Co.*, 39 Fed. Rep., 321; *Burkhard v. Travelers Ins. Co.*, 102 Pa. St., 262; *Freeman v. Travelers Ins. Co.*, 144 Mass., 572; *Tucker v. Mutual Benefit Life Ins. Co.*, 50 Hun [N. Y.], 50; *Scheiderer v. Travelers Ins. Co.*, 58 Wis., 13; *Cotton v. Fidelity & Casualty Co.*, 41 Fed. Rep., 506; *Tooley v. Railway Passenger Assurance Co.*, 2 Ins. L. J. [Ill.], 275; *Bizzell v. Booker*, 16 Ark., 308; *Baltimore & P. R. Co. v. Jones*, 95 U. S., 439; *Wabash, St. L. & P. R. Co. v. Locke*, 112 Ind., 404; *Philadelphia, W. & B. R. Co. v. Stinger*, 78 Pa. St., 225; *Milwaukee & St. P. R. Co. v. Arms*, 91 U. S., 494; *Karr v. Parks*, 40 Cal., 188; *Moore v. Central Railroad of Iowa*, 47 Ia., 688; *Frandsen v. Chicago, R. I. & P. R. Co.*, 36 Ia., 372; *Lowery v. Manhattan R. Co.*, 99 N. Y., 158; *Matson v. Maupin*, 75 Ala., 312; *Richmond & D. R. Co. v. Howard*, 79 Ga., 44; *Chicago & E. I. R. Co. v. Hedges*, 105 Ind., 398; *Briggs v. Union Street R. Co.*, 148 Mass., 72; *Brown v. Congress & B. S. R. Co.*, 49 Mich., 153; *Kay v. Pennsylvania R. Co.*, 65 Pa. St., 269; *Durant v. Palmer*, 29 N. J. Law, 546; *Gravell v. Minneapolis & St. L. R. Co.*, 11 Fed. Rep., 569; *Hoag v. Lake Shore & M. S. R. Co.*, 85 Pa. St., 293; *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S., 469; *Doggett v. Richmond & D. R. Co.*, 78 N. Car., 305; *Allen v. St. Louis Ins. Co.*, 85 N. Y., 473; *Wilson v. Conway Fire Ins. Co.*, 4 R. I., 156; *Bartlett v. Union Mutual Fire*

Ins. Co., 46 Me., 500; *Bowman v. Pacific Ins. Co.*, 27 Mo., 152; *Phœnix Ins. Co. v. Slaughter*, 12 Wall. [U. S.], 404; *North American Life & Accident Ins. Co. v. Burroughs*, 69 Pa. St., 43; *National Benefit Association v. Jackson*, 114 Ill., 533; *Griffin v. Western Mutual Benevolent Association*, 20 Neb., 620; *Phœnix Ins. Co. v. Barnd*, 16 Neb., 90; *Bloom v. Franklin Life Ins. Co.*, 97 Ind., 478; *Cluff v. Mutual Benefit Ins. Co.*, 13 Allen [Mass.], 308, 99 Mass., 317; *Bradley v. Mutual Benefit Life Ins. Co.*, 45 N. Y., 422; *Murray v. New York Life Ins. Co.*, 96 N. Y., 614; *Travelers Ins. Co. v. Seaver*, 19 Wall. [U. S.], 531; *Kerr v. Minnesota Mutual Benefit Association*, 39 Minn., 174; *Harper v. Phœnix Ins. Co.*, 18 Mo., 109, 19 Mo., 506.

IRVINE, C.

This was a suit on a policy of accident insurance, and resulted in a judgment in favor of the plaintiff, from which the defendant insurance company prosecutes error.

The policy sued upon insured Snowden against loss of time, not exceeding twenty-six consecutive weeks, resulting from bodily injuries, effected through external, violent, and accidental means, with a provision that if the loss of one entire hand or foot should result from such injuries alone within ninety days, the insurer would pay one-third of the principal sum, such sum being $5,000. The policy designated Snowden's classification as "preferred (being a cattle dealer or broker and shipper, not tender or drover, not on ranch or farm, by occupation)." The insuring clause of the policy began, "does hereby insure, subject to conditions on back hereof." On the back of the policy, under the heading "Agreements and conditions under which this policy is issued and accepted," was the following:

"4. This insurance does not cover * * * accident, nor death, nor loss of limb or of sight, nor disability resulting wholly or partly, directly or indirectly, from any

of the following causes, or while so engaged or affected: * * * Violating law; violating rules of a corporation; * * * voluntary exposure to unnecessary danger; entering or trying to enter or leave a moving conveyance using steam as a motive power; riding in or on any such conveyance not provided for the transportation of passengers; walking or being on a railway bridge or roadbed. (Railway employes excepted.)"

The answer of the insurance company alleged that the accident had been incurred under circumstances within the exceptions which we have quoted. The reply was a general denial.

The evidence tended to show that the insured was on his way from Cushing to Omaha, accompanying twelve carloads of cattle belonging to him, which he was bringing to market. The train was a long one and the cars containing his cattle were near the front end of the train. A stop was made for the purpose of taking water, at Seward, late on Sunday night. Snowden took advantage of this stop to alight from the caboose and go forward to examine his stock. He carried with him what is designated a "prod-pole," about five feet long and an inch and a half in diameter. He found a steer off its feet in a car about the fourth or fifth from the front of the train, and was endeavoring to get the steer on its feet by means of the prod-pole when the engine gave the signal to start. Snowden climbed upon the car. The train moved forward a very short distance and stopped again. Snowden dismounted and renewed his effort to get the steer on its feet. While so engaged another signal to start was given. Here the testimony becomes conflicting. Snowden testifies that he at once proceeded to climb upon the car by means of the ladder or steps on the side thereof, and that when he had almost reached the top of the car, the sudden movement of the train in starting wrenched him from the ladder and threw him upon the track, the wheels passing over one hand in

such a way as to necessitate immediate amputation. Several witnesses, both train hands and passengers, testify that immediately after the accident Snowden stated that the train had started and was gaining such headway that he feared that he would not be able to jump upon the caboose as it passed, and that he therefore endeavored to jump upon one of the stock cars as it passed him, and was thrown upon the track while making the attempt. On this state of the evidence the court gave the following instructions, and no others:

"1. Before the plaintiff can recover he must establish his case by a preponderance of evidence.

"2. If the plaintiff recover, he can only recover one third of five thousand dollars, and interest thereon at seven per cent from the time he notified the company of his injury, if he did so notify them.

"3. The plaintiff as a shipper had a right to attend the cattle which were being shipped, and if he was injured while engaged in so caring for the cattle, his loss is within the risk taken by the insurance company; provided he acted with the prudence of a man of ordinary intelligence and prudence, placed in like circumstances."

The defendant requested and the court refused to give, among others, an instruction to the effect that if Snowden received the injury while he was voluntarily exposing himself to unnecessary danger, he could not recover; another to the effect that if he received the injury while he was entering or getting upon, or trying to enter or get upon, a moving conveyance, using steam as a motive power, he could not recover; and still another, to the effect that if he received the injury while riding in or upon a moving conveyance using steam as a motive power, and which was not provided for the transportation of passengers, he could not recover. We entertain no doubt that it was entirely competent for the parties to contract for insurance not extending to the excepted risks. The company might have

insured Snowden against all manner of injuries. It might, if the parties had so desired, have insured him against a single kind of injury; for instance, if the contract provided that the company insured him only against injuries resulting from strokes of lightning, it could not possibly be claimed that the company would be liable for the injury here proved. Between these limits the parties might contract as they saw fit, and having contracted without ambiguity that the company should not be liable for injuries sustained while the insured was entering or trying to enter a moving conveyance using steam as a motive power, or while riding in or on such conveyance not provided for the transportation of passengers, we do not see that there is room for construction or for doubt as to the validity of the contract. In *Miller v. Travelers Ins. Co.*, 39 Minn., 548, a similar contract was considered, and it was held that a banker having been killed while attempting to get on a moving train, the company was not liable. The fact that the policy described Snowden's occupation as that of a cattle dealer or broker and shipper, does not conflict with the stipulation referred to. The policy also stated that he was not a tender or drover. Had he been insured as a tender or drover with a condition that the company would not be liable for injury sustained while tending or driving cattle, there would be room for doubt; had he been described as a cattle shipper, and had the policy provided that the company would not be liable if he engaged in shipping cattle, the right of the insured would be quite plain; but a man not being a tender or drover may be a cattle dealer, shipper or broker, without riding on conveyances not provided for the transportation of passengers, and without getting upon moving trains. The very fact that the business of the insured might induce him at times to do such acts, would afford a good reason for the company in its contract to expressly except from the insurance granted injuries received under such circumstances.

As we have said, there was a conflict in the evidence as to whether the train was in motion when Snowden attempted to board it, and all the evidence was to the effect that the car which he boarded was not one provided for the transportation of passengers. The court should have given the instructions requested by the insurance company on these points; and the refusal to do so was not cured by the third instruction given of its own motion. On this phase of the case no question of negligence was involved. The question was not whether Snowden, as a prudent man, was justified under the circumstances in attempting to board the car. No matter how careful he may have been, if the injury was any one against which the company had not insured him, it was not liable. The instruction relating to voluntary exposure to unnecessary danger might also have been given with propriety, although we do not hold that it was prejudiciously erroneous to refuse it, in view of the third instruction. What amounts to a voluntary exposure to unnecessary danger is necessarily largely a question of fact for the determination of the jury under all the circumstances of the case. The issue made by this provision was of a nature akin to issues on questions of negligence.

There are several assignments of error which we have not noticed, and which, in the present condition of the record, we do not deem it necessary to consider. For the errors already referred to the judgment must be reversed.

REVERSED AND REMANDED.

FIRST NATIONAL BANK OF OMAHA V. JOSEPH A. CHILSON.

FILED MAY 22, 1895. No. 6156.

1. **Review**: ISSUES BELOW: DEFECTIVE RECORD. The action of the district court in refusing to strike out the pleadings in a cause appealed from a justice of the peace, because presenting issues not made before the justice, cannot be reviewed unless the record discloses what issues were presented before the justice.
2. **Pleading**: PLEDGES: EVIDENCE. Suit was brought upon a note by the pledgee thereof. The defendant pleaded that the debt for which the note was pledged had been paid. *Held*, That, under this answer, evidence that the pledgee had taken other security and agreed to release the note was inadmissible.
3. **Negotiable Instruments**: PAYMENT: PRINCIPAL AND AGENT. Payment of money on a note at a bank where it is made payable, when the note has not been left there and is not produced, is not a payment of the note. In such case the person receiving the money becomes the agent of the payor, not of the payee.
4. ———: ———. Evidence examined, and *held* insufficient to sustain the verdict.

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

Nightingale Bros., for plaintiff in error.

Aaron Wall, contra.

IRVINE, C.

The First National Bank of Omaha sued Chilson before a justice of the peace in Sherman county, on a promissory note for $100, dated April 27, 1888, due ninety days after date, payable to Lalk & Kriechbaum, which it was alleged had been indorsed by Lalk & Kriechbaum to the plaintiff. The defendant appealed to the district court, where judg-

ment was rendered on a verdict in his favor. The plaintiff by these proceedings seeks a reversal of the latter judgment.

The petition counts on the note and its indorsement to plaintiff. The amended answer, after a general denial, admits the execution of the note, and specially denies the transfer to plaintiff, averring that if the plaintiff ever held the note, it was held as collateral security to a debt of Lalk & Kriechbaum to the plaintiff, and that such debt has been paid. The answer further avers that the defendant paid the note to Lalk & Kriechbaum. A motion was made to strike the answer from the files for several reasons, in substance reducible to the single ground that the defense raised by the answer was not presented before the justice of the peace. This motion was overruled, and the order overruling it is one of the errors assigned. We cannot say that the district court erred in overruling this motion. The record does not disclose upon what issues the case was tried before the justice of the peace. No answer is required in an action before a justice of the peace. In the absence of an answer any defense may there be urged, whether or not it could be admitted in the district court upon a general denial. Therefore, without considering whether or not the ruling of the district court was correct on other grounds, this assignment of error must be overruled, because the record does not disclose that the amended answer presents a defense not urged before the justice. The reply to the amended answer admitted that the note was indorsed to plaintiff as collateral security, and denied that it had been paid; that Lalk & Kriechbaum were authorized to receive payment, and that the indebtedness from Lalk & Kriechbaum, for which the note had been pledged, had been paid.

The only assignment of error which we shall notice, except the one already disposed of, is that the verdict is not sustained by the evidence. The evidence shows that Lalk & Kriechbaum, who were bankers at Loup City, pledged

this note with others to the plaintiff to secure a loan of money, and that some time after this note had become due, the defendant paid its amount to Lalk & Kriechbaum. The evidence tends to show that when Lalk & Kriechbaum received the money they informed the defendant that the note was not in their possession, but that they would obtain it and deliver it to him. This is the defendants' own testimony. The evidence also tends to show that after this transaction a remittance was made by Lalk & Kriechbaum to the plaintiff of about $500 on their indebtedness. But the evidence is undisputed that a very large indebtedness from Lalk & Kriechbaum to plaintiff remains unpaid. There is evidence tending to show that the plaintiff took from Lalk & Kriechbaum a real estate mortgage to secure this indebtedness, under an agreement that all the collateral notes should be surrendered. Under the averment in the amended answer that the principal indebtedness had been paid to the plaintiff, evidence that other security had been taken and the pledge of this note released was not admissible. Therefore, the verdict cannot be sustained upon the ground that there was evidence tending to show such a state of facts. As already stated, there was no evidence at all tending to show that the principal indebtedness had been paid. The evidence was all the other way. The note was payable by its terms at the banking house of Lalk & Kriechbaum; but the payment of money at the place designated in a negotiable instrument, where such instrument has not been left there for collection, or is not there produced, does not constitute a payment. The person receiving the money under such circumstances becomes the agent of the payor, and not of the payee. We think this principle absolutely settled. One paying money to another, to be applied on a note, which such person has not in his possession, assumes the burden to show the authority of the person to whom payment is made to receive the money. (*South Branch Lumber*

Co. v. Littlejohn, 31 Neb., 606.) We agree with the plaintiff in error that we can conceive of no theory on which the verdict could have been found, except one of those already mentioned. The first of these presented a defense not raised by the pleadings; the second, a plea of payment of the principal indebtedness, wholly unsupported by the evidence; and the third, a plea of payment of the note sued on, which the evidence, without contradiction, shows was made to an unauthorized person.

REVERSED AND REMANDED.

CHAUNCEY F. GAINES, APPELLEE, V. F. P. BONNELL ET AL., APPELLANTS.

FILED JUNE 18, 1895. No. 6245.

Review: FAILURE TO FILE BRIEFS. Affirmance of judgment in absence of brief and oral argument.

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

F. P. Olmstead, for appellants.

Letton & Hinshaw, contra.

PER CURIAM.

This is an appeal from an order confirming a sale of real estate under foreclosure. The case was not argued and no briefs have been filed. The judgment is, therefore,

AFFIRMED.

CHARLES BASYE V. STATE OF NEBRASKA.

FILED JUNE 18, 1895. NO. 7277.

1. **Criminal Law:** JURORS: VOIR DIRE EXAMINATION: REVIEW. Upon the *voir dire* examination of a venire-man the trial court should exercise a sound discretion, not only in respect to the pertinency of the questions propounded, but as to the limits, extent, and scope of the examination. In order to constitute prejudicial error a clear abuse of discretion must be shown.

2. ———: ———: ———. On the examination of a juror on his *voir dire* each party has the right, within reasonable limits, to put pertinent questions for the purpose of ascertaining whether or not there exist sufficient grounds for a challenge for cause, and also to enable the party to properly exercise his statutory right of peremptory challenge.

3. ———: ———: ———: REVIEW. During the impaneling of the jury in a prosecution for murder, counsel for the accused propounded to several jurors, who had read newspaper accounts of the killing, this question: "Have you formed any opinion or conclusion in your own mind as to whether or not the defendant was guilty, or whether or not the crime of murder had been committed?" The county attorney objected as not a proper *voir dire* question, which objection was sustained by the trial court. *Held*, Error.

4. ———: WITNESSES. Under the statutes of this state the defendant is a competent witness in his own behalf. His interest in the result of the trial may be shown for the purpose of affecting his credibility.

5. ———: EXAMINATION OF JURORS. In impaneling a jury in a criminal case it is proper to ask a juror whether the fact that the defendant is charged with a crime would have any weight with the juror, and whether he could give the same credit to the testimony of the accused, should he testify in his own behalf, that he could give to the testimony of any other witness, under the same circumstances.

6. **Qualification of Jurors.** The fact of qualifications of a juror, when challenged for cause, is to be determined by the trial court from a consideration of his entire examination and such other evidence and circumstances as tend to throw light upon the subject. The appearance and general demeanor of

the juror while being examined may be taken into consideration in determining his competency to serve.

7. ———: CHALLENGES: DECISIONS: REVIEW. The finding of the trial court, in deciding a challenge for cause, will not be set aside by the appellate court, unless it is clearly wrong.

8. ———: OPINIONS. Where, upon examination of a juror, it is shown that he has formed a hypothetical opinion, founded solely upon rumor and reading of newspaper reports, and that such opinion will not interfere with his rendering a fair and impartial verdict upon the evidence under the instructions of the court, he is not disqualified to sit in the case.

9. ———: ———. An opinion formed by a juror does not affect his competency, or afford cause for challenge, unless it is unqualified as to the guilt or innocence of the accused of the offense charged.

10. **Information**: INDORSEMENT OF NAMES OF WITNESSES. The indorsement of the surname and the initials of the Christian or given name of a witness upon an information is a sufficient compliance with the requirements of the statute which requires the names of the state's witnesses to be indorsed upon the information prior to the trial.

11. **Murder**: EVIDENCE. In a prosecution for murder it is competent for the state to prove the description and location of the wounds inflicted by the defendant upon the deceased, as tending to establish whether or not death resulted therefrom.

12. ———: ———. Dying declarations, in order to be admissible, must have been made under a sense of impending death, and it is competent for the party offering them to prove the physical condition of the deceased at the time they were made.

13. **Criminal Law**: ORDER OF ADMITTING EVIDENCE. The order in which a party shall introduce his proof is, to a great extent, discretionary with the trial judge, and the action of the court in that regard will not be cause for reversal when no abuse of discretion is shown.

14. ———: CONFESSIONS. A voluntary confession or admission of guilt made by a prisoner out of court is admissible in evidence against him.

15. ———: ———. *Held*, That sufficient foundation was laid for the admission of that class of testimony in this case.

16. **Attorney and Client**: PRIVILEGED COMMUNICATIONS. A communication from a party to an attorney is not privileged

where the relation of attorney and client did not exist between them.

17. ——: ——: DISCLOSURE IN EVIDENCE BY THIRD PERSONS. While confidential communications between attorney and client are privileged, and neither will the attorney be permitted, nor can the client be compelled, to repeat them, yet where a client makes statements to his counsel in the presence and hearing of a third party who stands in no relation of confidence to either the attorney or client, such person may testify to such statements.

18. **Murder:** REPUTATION OF DEFENDANT: EVIDENCE. On a trial for murder, evidence tending to show the defendant's general reputation as a peaceable and quiet man in the community in which he resided prior to the offense charged is competent, but his reputation for honesty and integrity is not admissible.

19. **Criminal Law:** CHARACTER OF DEFENDANT: EVIDENCE. Where, in a criminal prosecution, the defendant introduces evidence of his good character or general reputation, it is not competent for the state in rebuttal to put in evidence particular facts or rumors tending to prove it to be bad.

20. ——: ——: ——. It is permissible on cross-examination of a witness testifying in reference to character or reputation, to ascertain the extent of his information, the foundation for his opinion or the data from which he draws his conclusion; and upon such examination he may be asked, with a view to lessen the effect of his testimony as to general reputation, but not for the purpose of establishing the fact to be proved, whether he has not heard certain enumerated reports which tend to contradict the purport and effect of his testimony given on direct examination.

21. **Murder:** SELF-DEFENSE: DISPOSITION OF ACCUSED: EVIDENCE. In a prosecution for murder, where the circumstances tend to establish self-defense, evidence of the quarrelsome and irritable disposition of the deceased, and of threats recently made by him against the accused, which were communicated to the defendant prior to the killing, is admissible.

ERROR to the district court for Saunders county. Tried below before WHEELER, J.

The opinion contains a statement of the case.

Good & Good and *J. K. Vandemark*, for plaintiff in error:

The greatest latitude should be permitted in examining jurors to ascertain whether they are biased or prejudiced. The accused should not only be permitted to ask the jurors the direct question as to whether or not they have such bias or prejudice, but should be permitted to ask them any question from which the inference of bias or prejudice may be drawn. (*Monaghan v. Agricultural Fire Ins. Co.*, 18 N. W. Rep. [Mich.], 796; *Chicago & A. R. Co. v. Buttolf*, 66 Ill., 347; 1 Thompson, Trials, sec. 102.)

Error resulted from overruling challenges for cause where the examination showed that jurors had formed opinions as to the guilt of defendant. (*Miller v. State*, 29 Neb., 437; *Curry v. State*, 4 Neb., 550; *Cowan v. State*, 22 Neb., 519; *Olive v. State*, 11 Neb., 20.)

The court erred in sustaining objections to questions propounded to jurors in reference to the consideration to be given the testimony of defendant in case he should testify in his own behalf. (*Heldt v. State*, 20 Neb., 492; *Lester v. State*, 2 Tex. App., 432; *State v. McAfee*, 64 N. Car., 339; 1 Thompson, Trials, sec. 103; *People v. Car Soy*, 57 Cal., 102; *Stoots v. State*, 9 N. E. Rep. [Ind.], 380.)

Full names of the witnesses for the state should be indorsed on the information. (*Enewold v. Olsen*, 39 Neb., 59.)

The communication between defendant and his attorney, related by the witness Allen, was privileged and should have been excluded. (Wharton, Criminal Evidence, sec. 496; *Bowers v. State*, 29 O. St., 542.)

The objection to admission of defendant's confession on the ground that there was no foundation laid should have been sustained. (Greenleaf, Evidence [15th ed.], sec. 219; *Dodge v. People*, 4 Neb., 230.)

Evidence of defendant's honesty and integrity was erroneously rejected. (Wharton, Criminal Evidence [8th ed.], sec. 66.)

Defendant should have been permitted to show that deceased was a quarrelsome and irritable man. (Wharton, Criminal Evidence [8th ed.], sec. 72; 2 Thompson, Trials, sec. 2174.)

Defendant offered to prove threats made against him by deceased and the proof was erroneously excluded. (Wharton, Criminal Evidence [8th ed.], sec. 69; *State v. Tarter*, 37 Pac. Rep., [Ore.], 53; *Wiggins v. People*, 93 U. S., 467.)

Where the character of the accused is drawn in question, it is not permissible to show particular facts or acts committed by the accused in collateral matters. (*Olive v. State*, 11 Neb., 1; *Commonwealth v. O'Brien*, 119 Mass., 342; *Patterson v. State*, 41 Neb., 538.)

A. S. Churchill, Attorney General, for the state.

NORVAL, C. J.

At the January, A. D. 1894, term of the district court of Saunders county the plaintiff in error was tried upon an information charging him with murder in the first degree, by having on the 14th day of December, 1893, unlawfully, purposely, and feloniously, and of his deliberate and premeditated malice, killed and murdered one William O. Wright. The prisoner was found guilty of murder in the second degree, and thereupon he moved to set aside the verdict, and for a new trial, which motion was overruled, and he was adjudged to be imprisoned in the state penitentiary at hard labor for the term of twenty years, from which judgment and sentence he prosecutes a petition in error to this court.

The evidence contained in the bill of exceptions is quite voluminous, and it is not deemed necessary that we set out or discuss all the details thereof. For a proper understanding of some of the questions presented for review a brief statement of the facts disclosed by the record may not be out of place. From the evidence on the trial it appears that

the plaintiff in error and the deceased resided in the town of Valparaiso, in this state, and at the time of the unfortunate tragedy they lived upon the same block. Basye was a single man, engaged in repairing and painting buggies, and roomed over his shop. On the morning of the 14th of December, 1893, the deceased went to the room of Basye, one D. O. White being present when he entered, but who remained only a short time, but after completing his settlement with Basye he left, leaving deceased and plaintiff in error alone. A few minutes after White left, Basye shot Wright with a shot-gun. The latter died from the effects of the wounds the second night thereafter. Immediately after the shooting, plaintiff in error went upon the street and told the first person he met what he had done. He then went to the law office of C. S. Allen, and soon thereafter was taken into custody. The killing is admitted. The theory of the prosecution is that it was premeditated by the plaintiff in error. The latter denies this, claiming that he fired the fatal shot in self-defense. The record discloses that two days prior to the shooting, Wright caused Basye to be arrested for keeping a house of prostitution, but before a hearing was had the case was compromised and the complaint withdrawn, the defendant paying the costs. The state produced as a witness one Dan F. Riley, who testified that on the evening after the dismissal of the criminal case, Basye, in the presence of the witnesses Denman and Hotchkiss, said, "if he caught Mr. Wright around his place again he would put a load of shot into him." The plaintiff in error, as well as both Denman and Hotchkiss, upon being interrogated upon the witness stand, testified positively that no threat of any kind was made by Basye concerning the deceased at the time and place stated by Riley, but that the only threats made were of and concerning one Barnes. It further appears in evidence that the deceased was indebted to the plaintiff in error in the sum of $10 for painting a buggy, and that upon the day previous

to the shooting the account was presented by Basye's attorney to Wright, and payment thereof demanded, and that the latter, in an angry manner, refused to pay it then, saying, "he was not done with Basye yet, and that he would settle with him to-morrow." It was shown by the testimony of several witnesses that within a few days of the tragedy the deceased had frequently made threats that he would run Basye out of town, also that the deceased had borrowed a revolver of one Barnes, which fact, together with the threats made by Wright, were communicated to the plaintiff in error the evening preceding the shooting. The state introduced evidence tending to show that the deceased left home about 9 o'clock on the morning the fatal shot was fired, saying he was going to Basye's to pay him for painting the buggy. The only evidence as to what took place after he arrived at the place of abode of the plaintiff in error, and the facts and circumstances surrounding the killing, consists of the dying declarations of Wright, the testimony of the accused and his admissions or confessions. At least nine witnesses testified to the dying declarations of Wright, and their testimony is substantially the same, and to the effect that the deceased went over to Basye's rooms to pay him what he owed him, that he made a tender of the money, that Basye ordered him out of the room, and as deceased was leaving he shot him. The plaintiff in error testified that D. O. White came to his rooms on the morning of the 14th of December to settle an account, and after the business was transacted White went away, but before he did so Wright, the deceased, knocked at the door and was admitted by Basye, who greeted him with "Good morning," asked him in, gave him a chair and he sat down near the stove. During the five or six minutes that White remained after Wright arrived there was no other conversation between Basye and the deceased. The foregoing testimony of the plaintiff in error is fully corroborated in every particular by the evidence of

White, who was a witness in behalf of the state. The accused further testified that when White went away he (witness) put on his overcoat and overshoes, and then turned to the deceased and asked him what he was going to do about the buggy. To this inquiry the deceased replied by asking Basye what he was going to do, and the latter answered he did not know, that his lawyer had advised him to go and get the buggy and put it in the shop; that "Wright jumped up then where he was, holding the chair in his hand, and spoke in a very violent manner to me and said, 'I will be God-damned if you will. I would like to see either you or your lawyer get that buggy,' and then he grabbed up a piece of a chunk and commenced to shake it over my head. At that time I started to get to the door. I backed myself over very near the door, and he was backing over towards the door too, and he started to put his hand back on his hip, or made an effort to do that as he was going out, and I did not think it was right for him to go on that way, and he made an effort to strike me. I stepped back and picked up the poker, whereupon the deceased made a motion at me with something in his hand and says, 'You drop that or I will drop you,' and I done so. I stepped back a few steps and the thought occurred to me, and I reached around the corner and got my gun. I brought it around in front of me to a guard. To bring it to a guard is to bring the gun in front in a motion ready to fire. I told him to get out of the room. I told him that repeatedly. I repeated that three or four times and told him to keep his hands up. He stepped out in the hall and remained there. Well, he says to me, 'I have papers to serve on you, and I am going to serve them on you,' and he smacked his hand around over his hip pocket, and I throwed the gun up and she went off." There was likewise introduced on the trial evidence tending to show that Basye was a person of small stature, peaceable, quiet and inoffensive, and that the deceased was a large, strong man.

There are other circumstances appearing in the proofs introduced tending to strengthen the theory of the prosecution, and also that of the defense, which we will not set out.

The petition in error contains eighty-three assignments of error, several of which are not urged in the argument, and it is not deemed necessary that we notice or consider all the exceptions relied upon by the prisoner in his brief, but only the most important questions arising upon the record will receive attention at our hands.

J. E. Reed, Alvin Tracy, and Barney Schroeder were separately called and examined both by counsel for the state and the accused touching their qualifications to sit as jurors in the cause. During such examination it was disclosed that each had read newspaper accounts or statements of the tragedy, and thereupon to each was propounded by defendant's counsel the following question: "Have you formed any opinion or conclusion in your own mind as to whether or not the defendant was guilty, or whether or not the crime of murder had been committed?" The county attorney objected as not a proper *voir dire* question, which objection was sustained by the court, and exception was taken by the defendant. Of this ruling he now complains, and is made the basis of the sixth, tenth, and sixteenth assignments of error. We think the question propounded to the jurors was pertinent and proper and they should have been allowed to answer it. One object of the *voir dire* examination is to ascertain whether the mind of the venire-man is entirely free from bias, or prejudice, and whether he would make a competent juror. But the purpose of such examination is not alone to ascertain whether sufficient grounds for challenge for cause exist, but as well to enable the accused to properly exercise his right to challenge peremptorily. For the purpose of ascertaining the real condition of the mind of the venire-man, a wide range of inquiry is generally permissible. The court should always exercise a

sound legal discretion in respect to the pertinency of the question put to the juror, as well as to the limits to which the examination shall be extended. To constitute prejudicial error it must clearly appear that there has been an abuse of discretion in refusing to allow questions to be answered. In 1 Thompson, Trials, sec. 101, the author says: "Within reasonable limits, each party has a right to put pertinent questions to show, not only that there exist proper grounds for a challenge for cause, but to elicit facts to enable him to decide whether or not he will exercise his right to peremptory challenge." The supreme court of Michigan, speaking through Judge Champlin, in *Monaghan v. Agricultural Fire Ins. Co.*, 18 N. W. Rep., 797, in passing upon the scope of a *voir dire* examination uses this language: "It is the evident intent of the law to secure a jury that shall come to the consideration of the case unaffected by any previous judgment, opinion, or bias, with respect either to the parties or subject-matter in controversy, and it is important to the rights of parties that they may be permitted inquiries which may be the means of discovering facts which will justify the exclusion of a juror. The success of a challenge depends upon eliciting such information from the juror himself, as well as from other sources, as to his state or condition of mind, as will enable a judgment to be formed by the court as to his competency. For this purpose the law subjects the juror to an examination on oath, when questions are put to test his competency. If the juror had been permitted to answer the question, and he had replied that he would, in the case put, lean in favor of the plaintiff or against the defendant, can it be doubted that he could have been challenged for cause? He would have shown himself to have been disqualified, and no statement from him that he could render an impartial verdict would have removed the disqualification. * * * A party has a right to a certain number of peremptory challenges, and in order to exercise this right understandingly

it is proper for him to ascertain as nearly as practicable the disposition of the juror towards him, and towards the subject-matter in controversy; and any inquiry within reasonable limits which tends to bring to light any bias or prejudice entertained by a juror is proper." The doctrine is sustained by *Chicago & A. R. Co. v. Buttolf*, 66 Ill., 347; *Watson v. Whitney*, 23 Cal., 376; *State v. Godfrey*, Brayt. [Vt.], 170; *People v. Car Soy*, 57 Cal., 102; *State v. Bresland*, 61 N. W. Rep. [Minn.], 450. There is no room for doubt that the question above indicated which was asked the jurors in this case was proper, at least, for the purpose of determining whether the accused would challenge peremptorily the several jurors, and the trial court erred in sustaining the state's objection to said question.

Upon the *voir dire* examination of the venire-men Olmstead, Francis, and Schroeder the defendant's counsel asked each in substance the following question: "Would the mere fact that the defendant is charged with the commission of a crime have any weight with you, and could you give the same credit to his testimony, were he to go upon the stand, his interest in the result of the suit taken into consideration, that you could give to any other witness?" Complaint is made to the sustaining by the court below of the state's objection to the question quoted. By section 473 of the Criminal Code it is provided: "No person shall be disqualified as a witness in any criminal prosecution, by reason of his interest in the event of the same, as a party or otherwise, or by reason of his conviction of any crime, but such interest or conviction may be shown for the purpose of affecting his credibility. In the trial of all indictments, complaints, and other proceedings against persons charged with the commission of crimes or offenses, the person so charged shall, at his own request, but not otherwise, be deemed a competent witness; nor shall the neglect or refusal to testify create any presumption against him, nor shall any reference be made to, nor any comment

upon, such neglect or refusal." At common law a person prosecuted for a crime was disqualified from testifying as a witness; but in this state the rule is changed by the statute above set out. Here the defendant in a criminal prosecution may voluntarily take the witness stand and testify, but he cannot be compelled to do so. His interest in the result of the trial may be considered by the jury in determining his credibility and the weight that should be given his testimony. The purpose of the putting of the foregoing question to the jurors was to elicit whether or not the fact that the defendant was accused of crime would militate against him, and whether they could give the same credence, or weight, to his testimony as to that of any other person similarly situated. In other words, it was asked to enable the defendant to determine whether the jurors could sit in the trial of the cause without any bias or prejudice against him, and if it were disclosed that they could not, that he might challenge them peremptorily, if not for cause. The question was within the scope of a legitimate *voir dire* examination. (*Lester v. State*, 2 Tex. App., 432; *State v. McAffee*, 64 N. Car., 339; *People v. Car Soy*, 57 Cal, 102; *Stoots v. State*, 9 N. E. Rep. [Ind.], 380; 1 Thompson, Trials, sec. 103.)

The defendant challenged for cause the jurors Alvin Tracy and N. P. Baker, which challenges were overruled and the defendant excepted to the ruling of the court. Permitting these two jurors to serve, over the objection of the defendant, is covered by the eighth and twentieth assignments of error. These two assignments present the same question of law, and will therefore be considered together. The testimony of the jurors on their *voir dire* was practically the same, that of Baker being substantially as follows:

Q. You heard of this case at the time of the occurrence?

A. Yes, sir.

Q. Have you read the published statements in the local

papers at the time, or about the time, of the occurrence of this affair?

A. I think that I read one that was published in the county papers at the time, I don't know which, or perhaps both.

Q. Do you recollect now the matters contained in that which you read?

A. Yes, sir.

Q. Did the account which you read purport to give in detail a statement of the facts, or only a general statement of what had occurred?

A. Well, I don't know if I could answer that question now.

Q. Did the account which you read profess or undertake to give the details of the occurrence?

A. Yes, sir; I should suppose so.

Q. Did you from that account form an opinion as to the guilt or innocence of the accused?

A. Yes, sir; I think perhaps I did.

Q. You think you did?

A. I think I did.

Q. Was that opinion you had, and is it of such a character as to require evidence primarily, to remove it, or was it only an impression?

A. I should think it was more of an impression at the time.

Q. That is what it amounted to, an impression?

A. That is all.

Q. Did you talk with persons concerning the matter?

A. I don't know whether I did or not.

Q. Did you talk with any person with whom, from the nature of their conversation, or what he said to you, you might conclude, or did conclude that he knew the facts, or that he simply detailed them to you as hearsay?

A. No, sir; I don't know that I ever did.

Q. Is it your belief that you have talked with no person except persons mostly who talked from hearsay?

A. That would be my impression.

Q. Did you from any such conversation form any opinion as to the guilt or innocence of the accused?

A. No, I can't say that I did.

Q. Now, from what you have heard of this case, and read of it, have you now any opinion as to the guilt or innocence of the person charged with this crime?

A. No, I can't say that I have.

Q. Have you any such impression of the matter as would bias or influence your verdict, after you had heard the testimony and instructions of the court to the jury?

A. No, sir; I don't know that I have.

Mr. Baker also testified that he had no acquaintance either with the defendant or the person murdered.

The cross-examination by Mr. Good, on behalf of the defendant, was substantially as follows:

Q. You have read about the case in the local papers, and possibly in the Omaha *Bee?*

A. Yes, sir.

Q. You have heard some talk with reference to the case?

A. Street conversations perhaps.

Q. The conversations which you heard were conversations between persons from Valparaiso, or any of them from Valparaiso or persons in that vicinity?

A. No, sir. I am not acquainted down in Valparaiso. I think was here on the streets among neighbors.

Q. Do you know whether or not the persons with whom you talked, or heard the conversation, related what were the facts, or what were claimed to be the facts in the case?

A. No, I don't know as to that.

Q. From what you heard and what you read did you form any impression as to what verdict ought to be rendered in this case?

A. That would be owing to the reliance I would put upon it.

Q. How much reliance did you put upon it, Mr. Baker?

A. No, sir; I can't say that I put that much reliance on it.

Q. From what you read and what you heard, did you form any belief, or any bias or prejudice for or against the defendant?

A. No, sir.

Q. Are you conscious at this time, Mr. Baker, of any feeling or bias against the defendant?

A. No, sir.

Q. That impression which you then formed you have now?

A. Yes, sir; I suppose I have.

Q. Is the impression which you now have such as would require some evidence to remove or change it?

A. Yes, sir.

Q. The impression which you have is based upon reading the newspapers, and conversations which you have had and heard upon the subject?

A. Yes, sir.

Re-examined by county attorney:

Q. Notwithstanding this impression, Mr. Baker, can you sit here in the trial of this case as a juror, and impartially try the defendant on the evidence, and instructions of the court, and not have any bias by reason of the impression which you state you have of the matter?

A. Yes, sir; I think I could.

The court took the juror in hand and elicited from him the statement that he then had no opinion as to whether the defendant was guilty or not, and that his information in regard to the matter consisted in reading the accounts of the killing published in the *Wasp* and the Omaha *Bee*.

It is insisted that the case at bar falls squarely within

the rule announced by this court in *Miller v. State*, 29 Neb., 437. It was there held, following *Curry v. State*, 4 Neb., 550, *Olive v. State*, 11 Neb., 11, and *Cowan v. State*, 22 Neb., 519, that "when a person called to serve as a juror in a criminal case discloses on his *voir dire* that he has an opinion as to the guilt or innocence of the accused, based on rumor and the reading of newspaper accounts of the alleged crime, which will require evidence to remove, a challenge for cause should be sustained, even though he states that he thinks he could render an impartial verdict under the law and evidence." The statute provides, section 468 of the Criminal Code, that in a criminal case a challenge for cause may be made to any person called to serve as a juror for any of the nine grounds which are enumerated, the second of which is as follows: "That he has formed or expressed an opinion as to the guilt or innocence of the accused; *Provided*, That if the juror shall state that he has formed or expressed an opinion as to the guilt or innocence of the accused, the court shall thereupon proceed to examine, on oath, such juror as to the ground of such opinion; and if it shall appear to have been founded upon reading newspaper statements, communications, comments, or reports, or upon rumor, or hearsay, and not upon conversations with witnesses of the transactions, or reading reports of their testimony, or hearing them testify, and the juror shall say on oath that he feels able, notwithstanding such opinion, to render an impartial verdict upon the law and the evidence, the court, if satisfied that said juror is impartial and will render such verdict, may, in its discretion, admit such juror as competent to serve in such case." It is very evident that the purpose of the above provision was to secure to the state and to the accused a fair, impartial, unprejudiced, and unbiased jury in criminal prosecutions, one that will decide the case upon the evidence alone, under the charge of the court, uninfluenced by outside considerations. A juror, who upon his

voir dire discloses that he is biased or prejudiced, or who has a fixed and settled conviction or opinion as to the guilt or innocence of the defendant based upon mere rumor, or the reading of the public press, or founded upon conversations with witnesses of the transaction, is incompetent to serve, and should be rejected, even though he may upon his examination state that he feels able "to render an impartial verdict upon the law and the evidence." This is the true test of disqualification within the meaning of the statute. If upon the whole examination of the juror it is manifest that the opinion formed by him from reading newspaper accounts of the alleged crime or upon rumor is merely hypothetical, or conditional on the truth of the rumor or the newspaper reports read; that he has no settled opinion as to the guilt or innocence of the accused, and that he can render a fair and impartial verdict upon the evidence adduced on the trial, under the instructions of the court, the juror is competent. (*Murphy v. State*, 15 Neb., 383; *Bohanan v. State*, 18 Neb., 57; *Curry v. State*, 5 Neb., 412.) Under the statutes the mere fact that a juror has formed an opinion from what he has heard or read does not disqualify him from acting, nor make him incompetent to serve as a juror. It is only when the venire-man has such a settled opinion, or the examination shows such a state of mind as will preclude him from returning a true verdict upon the evidence submitted on the trial, that he is disqualified. In other words, he is incompetent if he entertains an unqualified or unconditional opinion on the merits of the case, however formed, or an opinion of that fixed character which repels the presumption of innocence of the prisoner. The statute does not in express terms, nor by fair implication, disqualify one from serving as a juror who has read newspaper reports of the commission of the crime. If it did, in this day and age of almost universal reading of the public press, and where the enterprising newspaper man gathers and publishes the events of the day, it would be almost

impossible to secure a competent jury to try any important criminal case. If from the reading of the reports of the commission of crime in the newspapers there is produced in the mind of the juror a settled conviction that what he has read was true and that he had formed a fixed opinion as to the guilt or innocence of the offense charged, then sufficient grounds for challenge for cause exists, since he would not be an impartial juror. Although it is competent and proper to put to a juror questions to elicit from him whether he could lay aside any opinion formed, and decide the case upon the evidence produced on the trial, yet it is the duty and province of the court, and not of the juror, to pass upon and determine the question of capability and whether or not his opinion disqualifies him to act as a juror. This is the plain import of the language of the statute already quoted. Besides, section 469 of the Criminal Code declares: "All challenges for cause shall be tried by the court, on the oath of the person challenged, or on any other evidence," etc. Manifestly, it is the duty of the trial court to decide as to the fact of qualification of the person challenged from a consideration of his entire examination and such other evidence and circumstances as tend to throw light upon the subject. The trial court in determining the fact of qualification is not confined to the answers of the juror alone, but may consider his appearance and general demeanor while undergoing examination. A venire-man might answer that notwithstanding his opinion he could decide the case on the evidence and law, and that he would not be influenced by prior outside information which he has obtained, and yet his examination might disclose facts that contradict this statement. If it did, he is disqualified. The rule for which counsel for the prisoner contends, if carried to its logical conclusion, will prevent most persons from serving as jurors, who have heard or read anything of the purported facts bearing upon the issue to be tried. In *Miller v. State, supra*, it was disclosed that the opinion

formed by the juror from reading newspaper accounts of the crime and from rumor was so fixed that he could not give the defendant a fair and impartial trial, although he honestly believed he could decide the cause upon the testimony alone. The proper distinction was not drawn in that and some other prior cases in this court between a hypothetical or conditional opinion and an unconditional and fixed one. A careful perusal of the examinations of the jurors Tracy and Baker discloses that they were not acquainted with either the deceased or the defendant; that they entertained no fixed or settled conviction, if indeed any, as to the guilt or innocence of the accused, but that they could render a fair and impartial verdict according to the evidence. The challenges for cause to the jurors were properly overruled.

J. D. Hare, William Giffin, and G. R. McCormick were separately called and examined as witnesses on behalf of the state. The defendant at the time objected to their testifying on the ground that their full Christian names were not written upon the back of the information, the surnames and initials of the Christian names of these witnesses being indorsed thereon. The identical question thus presented by the twenty-second, fortieth, and forty-first assignments of error was passed upon during the present term in *Perry v. State*, 44 Neb., 414, where it was held that such an indorsement of the names of witnesses upon the information is a sufficient compliance with the requirements of the statute. No good or sufficient reason having been suggested in the brief of counsel for disturbing the rule announced in the case mentioned, the decision will be followed herein. Therefore, defendant's objections to the above named witnesses being sworn and examined are not well taken.

Drs. Hare and Guttery, who conducted the *post mortem* examination of the body of Wright, were permitted, over the objections of the defendant, to give a particular and

minute description of the gun shot wounds,—the size, depth, and location of each. These rulings are the foundation of the twenty-third and twenty-fifth assignments. The testimony was clearly material and competent as tending to establish the fact that death resulted from the wounds. The proposition is too plain to require elaboration or argument.

Six assignments of error, the twenty-fourth, twenty-seventh, twenty-eighth, thirty-first, thirty-third, and thirty-sixth, are predicated upon the permitting of as many witnesses called by the state to testify as to the intensity of the pain suffered by the deceased after the wounds were inflicted. It is strenuously argued that this testimony was inadmissible and was prejudicial to the prisoner, for the reason that the jury might infer therefrom that it was proper to consider such testimony in determining the degree of the offense charged. Each of the six witnesses testified to certain dying declarations of the deceased, over the objections of the defendant that no proper foundation had been laid for this class of testimony, in that it was not shown that the party making them at the time believed himself *in extremis*. The competency of dying declarations is a question for the court to determine in view of the circumstances under which they were made. In order to be admissible it is essential that the party offering them establish that they were made under a sense of impending death. (*Rakes v. People*, 2 Neb., 157; *Fitzgerald v. State*, 11 Neb., 577; *Binfield v. State*, 15 Neb., 484.) The physical, as well as mental, condition of the deceased at the time of the making of the declaration is admissible, not only as tending to prove that they were made *in extremis*, but as affecting the weight which should be given them by the jury. While it is true the testimony relating to the degree of pain and suffering of the deceased was introduced after the witnesses had detailed the declarations, yet there should not be a new trial awarded for that reason,

since the order of introducing evidence is discretionary with the trial court. (*Clough v. State*, 7 Neb., 323; *Village of Ponca v. Crawford*, 18 Neb., 551; *McCleneghan v. Reid*, 34 Neb., 472; *Consaul v. Sheldon*, 35 Neb., 247.) The record in the case at bar fails to show that the defendant has been deprived of a substantial right or that there has been an abuse of discretion in the order in which the proofs were put in.

Several assignments of error refer to permitting different witnesses to testify to verbal confessions made by the defendant. Objections were made to the introduction of these admissions or confessions on the ground that no foundation was laid. The record, without the least contradiction, discloses that the confessions proved upon the trial were made on the day of the tragedy, before the defendant was arrested, and under circumstances of so conclusive a nature as to establish beyond controversy that they were voluntary, and without inducement of any kind being held out to the defendant to obtain them. They were made on the defendant's own offer, without question or suggestion, and without the influence of hope or fear, and were therefore admissible. (*Furst v. State*, 31 Neb., 403.)

C. S. Allen, an attorney residing at Valparaiso, testified to a conversation had with the defendant, in which the latter detailed the shooting and the circumstances surrounding the parties at the time. Objection was made by the defendant to this testimony on the ground that the communication was privileged, which was overruled, and the testimony admitted. A reversal is sought on that ground. Subdivision 4, section 328, of the Code of Civil Procedure, provides that testimony cannot be given by "an attorney, concerning any communication made to him by his client in that relation or his advice thereon, without the client's consent in open court or in writing produced in court." Section 333 declares: "No practicing attorney * * * shall be allowed, in giving testimony, to disclose any con-

fidential communication, properly intrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice or discipline." The foregoing provisions have heretofore been considered by this court, and it has been held that any confidential communication made by a party to an attorney is privileged, and cannot be given in evidence unless the client consents thereto. (*Romberg v. Hughes*, 18 Neb., 579; *Nelson v. Becker*, 32 Neb., 99.) In order to entitle one to the protection of the statute which renders the communication to a lawyer privileged it is obvious that the relation of client and attorney must have existed between them. Were the admissions testified to by Mr. Allen made by the defendant in confidential consultation with him as his attorney? This is a question of fact to be determined from the evidence introduced on that issue. It is undisputed that shortly after the shooting the defendant went to the law office of Mr. Allen, where, in the presence of J. K. Vandemark, an attorney of the same town, the conversation in question occurred. It was also shown without contradiction that Mr. Allen had never at any time been employed by the defendant, although on two previous occasions Mr. Basye went to see him to engage him to look after some legal business, but Mr. Allen declined to take the cases or to be retained. The evidence of the latter shows at the time the admissions were made the defendant did not seek his counsel or ask to engage him; that nothing was said from which the inference could be drawn that the accused desired to consult with him; that he gave him no advice, although Mr. Vandemark told him what to do. The testimony of Mr. Vandemark was to the effect that it was the witness' understanding that Basye came to employ Mr. Allen, and that the latter and the witness both counseled him. The evidence is ample to justify the trial court in reaching the conclusion that the relation of attorney and client

did not exist between Allen and the defendant, and that the communication was not made by the latter confidentially to obtain Mr. Allen as his counsel. It is argued that the communication is privileged, since Mr. Vandemark gave advice in the capacity of an attorney, and that Mr. Allen could not disclose the confession, because he happened to be present at the time. Wharton, Criminal Evidence, sec. 496, and *Bowers v. State*, 29 O. St., 542, are cited by counsel in support of their contention. These authorities are not in point. Mr. Wharton, after stating the general rule in regard to communications made by a client to his attorney being privileged, says: "Nor does the privilege cease to operate because a friend was present with the client at the interview." (Wharton, Criminal Evidence [8th ed.], sec. 496.) To the same effect is *Bowers v. State, supra.* The doctrine has no application to the facts in the case at bar. Under the foregoing authorities an attorney will not be permitted to disclose the admissions or communications of his client, against the consent of the latter, because the same were made in the presence of a third party. But it by no means follows that such third party, who was in no way connected with the attorney or client, cannot testify as to such admissions. Neither is the attorney permitted, nor can the client be compelled, to disclose communications or statements made by the latter to the former, but further than this the law affords no protection. Where, at least in the absence of fraud and collusion, a client makes statements to his attorney in the presence of a third party, such person is not prohibited by statute from testifying to such statement. (*State v. Sterrett*, 68 Ia., 76; *Jackson v. French*, 3 Wend [N. Y.], 339; *Hatton v. Robinson*, 14 Pick. [Mass.], 416; *Perry v. State*, 38 Pac. Rep. [Idaho], 655; *People v. Buchanan*, 39 N. E. Rep. [N.Y.], 846. It follows from what has been said that the defendant was not entitled to have the statements made by Basye to Allen excluded as a privileged communication.

Upon the trial the defendant offered to prove by two witnesses, D. O. White and James Casement, while they were upon the stand, that his reputation for honesty and integrity was good in the community where he lived. The court excluded the offered testimony, and of which action complaint is now made. The text-books and the adjudicated cases agree that in a criminal trial evidence of the previous good character of the defendant is always admissible as a fact for the jury to consider in determining the question of guilt or innocence. The character the defendant is entitled to prove must be consistent with the offense charged. For instance, in a prosecution for murder his general reputation as a peaceable and quiet man is competent, but not his character for honesty and integrity. Had this prosecution been for larceny, then the offered evidence would have been admissible. (Wharton, Criminal Evidence, sec. 60 and note 3.) Several witnesses were introduced by the defendant who testified to his general reputation as a peaceable and law-abiding citizen. On cross-examination each, over the objection and exception of the defendant, stated that he had heard of the defendant having a quarrel with, and striking, a man several years before while he resided near Raymond. It is argued that under the rule announced in *Olive v. State*, 11 Neb., 1, and *Patterson v. State*, 41 Neb., 538, the admission in evidence on cross-examination of specific facts tending to show the accused's reputation to be bad was erroneous. The precise point here raised was involved in and passed upon by the court in the cases mentioned above, in each of which it was held that the admission of such testimony upon cross-examination was reversible error. In the syllabus in each case it was correctly decided that where a defendant in a criminal case has introduced evidence of his good character or reputation, the state in reply cannot prove particular facts in order to show it to be bad. This rule is a wise one, for the obvious reason that the accused is not expected to be

prepared to meet a distinct and specific charge. The principle, however, was not correctly applied to the facts in the two Nebraska cases. It was upon cross-examination that the witness was interrogated as to specific matters. While particular facts are inadmissible in evidence upon direct examination for the purpose of sustaining or overthrowing character, yet this doctrine does not extend to cross-examination. It is firmly settled by the adjudications in this country that upon cross-examination of a witness who has testified to general reputation questions may be propounded for the purpose of eliciting the source of the witness' information, and particular facts may be called to his attention, and asked whether he ever heard them. This is permissible not for the purpose of establishing the truth of such facts, but to test the witness' credibility, and to enable the jury to ascertain the weight to be given to his testimony. The extent of the cross-examination of a witness must be left to the discretion of the trial court. The questions put to the several witnesses were within the scope of a legitimate cross-examination, and there was no abuse of discretion in permitting them to be answered. (*State v. Arnold*, 12 Ia., 480; *Oliver v. Pate*, 43 Ind., 132; *People v. Annis*, 13 Mich., 511; *Rex v. Martin*, 6 C. & P. [Eng.], 562; *Leonard v. Allen*, 11 Cush. [Mass.], 241; *Ingram v. State*, 67 Ala., 67; *Tesney v. State*, 77 Ala., 33; *De Arman v. State*, 71 Ala., 357; *Jackson v. State*, 78 Ala., 471; *State v. Jerome*, 33 Conn., 265; *Carpenter v. Blake*, 10 Hun [N. Y.], 358; Phillips, Evidence, 352; 1 Best, Evidence, sec. 261.)

Another contention is that the court erred in refusing to allow the defendant to prove that the deceased was a quarrelsome and irritable man, and that he had made threats against the defendant, which were communicated to the accused the evening prior to the shooting. This evidence ought to have been received. In a homicide case, where it is claimed that the killing was in self-defense, evidence

of the quarrelsome disposition of the deceased and the threats are proper elements for the jury to consider in determining whether the defendant was justified in taking the life of the deceased. In *State v. Zellers*, 2 Halst. [N. J. Law], 230*, the court say: "Inasmuch as the distinction between murder and manslaughter depends upon the impulse of the mind with which the act was committed, every circumstance which goes to show the feeling of the parties towards each other may be proper. That temper, which at one time might not be excited, might, under the excitement of other circumstances, be more easily roused, and, therefore, it may be received by the jury to show the state of mind of the parties." In *Brownell v. People*, 38 Mich., 735, Campbell, C. J., speaking for the court, observes: "The defense rested upon the grounds, among others, that Brownell used a pistol to repel an assault which was not only violent in fact, but made by a powerful man of dangerous temper, who had made threats against him. Looking at the case in a common-sense light, we cannot avoid seeing that any person would naturally be more in fear of a man of that sort than of a quiet or weaker man, and would, in case of an attack from him, feel a greater need of extreme measures to protect himself, and resist his adversary. Inasmuch as every one finds his excuse in facts as they honestly appear to him, such important facts as these cannot be disregarded." *State v. Tackett*, 1 Hawks [N. Car.], 210, was a prosecution for the crime of murder. The defendant set up self-defense. The supreme court on a review of the case uses this language: "If the general behavior of the deceased was marked with turbulence and insolence, it might, in connection with the threats, quarrels, and existing causes of resentment he had against the prisoner, increase the probability that the latter had acted under strong and legal provocation." In *State v. Tarter*, 37 Pac. Rep. [Ore.], 53, the supreme court of Oregon say: "Where the circumstances raise a question of self-defense,

evidence of uncommunicated threats, recently made, are admissible for the purpose of showing the motive of the deceased and the nature and character of the assault. So, also, proof of threats not communicated is often admitted for the purpose of corroborating evidence of those communicated; and likewise, where it is doubtful from the evidence which party commenced the affray, communicated threats are admissible to show who was probably the first assailant." As sustaining the doctrine that the character and disposition of the deceased, and the threats made by him against the prisoner, were admissible in evidence see Wharton Criminal Evidence, secs. 72–78, and cases there cited; 2 Thompson, Trials, secs. 2173, 2174, and cases cited; *Hurd v. People*, 25 Mich., 405. It is true that more than one witness for the defense did testify to threats made by the deceased, but that is no reason why the witness Espy should not have been permitted to detail other similar threats which he heard the deceased utter concerning the accused recently before the tragedy.

There are errors alleged upon the admission and exclusion of testimony, but as they are not likely to be repeated upon another trial, they will not be considered by us. So, too, the giving of a number of instructions, as well as the refusal of the defendant's request to charge, are assigned as error, but we will not stop to review them, although an examination shows that some of the instructions given on the subject of self-defense were erroneous. We do not, however, place a reversal upon that ground. For the errors already indicated the judgment is reversed, and the cause remanded.

REVERSED AND REMANDED.

HERMAN KOUNTZE v. JOHN H. ERCK.

FILED JUNE 18, 1895. No. 7749.

1. **Mortgages**: FORECLOSURE: DEFICIENCY JUDGMENT: SUPERSEDEAS BONDS. Where, upon the confirmation of sale of real estate made under a decree foreclosing a mortgage, the court renders a judgment for the amount of the deficiency and awards execution therefor, the penalty of a supersedeas bond on appeal from the order of confirmation is not required to be double the amount of the deficiency judgment, but must be in such sum as the court or judge shall fix, and conditioned as prescribed by the third subdivision of section 677 of the Code of Civil Procedure.

2. ———: ———: ———: ———. Where a proper supersedeas bond for an appeal from an order of confirmation is duly filed and approved, execution cannot be issued upon the deficiency judgment until the bond is set aside or modified, or the appellant fails to perfect his appeal, or the appeal is determined. *State Bank v. Green*, 8 Neb., 297; 10 Neb., 130, followed.

MOTION by plaintiff to vacate a bond given to supersede confirmation of sale and deficiency judgment rendered by the district court of Douglas county, and to quash the bill of exceptions. The case was heard below before AMBROSE, J. *Motion overruled in part and sustained in part.*

Winfield S. Strawn, for the motion.

George O. Calder, contra.

NORVAL, C. J.

An action was instituted in the court below by Herman Kountze against John H. Erck to foreclose a mortgage on certain real estate in the city of Omaha, executed by the defendant to the plaintiff to secure the payment of a promissory note calling for $7,775.62, with seven per cent interest thereon from date thereof until paid. Subse-

quently, and on the 30th day of December, 1893, the court found that there was due the plaintiff upon his note and mortgage the sum of $8,589.75, and that he was entitled to a foreclosure of the mortgage as prayed. Judgment and decree were entered in accordance with these findings, and a special master commissioner was appointed to make the sale. The defendant filed with the clerk a request for stay of the order of sale, and after the expiration of the stay, an order of sale was issued, and the property sold thereunder. The defendant presented objections to the confirmation of the sale, which the court overruled, the sale was confirmed, and deficiency judgment was rendered in favor of the plaintiff and against the defendant in the sum of $5,057.52. To all of which the defendant excepted. Time was given him in which to reduce his exceptions to writing, and on his application the court fixed the amount of supersedeas bond in the sum of $100 to be given to stay the execution of the order of confirmation. On the next day the defendant, with one surety, entered into a supersedeas bond to the plaintiff in the above sum of $100, conditioned "that if the said John H. Erck shall prosecute such appeal without delay and will not during the pendency of the appeal commit or suffer to be committed any waste upon the real estate in controversy, then the obligation shall be null and void, otherwise to remain in full force and effect." This bond was presented to, filed with, and approved by the clerk of the district court as by law provided. Subsequently, the plaintiff submitted a motion to vacate said order fixing the amount of the supersedeas bond and to require the defendant to give bond with approved surety in the sum of double the amount of deficiency judgment entered, which motion the court overruled, and the plaintiff excepted thereto. The plaintiff has procured and filed in this court a transcript of the proceedings, together with the defendant's original bill of exceptions, and had the case docketed as an appeal.

There is submitted for our determination the following motion presented by the plaintiff, to-wit:

"1. To vacate the bond herein given to supersede the confirmation of sale and deficiency judgment herein rendered, for the reason that the amount of said bond is wholly inadequate to meet the case and wholly insufficient to protect the interest thereby superseded.

"2. Subject to the foregoing, to require from the appellant an approved bond in double the amount of the deficiency judgment herein rendered, and one conditioned to pay interest on the amount found due appellee—all as a condition of superseding the order of confirmation of sale and the judgment rendered thereon.

"3. Subject to both the preceding provisions, to order that the bond given shall not operate as a supersedeas of the deficiency judgment herein, even if held sufficient to supersede the order of confirmation of the sale.

"4. That if such bond is held of any value in this case as to the amount, another bond be required to be given conditioned to pay interest upon the amount of the sale till the final decision of this case.

"5. To strike from the record and files in this case the pretended bill of exceptions, for the reasons: (1) That the same was not, within ten days after being returned by plaintiff with his proposed amendments thereto, presented or offered to be presented by the party seeking the settlement of said proposed bill, to the judge who heard the cause, upon five days' notice or otherwise; (2) that said pretended bill of exceptions was not made up, or offered to be made up of the evidence used on the motion to set aside the appraisement made in this case, or objections to the confirmation of said sale; and there is no law allowing the making a bill of exceptions of alleged copies of evidence."

The questions presented for consideration by the first four subdivisions of the above motion involve the construction of section 677 of the Code of Civil Procedure, which pro-

vides for the giving of supersedeas bonds in appeals in actions in equity. This section declares: "No appeal in any case in equity, now pending and undetermined, or which shall hereafter be brought, shall operate as a supersedeas, unless the appellant, or appellants, shall, within twenty days next after the rendition of such judgment or decree, or the making of such final order, execute to the adverse party a bond with one or more sureties as follows: First—When the judgment, decree, or final order appealed from, directs the payment of money, the bond shall be in double the amount of the judgment, decree, or final order, conditioned that the appellant, or appellants, will prosecute such appeal without delay, and pay all condemnation money and costs which may be found against him, or them, on the final determination of the cause in the supreme court. Second—When the judgment, decree, or final order directs the execution of a conveyance or other instrument the bond shall be in such sum as shall be prescribed by the district court, or judge thereof in vacation, conditioned that the appellant, or appellants, will prosecute such appeal without delay, and will abide and perform the judgment or decree rendered, or final order which shall be made by the supreme court in the cause. Third—When the judgment, decree, or order directs the sale or delivery of possession of real estate, the bond shall be in such sum as the court, or judge thereof in vacation, shall prescribe, conditioned that the appellant, or appellants, will prosecute such appeal without delay, and will not during the pendency of such appeal commit, or suffer to be committed, any waste upon such real estate. Fourth—When the judgment, decree, or final order dissolves or modifies any order of injunction which has been, or hereafter may be granted, the supersedeas bond shall be in such reasonable sum as the court, or judge thereof in vacation, shall prescribe, conditioned that the appellant, or appellants, will prosecute such appeal without delay, and will pay all costs which may be found against him, or them,

on the final determination of the cause in the supreme court; and such supersedeas bond shall stay the doing of the act or acts sought to be restrained by the suit, and continue such injunction in force until the case is heard and finally determined in the supreme court. The undertaking given upon the allowance of the injunction shall be and remain in effect until it is finally decided whether or not the injunction ought to have been granted."

The contention of plaintiff is that the first subdivision of the foregoing section governs in cases like the one before us, and that the penalty in the bond must be double the amount of the deficiency judgment rendered, and the bond should be conditioned as by said subdivision provided. It requires no argument to show that where a party appeals from a judgment or decree for the payment of money, in order to supersede the same he must execute a bond to the adverse party with one or more sureties in double the amount of the judgment or decree, conditioned that he "will prosecute such appeal without delay, and pay all condemnation money and costs which may be found against him, or them, on the final determination of the cause in the supreme court." Such is the plain and obvious import of the statute. It is equally clear that the third subdivision of the section controls the amount of the penalty and the condition of a supersedeas bond in an appeal from a decree of foreclosure of mortgaged premises and from a mere order confirming the sale of real property, and in either of which cases the bond must be conditioned like the one before us, and the amount of the penalty is to be fixed, in the discretion of the court or judge. The defendant has not appealed, nor attempted to do so, from the amount of the deficiency judgment, but merely from the order confirming the sale of the mortgaged premises, which order does not direct the payment of any sum of money whatever. It is true a deficiency judgment was rendered in the case at the same time, but the defendant had a perfect right to have either

or both reviewed, at his election. Having appealed alone from the order of confirmation we are entirely satisfied that the defendant was not required to give a supersedeas bond in double the amount of the judgment rendered for the deficiency remaining after the sale of the property, and further that the bond given is conditioned as prescribed by statute. We entertain no doubt that this court has the power to require the penalty of the bond to be increased, and would raise the amount were we satisfied that the sum fixed by the trial court was wholly insufficient to cover the damages which the plaintiff would likely sustain if the order appealed from should be affirmed. The record shows that the premises in controversy are vacant and unimproved, and certainly the defendant could neither "commit, or suffer to be committed," any great amount of waste upon the property. This is conceded by appellee. The amount of the bond is small, but we cannot, in the absence of any showing, say that it is inadequate or that there was an abuse of discretion by the trial court in fixing the penalty.

It is claimed that the bond in question does not operate to stay the issuance of an execution upon the deficiency judgment. The court as now constituted is strongly of the belief that the doctrine contended for is sound, and, if the question were an open one in this state, it would, doubtless, so hold, but the point has been set at rest, and that, too, adversely to the contention of this plaintiff, by a decision of this court pronounced in 1879, in *State Bank of Nebraska v. Green*, 8 Neb., 297, but which counsel insists should be overruled. That was an action to foreclose a real estate mortgage, in which a decree for the sum of $10,509.24, and costs and attorney's fees, was rendered in favor of the plaintiff. A sale was had under the decree, which was confirmed by the court, and a judgment for the deficiency was rendered on December 6, 1877, against the defendants for the sum of $9,944.73. A supersedeas bond was fixed by the court at $2,000 and the next day such a

bond was executed by Green with sureties, and the same was approved by the clerk of the district court. Subsequently, in March, 1878, execution for the amount of the deficiency judgment was issued and levied upon certain real estate belonging to Green, which writ was returned without a sale having been made, and orders of sale were thereafter issued, under one of which the property was sold and the sale confirmed. The confirmation was resisted on the ground that at the time the writ was issued a good and sufficient supersedeas bond was on file. Green appealed from the order of confirmation. It was contended by the appellee in that case, as in this, that the supersedeas bond did not stay the issuance of an execution upon the deficiency judgment, because the bond is not such as is required by statute. The court, after quoting section 3 of the act "to provide for appeals in actions in equity," section 677 of the Code of Civil Procedure, say: "The statute requires the appellant, in order to stay the operation of the judgment, to file a proper bond, approved by the clerk, within twenty days from the time of the rendition of the judgment, order, or decree. Upon the bond being filed and approved, the power of the court below to proceed in the case is suspended until the bond is set aside, modified, or the appellant fails to perfect his appeal within the time required by the statute. * * * The amount of the bond was evidently fixed by the court under the provisions of the third subdivision of section three, as the effect of the confirmation of the sale would be to divest the defendant of the possession of the real estate in question. This being the case, the appeal in that case was taken from the order confirming the sale. The amount of deficiency is contingent altogether upon the amount realized from the sale of the real estate. If, therefore, the order confirming the sale should be reversed, no order of execution for the deficiency could be made until a resale of the premises, as the amount could not be ascertained. This evidently was

the view taken by the court below, and we think it correct. If any particular objection existed against the bond it should have been made in the first instance in the court below; but the bond, apparently, is sufficient in form and amount, and it cannot be treated as void. * * * It follows that Green, having given the necessary bond for an appeal, the power of the district court to issue execution on the judgment was for the time being suspended, and the clerk had no authority to issue the execution and orders of sale. The court therefore erred in confirming the sale." The foregoing decision was adhered to in *State Bank of Nebraska v. Green*, 10 Neb., 130, and not having been questioned until now, these adjudications have become a rule of property, which we feel bound to follow until changed by legislative enactment. True, the section construed in 8th and 10th Nebraska has been since amended, but the only change has been the addition of the fourth subdivision of section 677 of the Code as now existing, which does not in any manner affect the question under review.

The remainder of the plaintiff's motion relating to the bill of exceptions will be sustained, but not upon the grounds assigned in the motion. The plaintiff procured the transcript to be made and had the cause docketed in this court, and he has an undoubted right to withdraw from the files the whole or any part of his own transcript. It was proper, as well as necessary, to file here a record upon which to move this court upon the subject of the bond, and the usual transcript upon appeal, such as appellee has filed herein, naturally constitutes the best of records in such cases. But he will not be permitted to file the defendant's bill of exceptions in this court for the purpose of moving to have the same quashed. The defendant may never claim any rights under the bill of exceptions. When he does, it will be time enough for the plaintiff to attack the validity of the bill.

JUDGMENT ACCORDINGLY.

FRANK S. PEARCE V. ALEXANDER S. MCKAY.

FILED JUNE 18, 1895. No. 5976.

1. **Trial:** REVIEW. The admission of incompetent or irrelevant testimony in a trial without a jury is not reversible error.
2. **Pleadings:** OBJECTIONS: REVIEW. Objection that a pleading does not state sufficient facts to constitute a cause of action or defense not raised in the trial court, nor in the petition in error, will not ordinarily be reviewed.
3. **Assignments of Error:** NEW TRIAL. An assignment in a petition in error for the denial of the motion for a new trial is bad which fails to specify to which of the several points made by the motion the assignment applies.
4. **Review:** CONFLICTING EVIDENCE. Where the evidence is conflicting the findings of the trial court are conclusive.

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

A. A. Kendall and *F. I. Foss*, for plaintiff in error.

J. D. Pope and *E. E. McGintie, contra.*

NORVAL, C. J.

Plaintiff in error was plaintiff in the court below, and from a judgment dismissing the action he prosecutes error.

The first two assignments in the petition in error are based upon the admission of certain testimony given by the defendant, over the objections and exceptions of the plaintiff. We will not here reproduce the testimony claimed to be objectionable, nor determine whether the same was improperly admitted. Conceding, as contended, that the testimony was wrongfully received, it is not sufficient ground for reversal, inasmuch as the cause was tried to the court without a jury. This is the established doctrine of this court. (*Enyeart v. Davis*, 17 Neb., 228; *McConahey v. McCona-*

hey, 21 Neb., 463; *Willard v. Foster*, 24 Neb., 213; *Richardson v. Doty*, 25 Neb., 424; *Ward v. Parlin*, 30 Neb., 376; *Stabler v. Gund*, 35 Neb., 651; *Whipple v. Fowler*, 41 Neb., 675.)

Complaint is made in the brief that the answer does not state sufficient facts to constitute a defense to the action. This objection was not raised in the court below, nor in the petition in error, hence the objection will not be considered by us. Errors relied upon for a reversal must be specifically assigned in the petition in error.

The next assignment that the court erred in denying the plaintiff's motion for a new trial is insufficient, because it fails to specify to which of the several points contained in the motion the assignment refers. (*Glaze v. Parcel*, 40 Neb., 732.)

It is finally insisted that the findings and judgment are not sustained by sufficient evidence. The record discloses that in December, 1888, the plaintiff in error and one William J. Armstrong formed a partnership under the name of Armstrong & Pearce, for the purpose of buying, feeding, and selling cattle and hogs, the place of business agreed upon being Palmer, Nebraska. By the terms of the partnership, the parties were to share the profits and losses equally. Armstrong put into the venture $150, and Pearce nothing. The partnership continued until some time in January, 1889, when Armstrong died, leaving plaintiff the sole surviving partner. At the time of Armstrong's death the firm was indebted to the Deposit Bank of Palmer, for moneys loaned, in the sum of several hundred dollars, and there was also due the partnership from Parkhurst, Hooper & Parker, of South Omaha, for hogs consigned to and sold by them, an amount aggregating more than $500. The aforesaid bank held the bill of lading for the shipment of stock by Armstrong & Pearce to the South Omaha firm. Armstrong was a nephew of the defendant McKay, and during the last illness of the former he requested the latter to look after and settle up his business

affairs. Afterwards, McKay, through the law firm of Hall, McCulloch & English, brought suit in the county court of Douglas county in the name of Frank S. Pearce, as surviving partner of the firm of Armstrong & Pearce, against Parkhurst, Hooper & Parker to recover the amount of their indebtedness aforesaid, where judgment was obtained against the defendants therein in the sum of $530.33, which was subsequently paid, and the amount thereof, less $114, the fees and expenses of said attorneys, was remitted to McKay. It is to recover the amount thus collected that this suit was brought. It is shown by uncontradicted testimony that the defendant expended in the prosecution of said action in the county court $31; that the bank at Palmer, after the death of Armstrong, began to urge the payment of the amount due it; that plaintiff being insolvent could not pay the same, and the only assets of the firm of Armstrong & Pearce was the amount due it from the South Omaha commission men; that McKay paid or deposited in said bank of his own money the sum of $420, to be applied on the indebtedness of Armstrong & Pearce to the bank, which has never been repaid the defendant. The suit brought by McKay was with the knowledge and consent of plaintiff. In fact the record discloses that it was upon the testimony of the latter the judgment against Parkhurst, Hooker & Parker was obtained. Although the evidence is conflicting, it strongly tends to establish that the $420 paid the bank by the defendant was with the plaintiff's consent, and that it was the understanding of both parties that McKay was to be reimbursed for the amount thereof out of the money which should be collected by him from the South Omaha parties. The net sum received by defendant on the judgment is not sufficient for that purpose. After a careful review of the evidence we are persuaded that, while it is very conflicting, it is ample to support the findings. Judgment is

AFFIRMED.

J. F. MATHEWS v. THOMAS O'SHEA ET AL.

FILED JUNE 18, 1895. No. 6235.

1. **Principal and Agent:** PAYMENT: CONVERSION. Where, in the absence of fraud, money has been voluntarily paid an agent for the use of his principal, in pursuance of a valid authority, the agent is not liable to an action in conversion at the suit of the party paying the money, although the money has never been paid over to the principal.
2. ———: ———: ———. Whether an agent who receives money for his principal is liable as principal to the person paying it, so long as the agent stands in his original situation, and until there has been a change of circumstances by his having paid over the money to his principal or done something equivalent to it, is not decided.
3. **Allegations and Proof.** The allegations of the petition and the proof must agree.

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

The facts are stated in the opinion.

Robertson, Wigton & Whitham, for plaintiff in error:

An agent who receives money for his principal is liable as principal, so long as he stands in his original situation, and until there has been a change of circumstances by his having paid over the money to his principal, or done something equivalent to it. (Story, Agency [8th ed.], sec. 300; *Hearsey v. Pruyn*, 7 Johns. [N. Y.], 179; *Herrick v. Gallagher*, 60 Barb. [N.Y.], 566; *Elliott v. Swartwout*, 10 Pet. [U. S.], 137; *Bend v. Hoyt*, 13 Pet. [U. S.], 263; *La Farge v. Kneeland*, 7 Cow. [N.Y.], 456; *Cox v. Prentice*, 3 Maule & S. [Eng.], 344.)

Robinson & Reed, contra, cited: *Lyon v. Tevis*, 8 Ia., 79; 1 Am & Eng. Ency. Law, 401; *Calvin v. Holbrook*, 2 N. Y., 126.

NORVAL, C. J.

This is an action by J. F. Mathews for the conversion of $100, lawful money of the United States. The petition contains the usual averments. The answer is a general denial. At the close of the plaintiff's testimony the jury, under the direction of the court, returned a verdict for the defendants, and from a judgment in their favor plaintiff prosecutes error.

On the 29th day of January, 1892, one W. L. Ramey, through the defendants as his agents, entered into a written contract with the plaintiff to convey to him certain real estate situate in the city of Madison, this state, for and in consideration of the sum of $3,000. By the terms of the agreement the plaintiff was to and did pay to the defendants upon the contract at the time of its execution, for the use of Ramey, the sum of $100. The remaining $2,900 was to be paid to plaintiff on March 1, 1892, or upon the execution and delivery to him of a warranty deed for the premises and an abstract showing title perfect and clear of all incumbrances of whatever nature. On the 1st day of March, 1892, the plaintiff tendered to the defendants the unpaid purchase price and demanded the deed. They declined to receive the money, and failed to furnish the deed for the property at the time stipulated, and thereupon plaintiff demanded of the defendants the $100 previously paid, they having never paid the same to Ramey, their principal, nor has he ever requested payment to him. The defendants refused to pay the money to the plaintiff. About the 15th of March the defendants tendered to the plaintiff a deed to the property without an abstract of title, which was not accepted, the property being incumbered. In the month of July following Ramey, through the defendants as his agents, requested the plaintiff to make a quitclaim deed to the premises to him, for the reason the written contract had been placed on record. This request was complied with by the plaintiff.

The sole question for determination is whether under the foregoing facts this action can be maintained. It is undisputed that the defendants were acting as agents merely for Mr. Ramey, and were known as such to the plaintiff. A payment to them was in law a payment to their principal. Had they paid over the $100 to Mr. Ramey, possibly the plaintiff could have maintained an action against the latter for a breach of the contract, or upon the implied promise to refund the money in case he failed to execute the deed as agreed; but it is clear that a suit for conversion would not lie against him, even though he had received the money from his agents. Neither can an action in the present form be maintained against the defendants, who were acting for their principal, since the plaintiff has neither such a possession or title to the money as would enable him to do so. Upon the payment of the $100 to the defendants, the plaintiff's title to it was divested, and it passed at once to Mr. Ramey, the principal. The agents did not obtain possession of the money wrongfully or fraudulently, but lawfully, and were holding it alone for the principal. There has been no conversion. True, the money has never been paid over to Mr. Ramey, and it is argued that where an agent receives money for his principal he is liable as principal to the person so paying it, if the money has not been paid over to the principal and there has been no change in the agent's original situation. Whether this contention is well founded or not we will not now stop to consider or decide. It may be observed that the authorities bearing upon the question are conflicting. The following hold that the agent is not personally liable to the person paying the money: *Smith v. Bond*, 25 W. Va., 387; *Costigan v. Newland*, 12 Barb. [N. Y.], 456; *Colvin v. Holbrook*, 2 N. Y., 126; *Lyon v. Tevis*, 8 Ia., 79; *Denny v. Manhattan Co.*, 5 Den. [N. Y.], 639. The opposite rule is sustained by *Hearsey v. Pruyn*, 7 Johns. [N. Y.], 179; *Stone v. Wood*, 7 Cow. [N. Y.], 453; *Cox v. Prentice*, 3 Maule & S.

[Eng.], 344; *Ripley v. Gelston*, 9 Johns. [N. Y.], 201. Conceding that money paid an agent for his principal may be recovered from such agent, the proper action, where there has been no fraud in the transaction, is for money had and received. (*Ashley v. Jennings*, 48 Mo. App., 142.) In the case under consideration no fraud is imputed to the defendants, but the money was honestly and fairly received by them as agents for their principal. The suit is in conversion and the evidence does not sustain the averments of the petition. The rule is that the allegations of the petition and the proof must agree. (*Young v. Filley*, 19 Neb., 543; *Chicago, B. & Q. R. Co. v. Grablin*, 38 Neb., 96; *Dillon v. Starin*, 44 Neb., 881.) It follows that the court did not err in directing a verdict for the defendants. The judgment is

AFFIRMED.

FARMERS & MERCHANTS INSURANCE COMPANY V. THOMAS J. MALONE ET AL.

FILED JUNE 18, 1895. No. 5782.

1. **Conflicting Evidence:** REVIEW. A verdict will not be set aside by a reviewing court as being against the evidence where upon a material issue in the case the evidence is conflicting.
2. **Trial:** ADMISSION OF TESTIMONY. Error cannot be predicated upon the exclusion of a certain line of testimony, where the same is subsequently received.
3. **Partnership:** CONTRACTS. Where one partner, during the existence of the partnership, entered into a contract with another within the scope of the partnership business, the firm will be bound thereby.

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

Campbell & Wallis, for plaintiff in error.

Robinson & Reed, contra.

NORVAL, C. J.

This action was brought by Thomas J. Malone and Milton Campbell under their firm name of Malone & Campbell to recover the sum of $343.55 claimed to be due them from plaintiff in error as commissions for services rendered in procuring applications of insurance. Upon a trial to a jury a verdict was returned in favor of the plaintiffs below in the sum of $205.97. From a judgment entered upon the verdict the insurance company prosecutes error.

It is admitted that on the 10th day of November, 1891, the plaintiff in error entered into a written contract with the defendants in error appointing them agents to solicit for the company applications for fire insurance in Madison county, and by the terms of which contract the plaintiff in error agreed to pay Malone & Campbell, as commissions, the amount of twenty-five per cent of the net premiums on all approved applications taken by them on detached residences, farm property, churches, and school houses written at specified rates, and the sum of twenty per cent on all mercantile business written by them at board or schedule rates, and accepted by the company. There is practically no dispute in the evidence as to the amount of insurance procured by defendants in error, or as to the amount of commissions which they have been paid for their services. The insurance company insists, and it introduced evidence on the trial tending to establish, that shortly after the aforesaid written contract of agency was made and not more than two applications had been procured thereunder, it, through its special agent, C. K. Huntington, entered into a verbal agreement with Milton Campbell, one of the defendants in error, for and on behalf of the said firm of

Malone & Campbell, by the terms of which said Huntington was to assist them in procuring applications of insurance for the Farmers & Merchants Insurance Company; that the expenses of obtaining the risks were to be borne equally by the company and the defendants in error, and the commissions and fees to be divided in the same manner, and that in pursuance of said verbal contract said Huntington, for the space of eleven days, went with and assisted Malone & Campbell in the work of soliciting insurance, during which time they jointly procured the major part of the applications upon which commissions are claimed in this case. That Huntington assisted the defendants in error in their work is conceded by them; and further, if there existed an oral contract by which the commissions were to be divided, as claimed by the insurance company, the judgment must be reversed. Whether such a contract was ever made was a question of fact for the jury to determine. The plaintiffs below deny that they entered into any such agreement, and testimony was received upon the trial which tends to support their contention. In fact the evidence upon that issue was of so conflicting a nature that the jury would have been warranted in finding either way, and such being the case, it cannot be said that the verdict is without evidence to support it.

Another assignment is that the court erred in excluding from the jury the evidence of the witness Huntington relating to the usage or custom existing between insurance companies and local agents as to the division of commissions when a special agent assists in obtaining applications. The plaintiff in error offered to prove such usage by Huntington on his direct examination, but the court rejected it. Whether it was competent to admit such proof it is unnecessary to decide, for if there was any error in the rulings it was cured by the witness Huntington testifying, on cross-examination, that such a usage existed.

Error is alleged in that the court erred in refusing to

submit to the jury the first request of the plaintiff in error, which reads as follows: "Where two parties undertake to transact business together and there is no agreement as to how the profits and losses are to be divided, the law presumes that the parties intended to divide them equally." This instruction was not applicable to the issues made by the pleadings, since the insurance company in its answer relied upon an express oral contract for a division of the commissions. The rule stated in the request to charge could only apply in the absence of an express contract between the parties.

Objection is made to the refusal of the court below to give the third instruction requested by the plaintiff in error, which is in the following language: "Each member of a firm is an agent of that firm in the transaction of the firm's business, and any agreement made by a member of that firm will bind the firm in reference to the firm business." It is a familiar rule of law that one partner can bind the firm by any contract which he may make on behalf of the firm during the life of the partnership and within the scope of the firm business. This principle was enunciated in the instruction refused. The request was applicable to the case made by the pleadings and proof. The insurance company contended that a verbal contract for the division of commission was made by it with Mr. Campbell, one of the defendants in error, for and on behalf of his firm. The jury should have been informed to what extent the firm of Malone & Campbell was bound by the agreement entered into in its behalf by one of the partners. The principle stated in the request was not covered by any of the instructions given. For the error indicated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

MARY A. SMALL ET AL. V. C. M. SANDALL.*

FILED JUNE 18, 1895. NO. 5887.

Review: JOINT ASSIGNMENTS OF ERROR: PRACTICE. A joint assignment of errors in a petition in error made by two or more persons which is not good as to all who joined therein will be overruled as to all. *Gordon v. Little*, 41 Neb., 250, followed.

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

George W. Bemis, for plaintiffs in error.

Harlan & Harlan, contra.

NORVAL, C. J.

The defendant in error, C. M. Sandall, brought this action before a justice of the peace against Mary A. Small, one of the plaintiffs in error, to recover $5 on an account alleged to have been assigned to plaintiff by one Froid. The bill of particulars was in the usual form, and defendant answered by a general denial. The plaintiff having recovered a judgment for the full amount of his claim, the defendant prosecuted an appeal to the district court, where judgment was again rendered against her and one J. M. Bell, the other plaintiff in error, who was the surety on the appeal undertaking, for the sum of $5.19, and cost of the action. The cause is brought to this court to obtain a review of the judgment by petition in error, Small and Bell joining in the assignment of errors, there being ten in number. The first is based upon the decision of the court in striking out certain paragraphs of the answer. The next four assignments relate to the refusal of the court to give certain instructions requested by Mrs. Small. The sixth

*A rehearing has been allowed.

and seventh relate to the sufficiency of the evidence to support the verdict. Eighth, the verdict is contrary to law. Ninth, the court erred in overruling the motion for a new trial. Tenth, the court erred in rendering a joint judgment against Mrs. Small and J. M. Bell, her bondsman.

It is obvious that Mr. Bell cannot have reviewed any of the alleged errors covered by the first nine assignments, since he did not except to any of the rulings therein complained of, nor did he join in the motion for a new trial, nor did he except to the overruling of the same. It is equally clear that Mrs. Small is not in a position to complain because judgment was rendered against her surety on the appeal bond. He alone could question the authority of the court to render a judgment against him in this action. The errors pointed out in the petition in error do not affect Mrs. Small and Mr. Bell jointly, but severally; therefore, the several assignments not being well taken as to each, must be denied as to both. (*Gordon v. Little*, 41 Neb., 250.)

JUDGMENT AFFIRMED.

CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILROAD COMPANY V. DAVID DEAVER.

FILED JUNE 18, 1895. NO. 6044.

1. **Common Carriers:** NEGLIGENCE IN SHIPMENT OF LIVE STOCK. Evidence examined, and *held* to sustain the allegation of negligence in furnishing for the shipment of live stock, cars which were dangerous and unfit for use on account of the broken condition thereof.

2. **New Trial:** MISCONDUCT OF JURY. The term "misconduct," as used in the provision for new trials in civil actions, does not necessarily imply an evil or corrupt motive on the part of the jury or prevailing party.

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

N. M. Hubbard, Jr., for plaintiff in error.

H. Wade Gillis, contra.

POST, J.

This is a petition in error and presents for review a judgment of the district court for Burt county. The cause of action alleged was the negligence of the defendant therein in furnishing to the plaintiff for the shipment of cattle a certain car which was dangerous and unfit for use by reason of the broken and unsafe condition of one of the doors thereof, resulting in the breaking of a leg of one of plaintiff's steers. Further reference to the pleadings will not be required, since the errors alleged do not involve the issues thereby presented.

The first assignment of the petition in error is that the verdict is not sustained by sufficient evidence. The undisputed evidence is that the plaintiff, on the 27th day of June, 1891, ordered of the defendant, through its agent, at Tekamah, two cars for the shipment of cattle from the station named to South Omaha, on the 29th day of the same month. On loading his cattle the day last named the plaintiff discovered that the cross-bar of one of the doors was cracked and the iron fastenings at the bottom thereof were broken so that said door could not be securely closed, but would swing outward at the bottom. The attention of the agent was directed to the condition of the car, but no effort was made to repair it. On the arrival of the car at South Omaha it was discovered that one of the steers shipped therein had broken his leg. The question was on this evidence submitted to the jury, whether such injury was the natural and proximate result of the alleged negligence of the defendant. The circumstances of the case, including

the character of the injury and the condition of the door of the car, tend strongly to sustain the contention of the plaintiff, and the finding in his favor should not be disturbed on the ground that it is unsupported by the evidence.

Another assignment is that the court erred in refusing to set aside the verdict on account of misconduct of the plaintiff's counsel. The facts necessary to an understanding of that contention are as follows: On September 30, 1892, Mr. Gillis, attorney for the plaintiff, addressed Mr. Hubbard, attorney for the railroad company, as follows:

"*N. M. Hubbard, Omaha, Nebraska*—DEAR SIR:—I wish you would consent to a continuance of Deaver v. R. R. Co. I have sickness in my family, and am trying to get out of trying any more cases this term. Will regard your consent as a great favor.

"Yours truly, H. WADE GILLIS."

To the above Mr. Hubbard responded as follows:

"OMAHA, Sept. 30, 1892.

"*Hon. H. Wade Gillis, Tekamah*—MY DEAR JUDGE:—I have your favor of the 30th. Am very sorry to learn that you have sickness in your family. You are welcome to a continuance of Deaver case, and am only sorry that I cannot be of more assistance to you.

"Yours truly, N. M. HUBBARD."

Some time subsequent to the date of the above correspondence Mr. Hubbard was informed by Mr. Gillis that the district court had refused to recognize the agreement for a continuance, and that the cause had been dismissed for want of prosecution. It was then mutually agreed, according to the affidavit of Mr. Hubbard, that the latter would go to Tekamah at a subsequent term of the court and consent to a reinstatement of the cause; that he had no knowledge of its having been reinstated, and, relying upon the statement of Mr. Gillis, believed it was not on the

docket, until the morning of the trial, when he received a message from the latter advising him that it would be for trial on that day; that he was then engaged in the trial of an important cause before the district court for Douglas county and was unable to attend and participate in the trial. Mr. Gillis, in an affidavit filed by the plaintiff, without controverting the foregoing statement, testified that he was willing to grant a reasonable continuance, and that if Mr. Hubbard had, in reply to the telegram referred to in his (Hubbard's) affidavit, "shown an intention to attend this court within a reasonable time, affiant would have consented to trial of same being put off to enable said Hubbard to get here, but the only reply affiant received to said telegram was a somewhat peremptory demand for a week's delay." This is not an attempt to enforce an agreement between counsel made out of court for their own convenience. The irregularity charged is the pressing of the cause for trial in the absence of the representative of the adverse party, who had not previous to that time been advised of the vacation of the order of dismissal. The circumstances attending the reinstatement of the cause are not shown by the record, but Mr. Hubbard, as we have seen, testified, without contradiction, that he was not advised of that order, and was not aware that the cause was on the docket until the receipt of the message from Mr. Gillis a few hours previous to the trial. The question is not whether the cause should have been continued for a week or a shorter period, but whether the action of counsel in forcing it to trial on that day, in the absence of the attorney for the defendant, was misconduct within the meaning of the statute. It should, in justice to Mr. Gillis, be remarked that no evil motive is imputed to him, and it is probable that there were considerations for the ruling complained of which are not shown by the record; but the facts disclosed amount to misconduct in its legal sense, without regard to the question of motive. Much has been

said and written in harmony with the above, and the law of the subject is too well established to require the citation of authorities in this connection. It follows that the motion for a new trial should have been sustained and that the judgment should accordingly be

REVERSED.

BEN B. WOOD V. MAX L. ROEDER.

FILED JUNE 18, 1895. NO. 6867.

1. **Summons:** SERVICE: PLACE OF RESIDENCE. The words "residence," and "usual place of residence," as employed in statutes, are generally synonymous with the term "domicile," hence the residence essential to confer jurisdiction is a legal one equivalent to the domicile of the defendant.

2. ———: ———: ———. The domicile of a defendant is that place where he has his fixed and permanent home, and to which, when absent, he has the intention of returning.

3. ———: ———: ———. To effect a change of domicile there must not only be a change of residence, but an intention to permanently abandon the former home. The mere residing at a different place, although evidence of the required intention, does not *per se* constitute a change of domicile.

4. ———: ———: ———. On the 10th day of February, 1894, R., a resident of O., in this state, with his family, went to New York city, among other purposes to establish institutes for the cure of the morphine habit, leaving his furniture and household goods in charge of a servant in a rented house, for which he continued to pay rent monthly until June 1, following. In the spring of that year he sent to O. some of his own and his wife's winter clothing and caused their summer clothing to be forwarded to them. On May 7, of the same year, R. wrote his landlord requesting a lease of the house occupied by him for the ensuing year, and saying: "I am closing up an important deal that will take from two to three weeks. In that case Mrs. R. will spend a few weeks at the sea shore before returning home." The servant in charge of the house understood their absence to be temporary merely and was not advised of any in-

tention on the part of R. to reside permanently in New York until the month of June, and was, on the 17th day of April, engaged in putting the house in order preparatory to the return of the family, when a copy of the summons herein was by the sheriff left with her in said house for R. *Held*, Not to establish a change of domicile by R., and that the service of summons was at his usual place of residence within the meaning of the Code of Civil Procedure.

5. ——: ——. *Haynes v. Aultman*, 36 Neb., 257, distinguished.

OBJECTION by defendant in error to jurisdiction of supreme court on the ground that there was no legal service of summons in error. *Objection overruled.*

Winfield S. Strawn, for defendant in error.

George E. Pritchett, contra.

POST, J.

This is an objection by the defendant in error Roeder to the jurisdiction of this court on the ground that there was no legal service of the summons in error. It is conceded that a petition in error was filed herein within one year from the date of the judgment below, and that a summons was in due time issued for the defendant in error, directed to the sheriff of Douglas county, which was subsequently returned, showing service in due form by copy left at the usual place of residence of the defendant in error in said county. It is claimed in support of the objection that Roeder was not, at the date of such service, to-wit, April 17, 1894, a resident of Douglas county, but that he had, on the 10th day of February previous thereto, removed with his family from the city of Omaha to the state of New York, where he had a permanent residence at the date first mentioned. Numerous affidavits have been submitted in support of the objection, among others one by Roeder himself, which, so far as material to the question at issue, is as follows: "Max L. Roeder, being

duly sworn, deposes and says that he is the identical person above named, defendant in error in the above entitled cause; that on February 10, 1894, affiant removed with his family from the city of Omaha, Nebraska, to the city of New York, in the state of New York; that since said date affiant has been continuously a citizen of the state of New York; that since said February 10, 1894, this affiant has not been a resident of the city of Omaha, or state of Nebraska, nor had any home or place of residence in the said city of Omaha, or in the county of Douglas, in the state of Nebraska, nor has affiant or his family, or any of them, since said date ever been in said county of Douglas, or further west than the state of New York." The other affidavits are to the same effect and in substantially the same language as the above.

From evidence submitted by the plaintiff in error it appears that immediately prior to the departure of Roeder and wife from Omaha, they were occupying a rented house, in which they had resided continuously since the month of December, 1893, and their furniture and household goods, except a portion of their clothing and some silverware, were left in said house in charge of a servant, who remained on the premises most of the time, the balance of her time being spent with Mrs. Roeder's mother, Mrs. Goldsmith, under the direction of the Roeders. In the spring following their departure they shipped to Omaha some of their winter clothing, which they caused to be packed in said house, and by their order some summer clothing was forwarded to them at New York. At the time of the alleged service of the summons the servant mentioned was, in consequence of information received through Mrs. Goldsmith, engaged in cleaning and putting the house in order preparatory to the return of the Roeders. On the 7th day of May following the date of the service this letter was written by Mr. Roeder to his landlord in Omaha:

"PLAZA HOTEL, NEW YORK, MAY 7, 1894.

"*Geo. N. Hicks, Esq., New York Life Building, Omaha, Neb.*—DEAR SIR: I desire to be informed without delay if you will give me the lease on our house until next May. It is very important that I know this immediately so that I can make my arrangements, and either give up the house at once, or know that I will not have to return on a few days' notice and store my things, in case you sell the same. I am closing an important deal which may take from two to three weeks, in that case Mrs. Roeder would undoubtedly spend a few weeks at the sea shore before returning home. But if you will give us the lease or assurance that in case the house is sold, we will not be disturbed until next May, I will keep the same, as you know we think a great deal of that little corner. I do not know whether my man has paid the rent or not; if not, then please send bill and I will see that the same is forwarded. Please answer by return mail.

"Yours truly, M. L. ROEDER."

About June 1, following, Mrs. Roeder addressed Mr. Hicks as follows:

"PLAZA HOTEL, NEW YORK, Monday.

"DEAR MR. HICKS: It will be a great disappointment to me if you refuse to give us a lease on our house. You know I have always taken a great interest in it, and now, after having had it papered so prettily, it would be really too bad to have someone else move in. Some of my friends have invited me to spend the summer with them in their cottages at Buzzard's Bay and other resorts, but if we cannot get a lease on the house Mr. Roeder says I will have to return to Omaha at once and have everything stored. Please let us hear from you saying that we may rest easy about keeping the house for another year.

"Yours sincerely, MRS. ROEDER."

To Mr. Hicks, the party addressed in the foregoing communication, Roeder stated that he was going to New York

for the purpose, among other things, of establishing institutes for the cure of the morphine habit, or to sell an interest in a morphine cure owned by him. He also paid rent monthly for the house occupied by him, up to and including June, 1894, and the servant above mentioned understood the absence of the family to be temporary only, and was not aware of any purpose on their part to remain permanently in New York previous to the date last above named. The natural and necessary inference is, we think, from the facts stated, that it was Roeder's purpose on leaving to return to his home in Omaha, and that he had no intention of abandoning his residence there prior to the month of June, 1894, or more than six weeks subsequent to the date of the service assailed. Indeed, a critical examination of the proofs submitted by him, including his own affidavit, fails to disclose any of the usual and cogent evidences of a change of domicile.

The terms "residence" and "domicile," as used in statutes, are generally convertible terms; hence, the residence essential to confer jurisdiction is a legal one equivalent to the domicile of the defendant. It is said in a recent work of great merit that the fundamental idea of domicile is the home. (Jacobs, Domicile, 72. See, also, 5 Am. & Eng. Ency. of Law, 857, and authorities cited.) To effect a change of domicile there must not only be a change of residence, but an intention to permanently abandon the former home. The mere residing at a different place, although evidence of a change, is, however long continued, *per se* insufficient. (See Jacobs, Domicile, 125 *et seq.*; *Hodgson v. De Beauchesne*, 12 Moore P. C. Cas. [Eng.], 283; *Moorhouse v. Lord*, 10 H. L. [Eng.], 285; *Frost v. Brisbin*, 19 Wend. [N. Y.], 11; *Dupuy v. Wurtz*, 53 N. Y., 556; *City of Hartford v. Champion*, 58 Conn., 268; *Ayer v. Weeks*, 65 N. H., 248; *Cobb v. Rice*, 130 Mass., 231.) We are aware that a modification of that rule has been recognized in its application to questions of taxation, the right to vote,

pauper settlement, and the like; but without doubt it applies in all its force to questions of jurisdiction as the basis for judicial proceedings. The provisions of our Code so far as they relate to the subject in hand are section 584, authorizing the service of a summons in error in the same manner "as in the commencement of an action," and section 69, providing for service of summons at the commencement of an action by delivering a copy thereof to the defendant personally, "or by leaving one at his usual place of residence, at any time before the return day." Reading these provisions in the light of common law principles we can perceive no ground upon which to doubt the sufficiency of the service on the defendant in error. This conclusion we confess may seem to conflict with some of the earlier decisions of this court, but a careful examination of those cases proves the conflict to be apparent rather than real. In *Blodgett v. Utley*, 4 Neb., 25, it is said: "The words 'usual place of residence' mean the place of abode at the time of service." That was a case involving the statute of limitations, in which the operation of the statute was held not to have been interrupted, the defendant having a residence in this state where service could have been made. In *Haynes v. Aultman*, 36 Neb., 257, the question involved was the validity of a judgment of a justice of the peace based upon service by a copy left at the former residence of the defendant, after he had removed with his family from the county and abandoned his domicile therein. It was held, on the authority of *Blodgett v. Utley*, that the service was unauthorized and the justice of the peace did not thereby acquire jurisdiction over the defendant. The defendant in error it seems relies with confidence upon the following expression of the opinion in that case: "If the debtor and all the members of his family are absent from the county and the time of their return is uncertain, or their absence will be protracted beyond the time of the trial, it is evident that a summons left at the former residence

would not be sufficient to apprise the debtor of the action. For the purposes of that trial the summons would not be served at the residence of the debtor." The language quoted should, however, be understood as referring to the facts of that case, as otherwise it must be regarded as *obiter* merely. In *Forbes v. Thomas*, 22 Neb., 541, it was held on the facts that the plaintiff, who had removed to the territory of Dakota and remained there engaged in business for the period of four years, had abandoned his residence in this state, although his family resided here for a considerable portion of the time, there being evidence tending to prove an intention to acquire a domicile in that territory. It certainly cannot be said that this court is committed to the doctrine that the term "usual place of residence," as employed in the Civil Code, necessarily implies, in every case, the personal presence of the defendant or his family, or that the court will fail to acquire jurisdiction by reason of the continuous absence from their home of the defendant and family from the date of service until after the time of the trial. The views here expressed are in harmony with the rulings of the New York courts, from which it seems the defendant would in that state have no standing in any matter in which residence there is prescribed as a condition to the relief sought or essential to the jurisdiction of the court. (*Vide In re Dimock*, 32 N. Y. Supp., 927, and cases cited.) It follows that the objection should be

OVERRULED.

CHARLES R. LEE v. ELVENE SMART.

FILED JUNE 18, 1895. No. 6007.

Master and Servant: DANGEROUS MACHINERY: RISK. Where a servant, in obedience to the requirements of his master, incurs the risk of machinery or appliances which, although dangerous, are not of such character that they may not be safely used by the exercise of reasonable skill and caution, he does not as a matter of law assume the risk of injury from accident resulting from the master's negligence. (*Sioux City & P. R. Co. v. Finlayson*, 16 Neb., 578.)

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

Tiffany & Vinsonhaler, for plaintiff in error.

I. J. Dunn and *John J. O'Connor, contra.*

POST, J.

This was an action in the district court for Douglas county, in which the plaintiff therein, defendant in error, recovered for personal injuries received through the alleged negligence of the defendant therein in providing him with a defective wagon and insufficient team for the hauling of lumber and in overloading said wagon. The evidence in the bill of exceptions establishes the following facts: On the 9th day of July, 1890, the plaintiff below, who will be hereafter referred to as the plaintiff, was employed by the defendant, a lumber merchant in the city of Omaha, as teamster, and acted in said capacity until the receiving of the injuries hereafter mentioned on the 11th day of the same month. The plaintiff, on the day last named, was ordered by the defendant to deliver a load of lumber in the city of Council Bluffs, Iowa, which is reached by a wagon bridge over the Missouri river. The wagon road

on the Council Bluffs side of the river is much below the level of the bridge, which is reached from that side by a long approach. On descending from the bridge along said approach on the morning in question the team driven by the plaintiff became unmanageable, owing to the pressure of the heavily loaded wagon, which was not supplied with a brake of any kind. Being unable to control said team, and being in fear of imminent danger from the crushing or capsizing of the wagon, he jumped therefrom, and in so doing received the injuries for which he claims in this action. The alleged negligence consists in the overloading of the said wagon and the failure to supply it with a brake or appliance of like character.

The argument in this court is directed mainly to one proposition, viz., that the plaintiff was fully advised of the condition of the wagon and the character of the load which had been entrusted to his care, and that he accordingly assumed the risk of the employment in which he was engaged at the time of the injury. It has been many times asserted, and may be accepted as a general rule, that a servant who knows, or by the exercise of reasonable diligence could know, of any defect or imperfection in the things about which he is employed, and continues in the service without objection and without promise of change, is presumed to have assumed all the consequences resulting from such defects, and to have waived the right to recover for injuries caused thereby. A modification of that rule was, however, recognized by this court in *Sioux City & P. R. Co. v. Finlayson*, 16 Neb., 578, viz., that where the servant, in obedience to the requirements of his master, incurs the risk of machinery or appliances which, although dangerous, are not of such a character as to threaten immediate injury, or where it is reasonably probable that they may be safely used by extraordinary caution and skill, the master will be liable for a resulting accident. We are aware that the doctrine of the foregoing exception has

been criticised (see sec. 17, notes to *Holmes v. Clarke*, 2 Thompson, Negligence, 953), although it is supported by many well considered cases, and must, whatever view we may entertain of it as an original proposition, be accepted as the law of this state. The following, in addition to those referred to in *Sioux City & P. R. Co. v. Finlayson*, may be cited as authority for the doctrine there asserted: *Conroy v. Vulcan Iron Works*, 62 Mo., 39; *Thorpe v. Missouri P. R. Co.*, 89 Mo., 650; *Kearney Electric Co. v. Laughlin*, 45 Neb., 390. That the case at bar is within the exception there recognized is apparent from a brief reference to the evidence in the record. The plaintiff, according to his own testimony, discovered the day after he entered the defendant's service that there were no blocks in the brake bars of the wagon assigned to him, and asked the defendant if it was necessary to fix them, to which the latter replied that other men had used the wagon without being fixed, and that he, the plaintiff, could, because the streets were level. The plaintiff appears to have had little knowledge regarding the weight of the load in question, but according to the testimony of Mr. Fry, who assisted in putting the lumber onto the wagon, it consisted of 2,945 feet of green poplar, weighing upwards of 8,500 pounds, or more than twice the weight of a reasonable load under the circumstances. Said witness testified further that when the wagon was about three-fourths loaded he called the defendant's attention to the fact that there was danger of overloading it, to which the latter replied that he wanted to put on a heavy load, as he was obliged to pay toll on crossing the bridge. The plaintiff, who it is shown had never crossed the river by means of the bridge mentioned, experienced no difficulty until he had started down the grade at the east end of the bridge, when, as claimed, without fault on his part, he lost control over the team in the manner and with the result above stated. The trial court on this evidence correctly declined to advise the jury that the plaintiff as a mat-

ter of law assumed the risk of accident, although he knew, or might with reasonable diligence have known, that there was danger in thus using the wagon without a brake, heavily loaded as it was, and by proper instructions the question was submitted whether in attempting to cross said bridge the plaintiff exercised reasonable caution, or whether in so doing he was guilty of contributory negligence.

Exception is taken to the giving and refusing of certain instructions, but a reference to the record discloses the fact that they are, in the petition in error, included in assignments with other paragraphs which are undoubtedly correct and which are not assailed in the printed brief of counsel for the plaintiff in error. Such assignments must, under the oft-repeated rule of this court, be disregarded. The judgment of the district court will for reasons here stated be

AFFIRMED.

STATE OF NEBRASKA, EX REL. A. S. CHURCHILL, ATTORNEY GENERAL, V. JOHN T. HAY, INCUMBENT, AND LUTHER J. ABBOTT, CLAIMANT.

FILED JUNE 18, 1895. NO. 7767.

1. **Statutes:** REPEAL BY IMPLICATION. A subsequent statute treating of a subject in general terms, and not expressly contradicting the more positive provisions of a prior special act, will not be construed as a repeal by implication of the latter if any other reasonable construction can be adopted.

2. **State Officers:** HOSPITAL FOR INSANE: REMOVAL OF SUPERINTENDENT. The provision of section 7, article 7, chapter 83, Compiled Statutes, for the hearing by the board of public lands and buildings of charges against certain officers is cumulative only, and was not intended as a repeal of the prior provision for the removal, by the governor for cause, of the superintendent of the hospital for the insane at Lincoln. (Sec. 11, ch. 40, Compiled Statutes.)

3. **Public Officers: POWER OF GOVERNOR TO REMOVE.** The power conferred upon the governor to remove certain public officers for cause is an administrative and not a judicial function, and orders made in the exercise of that power are not reviewable by the courts.

4. ———: ———: **JURISDICTION OF COURT.** The limit of judicial interference in such cases is to protect public officers, removable for cause only, in their right to a hearing upon specific charges.

5. ———: **REMOVAL BY GOVERNOR: SUFFICIENCY OF FINDINGS.** Certain findings examined, and *held* to sustain the order based thereon removing the respondent from the office of superintendent of the hospital for the insane at Lincoln.

ORIGINAL action in the nature of *quo warranto*, on the relation of the attorney general, to determine which of the respondents is entitled to hold the office of superintendent of the hospital for the insane at Lincoln. *Judgment of ouster against incumbent.*

The facts are stated in the opinion.

A. S. Churchill, Attorney General, for the state.

M. B. Reese, C. Hollenbeck and *J. W. C. Abbott,* for respondent Luther J. Abbott:

The power exercised by the governor in hearing charges against respondent Hay and in removing him from office was administrative and not judicial. (*State v. Hawkins*, 44 O. St., 98; *State v. Oleson*, 15 Neb., 247; *Minkler v. State*, 14 Neb., 181; *State v. Supervisors of Saline County*, 18 Neb., 422; *State v. Sheldon*, 10 Neb., 453.)

The governor had the power to remove the incumbent for cause, and that power was not taken away by the power given the board of public lands and buildings to hear charges and report the evidence and their conclusion to the governor. (*State v. Smith*, 35 Neb., 13.)

Whenever a power is given by statute everything necessary to make it effectual or requisite to attain the end, is implied. (Sutherland, Statutory Construction, sec. 341.)

Repeal by implication is not favored. An act will not be held to repeal a former act unless the repugnancy between the two is plain and unavoidable. (*Lawson v. Gibson*, 18 Neb., 137; *State v. Babcock*, 21 Neb., 599; *Hopkins v. Scott*, 38 Neb., 661.)

It does not require a judicial process to declare an office vacant. (*Conner v. Mayor of New York*, 5 N. Y. 285.)

The governor has power under the statute to remove any appointive officer after a hearing of charges. (*Keenan v. Perry*, 24 Tex., 253; *Wilcox v. People*, 90 Ill., 186; *People v. Higgins*, 15 Ill., 110; *State v. Doherty*, 25 La. Ann., 119; *State v. Hawkins*, 44 O. St., 98; *City of Hoboken v. Gear*, 27 N. J. Law, 265; *People v. Whitlock*, 92 N. Y., 191; *State v. McGarry*, 21 Wis., 496; *Trimble v. People*, 34 Pac. Rep. [Col.], 981.)

Webster, Rose & Fisherdick, for respondent John T. Hay:

The governor has no original jurisdiction under the constitution or the statute to receive, entertain, or hear charges against any officer of the insane hospital or of any other of the state institutions placed under control of the board of public lands and buildings. (Mechem, Public Officers, secs. 103, 104, 110, 446–448, 455; *State v. Seavey*, 22 Neb., 454; *State v. Smith*, 35 Neb., 33; *Lease v. Freeborn*, 35 Pac. Rep. [Kan.], 817; *People v. Freese*, 76 Cal., 633; *Carr v. State*, 111 Ind., 101; *People v. Weber*, 86 Ill, 285; *Marbury v. Madison*, 1 Cranch [U. S.], 174.)

The governor's jurisdiction in respect to the hearing of charges—granting he has such—is concurrent with that of the board of public lands and buildings, and being judicial and not executive in character, may be challenged and his competency to give an impartial hearing inquired into. (*Stockwell v. Township Board of White Lake*, 22 Mich., 344; Cooley Constitutional Limitations, 413; *State v. Crane*, 36 N. J. Law, 399.)

The evidence considered by the governor,—*ex parte* affidavits, and records and reports not disclosed to defendant or opportunity given to him to examine, rebut, or explain,—was incompetent, and no conviction or judgment founded on proceedings in which such evidence was considered should be permitted to stand. (*State v. Bryce*, 7 O., 416; *Andrews v. King*, 77 Me., 233; *Dullam v. Willson*, 53 Mich., 414; *People v. Nichols*, 79 N. Y., 588; *Murdock v. Trustees of Phillips Academy*, 12 Pick. [Mass.], 244.)

Defendant was wrongly required before the governor to take the burden of proof, and presumed guilty till he should, to the governor's satisfaction, show he was not guilty. This is itself sufficient to render the conclusion arrived at a mere nullity. (*Dullam v. Willson*, 53 Mich., 413; *Larkin v. Noonan*, 19 Wis., 99; *Andrews v. King*, 77 Me., 233; *In re Eaves*, 30 Fed. Rep., 26.)

The nature of the governor's action being not in his executive or political capacity, but in a judicial one, and affecting a right, is subject to judicial review, not only as to his jurisdiction, but also as to the regularity of his procedure and the fairness and validity of the proceedings themselves to sustain a judgment of amotion. (*Marbury v. Madison*, 1 Cranch [U. S.], 163; *Page v. Hardin*, 8 B. Mon. [Ky.], 655; *Dullam v. Willson*, 53 Mich., 409; *Commonwealth v. Fowler*, 10 Mass., 302; *State v. Chase*, 5 O. St., 534; *In re Nichols*, 57 How. Pr. [N. Y.], 396.)

The charges themselves are insufficient to constitute malfeasance in office or other good and sufficient cause for removal, and are insufficient to require respondent to answer to; and the governor's findings are insufficient to justify or sustain a removal from office. (*State v. McGary*, 21 Wis., 498; *State v. Lazarus*, 39 La. Ann., 161; *Coite v. Lynes*, 33 Conn., 115; *In re Nichols*, 57 How. Pr. [N. Y.], 396; *Dullam v. Willson*, 53 Mich., 407.)

POST, J.

This is an original proceeding in the nature of a *quo warranto*, on the relation of the attorney general, under the provisions of section 714 of the Civil Code, for the purpose of determining which of the respondents is entitled to the office of superintendent of the hospital for the insane at Lincoln. The questions we are called upon to decide are all presented by the pleadings of the respondents, hence further reference to the information will not be required in this opinion. It appears from the pleadings that the respondent Hay, hereafter referred to as Dr. Hay, was by Hon. Lorenzo Crounse, governor, appointed to the office in dispute, his appointment taking effect April 1, 1893. The authority for such appointment is found in section 10, chapter 40, Compiled Statutes, as follows: "The governor of the state shall appoint a superintendent and may appoint two assistant physicians for the hospital of the insane, one of whom shall be a woman, who shall hold their offices for a term of six years, unless sooner removed as hereafter provided." It is by section 11 of said chapter further provided: "The superintendent of said institution shall be a physician of acknowledged skill and ability in his profession, and be a graduate of a regular medical college. He shall be the chief executive officer of the hospital, and shall hold his office for the term of six years, unless sooner removed by the governor for malfeasance in office, or other good and sufficient cause." On the 20th day of April, 1895, Hon. Silas A. Holcomb, governor, caused to be served upon the respondent above named the following notice:

"LINCOLN, NEB., April 20, 1895.

"*To J. T. Hay, M. D., Hospital for the Insane, Lincoln, Neb.*—SIR: I beg to hereby notify you that information and complaints in the nature of charges have been presented to me affecting your management of the hospital for the insane at Lincoln, Nebraska, over which you have

heretofore had control as superintendent, specified as follows:

"1. That the management of said hospital while under your control has been extravagant, costing the taxpayers of the state a much greater sum of money than like institutions similarly situated in adjoining states.

"2. That as superintendent of said hospital you have grossly neglected your duty in permitting and allowing your subordinates and employes to wantonly and cruelly assault, abuse, and maltreat the patients in said hospital for treatment.

"3. That you have been negligent in your duties, in absenting yourself from said hospital while the assistant physician therein was also absent.

"4. That you have been guilty of misconduct in office by attempting to influence your employes and subordinates from giving testimony in the courts of justice and by attempting to induce them to withhold facts and thereby defeat the ends of justice when criminal proceedings were being tried in the courts involving certain persons in defrauding the state out of large sums of money.

"5. That you have not properly, or in a suitable manner, treated the patients entrusted to your care for mental diseases with which they have been afflicted, but on the contrary you have grossly neglected to treat such patients and have thereby greatly impaired the usefulness of said hospital as a place for the treatment of the insane.

"6. That under your administration of said hospital patients therein have been frequently assaulted and abused in an unnecessary manner and thereby bringing scandal and disgrace upon said institution.

"7. That the management of said hospital by you as superintendent has been wasteful and extravagant, incompetent and inefficient.

"You are required to appear at my office April 30, A. D. 1895, at 2 P. M., and to show cause, if any you have,

why you should not be removed from the said office of superintendent for said institution.

"SILAS A. HOLCOMB,
"*Governor.*"

On appearing before the governor in response to the foregoing citation Dr. Hay interposed certain objections to the proceeding, which will be hereafter noticed, and which having been overruled, a hearing was had, resulting in the following finding and order:

"STATE OF NEBRASKA,
"EXECUTIVE OFFICE, LINCOLN, May 18, 1895.

"*J. T. Hay, Hospital for the Insane, Lincoln, Neb.*—SIR: I beg hereby to inform you of the conclusions reached by me in the matter of the investigation of the management of the Nebraska hospital for the insane at Lincoln during the period of your incumbency as superintendent.

"1. From the investigation made by me I find that during the management of the hospital for the insane by you the expenses of maintaining the patients have been greater than necessary, and that there has not been that degree of economy exercised which the taxpayers of the state have the right to expect from those employed in the public service.

"2. Also, that the attendants employed by you and under your control have wantonly and unnecessarily abused and maltreated patients in your charge, and that the patients have not been given that kindly care and treatment from those having them in charge which by reason of their unfortunate condition they should receive.

"3. Also, that the medical treatment of patients, especially in the violent ward known as the third ward, has not been modern nor in accordance with what experience has demonstrated to be best for patients in hospitals for the insane, in this: The administration of sedatives and narcotic drugs by yourself, your assistants and attendants, had a harmful effect upon the patients committed to your care. The administration of such drugs in the quantities given

at the Nebraska hospital for the insane at Lincoln, Nebraska, under your superintendency, are not warranted by the experiences of other institutions of the same character, in this: The clinical records of the hospital over which you have had the supervision disclose that you have relied upon sedatives, narcotics, hypnotic drugs to accomplish results which could better be obtained by the use of other and less dangerous methods; especially do the records of your institution show the extensive employment by you and under your direction of the hypnotic paraldehyde, a drug dangerous to life when administered frequently and in large doses; and also, you have carelessly and negligently permitted attendants at the hospital to administer such narcotic, hypnotic, and sedative drugs to patients under your charge at frequent intervals, and in large doses, at the discretion of the attendants, without the express prescription or direction of one of the physicians in charge of said hospital, and without specific directions so to do. That there has not been exercised that degree of care, caution, and skill in the management of the hospital which should obtain in such an institution and which is necessary to secure in order that the hospital may be conducted economically and the patients receive the care and attention necessary for their bodily comfort and proper professional treatment looking toward their recovery.

"For the causes above mentioned it is hereby ordered that you be and are hereby removed as superintendent of said hospital, and you are hereby relieved of any further authority or duty as such superintendent.

"SILAS A. HOLCOMB,
"*Governor.*"

On the day last named Luther J. Abbott, hereafter referred to as Dr. Abbott, was by the governor appointed superintendent of the hospital, *vice* Dr. Hay, removed, and has qualified himself therefor by giving bond and taking the requisite oath of office. Both respondents are eligible

to the office, and the questions argued all relate to one inquiry, viz., the legality of the order of the governor removing Dr. Hay.

The first proposition to which we will give attention is that exclusive jurisdiction has by statute been conferred upon the board of public lands and buildings to take cognizance of and hear charges against officers of the class including the superintendent of the hospital for the insane. The basis of that contention is section 7, article 7, chapter 83, Compiled Statutes, which reads as follows: "It shall be the duty of the board to take cognizance of all charges or complaints made against the said public officers, and at a regular meeting to give an impartial hearing to such charges and the defense against them, if any, and report the charges, evidence, and their conclusions in the matter to the governor within six days after the determination of such investigation." This act was approved February 13, 1877, while the act for the government of the hospital for the insane was approved March 13, 1873. In *Jackson v. Washington County*, 34 Neb., 680, it was said that a subsequent statute treating of a subject in general terms, and not expressly contradicting the more positive provisions of a prior special act, will not be construed as a repeal by implication of the latter if any other reasonable construction can be adopted. The later act must, in the light of that rule, be construed as cumulative and embracing charges and complaints of parties aggrieved by the alleged misconduct of the officers therein contemplated. It was, in brief, designed for the benefit of the public at large, to afford a summary remedy in certain cases for misconduct in office, and not as a limitation upon the executive prerogative conferred by the act of 1873.

The question to which most prominence is given in the argument was suggested in *State v. Smith*, 35 Neb., 13, viz., whether the power of removal for cause of an officer holding for a fixed and definite term is judicial in the sense that

such officer is entitled to have the question of cause determined by the courts in the first instance or by appropriate appellate proceeding. The conclusion reached, although not expressed in the case cited, was that such power is in its proper sense an administrative rather than a judicial function, and that orders made in the exercise thereof are not reviewable by the courts; and a re-examination of the subject at this time has confirmed that conclusion. A review of the cases cited in support of the conflicting views upon this question is deemed unnecessary in this connection. It is sufficient that the conclusion above stated is in accord with the decided weight of authority and supported by the more satisfactory reasoning. (See *State v. McGarry*, 21 Wis., 496; *State v. Prince*, 45 Wis., 610; *Keenan v. Perry*, 24 Tex., 253; *State v. Doherty*, 25 La. Ann., 119; *Taft v. Adams*, 3 Gray [Mass.], 126; *Ex parte Wiley*, 59 Ala., 226; *Thompson v. Holt*, 52 Ala., 491; *State v. Hawkins*, 44 O. St., 98; *Donahue v. Will County*, 100 Ill., 94.) But the question cannot be regarded as an open one in this state. In *State v. Oleson*, 15 Neb., 247, it was held that the power of the county board to remove a sheriff for corruption in office, under the provisions of article 2, chapter 18, Compiled Statutes, is *quasi*-political and administrative in its nature, and not prohibited by the constitution. The doctrine of that case was expressly recognized and affirmed in *State v. Saline County*, 18 Neb., 422. We can perceive no difference in principle between those cases and that before us, since the question involved therein was the nature of the power conferred and not the person to whom it is entrusted. Speaking of the cases which assert the opposing view it may be said that, as a rule, they rest upon the assumption that the incumbent has a property right in the office he holds. Such, although the doctrine of the common law has no foundation whatever in a representative government where the right to hold office is a mere privilege.

(*Conner v. Mayor of New York*, 5 N. Y., 285; *State v. Hawkins, supra.*) The limit of judicial interference in all such cases is that indicated in *State v. Smith, supra*, viz., to protect the officer in his right to a hearing on specific charges; or, in other words, to require the officer or body claiming the right of removal to keep within his or its jurisdiction.

An allegation of the answer of Dr. Hay which should be noticed in this connection is that Governor Holcomb was incapable, on account of bias and prejudice, of giving said respondent an impartial hearing. What has already been said is a sufficient answer to that contention. But there are other considerations which lead to the same result, the first of which is that there is in the record no apparent foundation for the charge, and second, the motives of the chief executive officer of the state in the discharge of his duty as such are not the subject of inquiry in this proceeding. Criticism, in our opinions, upon the official conduct of the head of a co-ordinate department of the state government would be as indecorous and unjudicial as reflections upon this court in a state paper by the governor would be undignified and unstatesmanlike.

It is urged by Dr. Hay that "the charges themselves are insufficient to constitute malfeasance in office, or 'other good and sufficient cause for removal,' and are insufficient to require the respondent to answer, and the governor's findings are insufficient to justify or sustain a removal from office." We quite agree with counsel that the governor is not by the terms of the act here involved invested with arbitrary powers. The language "other good and sufficient cause" should be held to mean causes of like nature and affecting the competency or fitness of the respondent for the position he holds, or, in the words of Judge Dixon, construing a similar statute in *State v. McGarry, supra*, "the cause must be one which touches the qualifications of the officer for the office, and shows that he is not a fit or proper person to perform the duties."

We shall not examine *seriatim* the findings of the governor. The statement therein that the expenses of maintaining the hospital for the insane have been greater than necessary, and that the degree of economy in its management has not been such as the taxpayers have a right to expect, is in the nature of a conclusion, and probably too indefinite to sustain an order of removal, since it does not appear therefrom that Dr. Hay is directly responsible for such extravagance. Expenditures for the maintenance of our state institutions are largely controlled by the board of purchase and supplies, composed of the governor, commissioner of public lands and buildings, and secretary of state, and for whose mismanagement the superintendent of the hospital for the insane is in nowise responsible. But the second and third findings relate to matters within the jurisdiction of the respondent, and directly involve his management of the hospital. They are certainly responsive to the issues presented by the charges, and sufficient in law to sustain the order based thereon. We shall not argue to prove that the wanton abuse of patients committed to such institutions is cause for removal under the law of this case; and it is wholly immaterial whether such abuse be in the way of physical restraint of patients, or in permitting the giving by irresponsible attendants at their pleasure, without prescription or direction of the physicians in charge, of dangerous doses of narcotic or other drugs.

It follows that the order removing Dr. Hay is in all respects regular and binding, and that he has, since the date thereof, held the office in controversy without authority of law. It follows, too, that the appointment of Dr. Abbott invested the latter with a right to possession and the emoluments of said office, and that he is entitled to judgment on the pleadings. The proper writ will accordingly be allowed for the purpose of putting him in possession. Judgment of ouster against the respondent Hay in favor of the respondent Abbott.

JUDGMENT OF OUSTER.

CHARLES T. PATTEN, APPELLANT, V. CHARLES H. LANE ET AL., APPELLEES.

FILED JUNE 18, 1895. No. 6301.

1. **Practice:** ACTIONS IN REM: NOTICE OF CROSS-BILL. Where, under our practice, the defendants to an action *in rem* are required to disclose their interests in the subject of the controversy, notice of a cross-bill is to be regarded as a proceeding in the cause designed to assist in the prosecution thereof, and accordingly interlocutory in character.
2. **Jurisdiction:** VALIDITY OF DECREE. In such case a decree based upon a cross-bill filed by a single defendant after answer day, his co-defendants having made no appearance, is irregular merely, and not void for want of jurisdiction.
3. **Notice of Cross-Bill.** *Arnold v. Badger Lumber Co.*, 36 Neb., 841, distinguished.

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

McClanahan & Halligan, for appellant, cited: *Carlow v. Aultman*, 28 Neb., 672; *Cockle Mfg. Co. v. Clark*, 23 Neb., 702; *Arnold v. Badger Lumber Co.*, 36 Neb., 841.

Wharton & Baird, contra.

POST, J.

This is an appeal from a decree of the district court for Douglas county dismissing the petition of the plaintiff by which he seeks to set aside a deed executed by him to the defendant Lane for lot 10, in block 34, in Kountze Place, in the city of Omaha; also to set aside a deed for the same property from John F. Boyd, master commissioner, to Henry F. Cady, and a deed from said Cady to Lane, also for leave to redeem said property. The material facts are as follows: On the 5th day of July, 1888, Andrew J.

Eaton, a single man, and Isabella K. Eaton, being the owners of the property above described, mortgaged the same to one Smith to secure their notes of even date therewith for $4,500. On the 9th day of the same month they executed a second mortgage on said premises to one Bates for $250, and on the same day they executed a third mortgage to Fred W. Gray for $1,719.44. On the 4th day of February, 1889, the Eatons conveyed the west half of said premises to William F. Chittick. On the 9th day of May, 1890, said Eatons conveyed the east half of said premises to Ursella O. Bartlett, to whom on the day following said Chittick conveyed the west half thereof, and who, on the 13th day of March, 1891, conveyed said lot to the plaintiff. On the 4th day of March, 1889, Lewis Bradford commenced an action in the district court of Douglas county for the foreclosure of a mechanic's lien against said premises, to which the several mortgagees, as well as the holders of the title, Chittick and the Eatons, were made defendants. Summons was served on the several defendants March 6, the answer day named therein being April 8, following. On the day last named Fred W. Gray filed a demurrer to the petition, and on May 11 had leave to withdraw his demurrer and file answer and cross-bill, in which he prayed for the foreclosure of his mortgage. April 14, 1890, the petition of Bradford, the plaintiff, was dismissed at his cost. April 15 the default of Chittick and the Eatons was entered, and on the same day the cause proceeded to decree on Gray's cross-bill, and in accordance with the prayer thereof. Under this decree the property was sold by Boyd, special master, to Cady, who subsequently conveyed to the defendant Lane, and two days thereafter the plaintiff conveyed his interest in said property to said defendant.

There are two facts appearing from the foregoing statement to which especial prominence is given in the brief of counsel, viz.: (1) That Mrs. Bartlett, through whom the

plaintiff claims, acquired title from Chittick and the Eatons during the pendency of the foreclosure proceeding and after the entry of the decree therein; and (2) that her said grantors, who held the legal title at the time of the filing of the cross-bill, were not served with summons or other formal notice thereof. It is clear, both upon reason and authority, that if the court had acquired jurisdiction of the defendants named for the purpose of the cross-bill, not only they, but their grantees as well, are estopped by the decree subsequently rendered. Another proposition firmly established by the decisions of this court is that where a defendant, after answer day, files a pleading in the nature of a cross-petition for relief against a co-defendant, the latter is entitled to notice thereof. (See *Hapgood v. Ellis*, 11 Neb., 131; *Cockle Mfg. Co. v. Clark*, 23 Neb., 702; *Carlow v. Aultman*, 28 Neb., 672; *Arnold v. Badger Lumber Co.*, 36 Neb., 841; *Havemeyer v. Paul*, 45 Neb., 373.) The question was in each of the above cases presented by direct attack upon the decree. But in this case counsel assert that such notice is in its nature a jurisdictional process, without which the decree is not voidable merely, but absolutely void. Preliminary to a consideration of that question it should be observed that the district court in the decree appealed from in express terms found that the defendants in the former suit were legally notified of the filing of the cross-bill upon which the decree of foreclosure rests. The basis of that finding is the entry of notice in the motion docket conformably to the rules of the district court for Douglas county, which, so far as they relate to the subject in hand, are as follows:

"15. All motions relating to actions, except such as are made at or during the progress of a trial or hearing, or not incident to or relate to the time of trial, or are grantable of course without notice, must be in writing, and filed, unless the court shall see fit to dispense therewith, when the motion is made in open court, in the presence of counsel for

the adverse party; and notice for the hearing of all such motions must be given as required by statute or these rules.

"16. A motion docket will be furnished for the use of the bar, and the filing of a motion, and the entry in such docket of notice of the motion, or the hearing of a demurrer, and entering the title of the cause in which it is filed, with date of entry, together with a brief statement of the object of the motion and the names of the attorneys of record in the cause for twenty-four hours before the morning of motion day, shall be notice thereof to the opposite party in all cases where a different notice is not required by statute."

It is argued that inasmuch as no provision has been made for the issuing and service of a formal summons upon the filing by a defendant of a pleading in the nature of a cross-bill, the character of the notice required and the time for pleading thereto is a subject within the jurisdiction of the court, and for an error of judgment in that regard the remedy is by motion to set aside the decree or other direct proceeding. It is further argued that it is within the power of the district court by rule to provide for notice in such cases; that under the rules above quoted, the entry in the motion docket was notice to each of the defendants of the cross-bill in question, and that the failure to give other or different notice presents a mere irregularity in nowise affecting the jurisdiction of the court. But the weakness of that argument is that it assumes the very proposition in dispute, viz., the jurisdiction over the parties adverse to Gray in the former suit for the purpose of any order, since it is only those parties who are brought within the jurisdiction of the district court by its process or otherwise who are required to take notice of its rules. Recurring to the question first suggested, it may be said that if the court by its summons in the former suit acquired jurisdiction of the defendant, for the purpose of the

several liens upon the mortgaged premises, it follows that notice of the cross-bill was not essential to a valid decree. This brings us to a consideration of the question on its merits.

A cross-bill is brought by a defendant in a suit against the plaintiff or defendant in the same suit, or against both touching the matters in question in the original bill (2 Daniell, Chancery Practice [4th ed.], 1548; Story, Equity Pleading, sec. 389; 1 Hoffman, Chancery Practice, 455), and is generally considered as a defense, or as a proceeding to procure a complete determination of a matter already in litigation. (2 Daniell, Chancery Practice [4th ed.], 1548.) The appearance of parties adverse to the complainant in a cross-bill was enforced by subpœna in the same manner as in case of an original bill. (1 Smith, Chancery Practice, 461*.) But a wide departure from that practice has been countenanced by the courts of this country, particularly in actions *in rem* where the defendants are by the original bill required to disclose their interests in the subject of the controversy. For instance, in *Pattison v. Vaughan*, 40 Ind., 253, it is said: "We think that as to matters contained in the original complaint, if not in all cases, the defendants to the original complaint, when served with process thereon, as well as the plaintiff therein, must be regarded as in court for all the purposes of the action, whether the matter in controversy arise upon the original complaint or upon the answer or cross-complaint." This language is quoted with approval by Judge Elliott in *Bevier v. Kahn*, 111 Ind., 200, in which it is held that notice is unnecessary when the original bill discloses the character of the claim of the cross-bill. And in *Gregory v. Pike*, 29 Fed. Rep., 588, it is said that a cross-bill, being auxiliary to the original bill, service thereof may be had on the attorney of record, and it is no objection that the party himself is out of the jurisdiction of the court. (See, also, Work, Jurisdiction, sec. 44.) The

conclusion we reach from an examination of these authorities, with others, is that notice of a cross-bill, under our system, particularly in an action of foreclosure, is a proceeding in the cause, designed to assist in the prosecution thereof, and, accordingly, interlocutory rather than jurisdictional in character. Such, too, is the logical effect of our decisions holding that defendants are required to take notice of cross-bills filed before answer day. Those decisions rest upon the assumed jurisdiction of the court to determine the equities of the defendants, not alone against the plaintiff, but also as between themselves. The doctrine that the court having once acquired jurisdiction may decide every question arising in the prosecution of the cause is the settled law of this state, and we can perceive no ground upon which to doubt its application to the case before us. We are aware that it was in *Arnold v. Badger Lumber Co.*, *supra*, said, that a defendant who has made no appearance can be affected by a cross-bill filed after answer day only by service of notice "in the nature of a summons as to such pleading;" but the question there involved was, as we have seen, the regularity and not the validity of the decree. We find in the Code (sec. 574 *et seq.*) a general provision for notice of motions, which is required to be in writing and to state the names of the parties, to designate the court or judge to whom it will be addressed, and to be served in the manner prescribed for the service of summons. The office of the notice thus required is certainly "in the nature of a summons," since it is a process upon which the validity of the order depends. In that sense and no other did we use the expression above quoted in the case referred to.

The conclusion stated renders unnecessary an examination of the other questions presented by the record.

DECREE AFFIRMED.

IRVINE, C., not sitting.

CHARLES W. HAMILTON v. GEORGE GOFF.

FILED JUNE 18, 1895. No. 5851.

1. **Contracts**: BREACH: WHEN CAUSE OF ACTION ACCRUES. H. agreed to furnish to G. a designated herd of cattle on the 1st day of May, to be cared for and herded by the latter during the ensuing season at a stipulated rate per head. On May 13, H. having refused to furnish said cattle or any of them, an action for damage was brought by G. on the said contract. *Held*, That the action was not premature.
2. **Record for Review.** *Held*, That the question of the measure of damage is not presented by the record.

ERROR from the district court of Pierce county. Tried below before POWERS, J.

John R. Hays and *Benjamin Lindsay*, for plaintiff in error.

Douglas Cones, contra.

POST, J.

This action originated in the county court of Pierce county, from whence it was removed by appeal to the district court of said county, where a trial was had, resulting in a verdict and judgment for Goff, the plaintiff therein.

The essential allegations of the petition are as follows: On the 28th day of April, 1891, the defendant below, Hamilton, verbally agreed to furnish to the plaintiff a designated herd of cattle, estimated at 138 head, to be herded and cared for by the latter during the season of that year, or such part thereof as the defendant might elect, at the agreed rate of seventy-five cents per head for the season, or forty cents per head for all remaining in the herd not later than July 1; that, relying upon the said promise, the plaintiff was at great expense in preparing to properly herd and care for said cattle, but the defendant has wholly

failed to perform the obligation imposed upon him by said contract, and that he, on or about May 1, 1891, refused to deliver the cattle above mentioned or any others, to plaintiff's damage, etc. The answer is, first, a general denial; second, an allegation that if any contract was in fact made as alleged, no right of action had accrued thereon when this action was commenced.

An analysis of the evidence is unnecessary in this connection, since we observe no substantial conflict with respect to the agreement alleged, or the facts which in law constitute a breach thereof. The only inquiry is, therefore, whether the action is premature, as alleged by the plaintiff in error. The date of the commencement of the action in the county court is not disclosed by the record, the evidence upon that point being confined to the petition in the district court, which was filed July 9, 1891. But assuming the date named by counsel for plaintiff in error, May 13, to be correct, it does not follow that the action was prematurely brought. The defendant, by his agreement, was required to deliver the cattle on May 1, and a refusal on that day amounted to a breach of the contract, for which the plaintiff was entitled to recover damages. But the argument in this court is directed to the measure of damage rather than the cause of action, a question not presented by this record. True, one of the assignments of the petition in error is the giving of paragraphs 6 and 7 of the instructions on the motion of the court, but a reference to the motion for a new trial fails to disclose any objection therein to said instructions. It has long been the rule of this court that exceptions to the giving or refusing of instructions will not be noticed unless such rulings are specifically assigned in the motion for a new trial. (*Cleveland Paper Co. v. Banks*, 15 Neb., 20; *Hastings & G. I. R. Co. v. Ingalls*, 15 Neb., 129; *Omaha & R. V. R. Co. v. Walker*, 17 Neb., 432.) There being no error of record, the judgment must be

AFFIRMED.

CHRISTOPHER BETZ, APPELLEE, V. ALBION P. MARTIN ET AL., APPELLANTS, IMPLEADED WITH JESSE P. CHIPMAN.

FILED JUNE 18, 1895. No. 5811.

Review: FAILURE TO FILE BRIEFS: AFFIRMANCE. A cause which is submitted without oral argument being made or briefs filed will ordinarily be affirmed without examination of the record. *Miller v. Lewis*, 41 Neb., 692, followed.

APPEAL from the district court of Lancaster county. Heard below before FIELD, J.

William B. Price, for appellants.

A. G. Greenlee, contra.

HARRISON, J.

This is an appeal from a decree of foreclosure of real estate mortgages rendered in the district court of Lancaster county May, 1892, and was submitted to this court upon the record and bill of exceptions, without either oral argument or briefs filed calling attention to any alleged error or errors claimed to have been committed by the trial court. Under such circumstances it is the established rule of this court that, ordinarily, the judgment will be affirmed without an examination of the record. (*Stabler v. Gund*, 35 Neb., 648; *Zimmerman Mfg. Co. v. Tower*, 40 Neb., 306; *Miller v. Lewis*, 41 Neb., 692.) The decree of the district court is

AFFIRMED.

OLIVA PLUCKNETT V. WILLIAM TIPPEY ET AL.

FILED JUNE 18, 1895. No. 6389.

Intoxicating Liquors: SALOON-KEEPER'S BOND: CONSTRUCTION: LIABILITY OF SURETIES: EVIDENCE. Statements in the conditions of the bonds of retail liquor dealers, which were as follows: "Now, if the above bounden shall not, during the continuance of said license, keep a disorderly house, * * * and shall pay all damages, fines, and forfeitures that may be adjudged against said * * *, under the provisions of chapter 61 of the General Statutes of the state of Nebraska passed at the sixteenth legislative assembly, and approved February 28, 1887, then, in such case, the above obligation to be void, otherwise in full force and effect,"—*held*, to refer to chapter 61 of the Laws of Nebraska, 1881, as arranged and published by the secretary of state as authorized by law, and as the chapter designated contained the liquor law, the statements in the bonds sufficiently referring to the liquor law and its provisions, the bonds were valid, and it was error to exclude them from the evidence in a case on the ground that the liquor license act, or law, was not described or referred to in the conditions of the bonds.

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

F. I. Foss and *Alfred Hazlett*, for plaintiff in error.

Griggs, Rinaker & Bibb, contra.

HARRISON, J.

The plaintiff, for herself and her minor child, commenced this action in the district court of Saline county against the defendants William Tippey and George W. Schram as retail liquor dealers in the village of De Witt, in said county, and the other defendants as sureties upon bonds given when licenses were granted to the dealers to engage in the liquor business, to recover damages for the death of the husband and father, alleged to have resulted from drinking intoxi-

cating liquors obtained in the saloons of the principal defendants. The answers filed were general denials. After issues joined, a trial was had before the court and a jury, which resulted in a verdict and judgment in favor of the plaintiffs against the two saloon-keepers and a judgment of dismissal of the action as respects the defendants, the bondsmen. It appears that during the trial the plaintiff offered the bonds in evidence and that they were objected to on behalf of the sureties "as incompetent, immaterial, and irrelevant and not admissible under the pleadings, not binding upon the sureties, not being a statutory bond, not being the bond declared upon in the petition in this case, and not such a bond upon which an action of this kind can be predicated and founded." This objection was sustained and the bonds excluded from the evidence. This action of the trial court, it is alleged by counsel for plaintiff, was erroneous, and it is the only reason assigned and urged as sufficient to secure a reversal of the judgment of the lower court. The bonds in question were executed to the state, each in the sum of $5,000, and each contained a recital of the granting of a license to sell liquors, and stated where the business was to be conducted and the length of time it was to continue under the present license and bond, and also contained the following conditions: "Now, if the above bounden * * * shall not, during the continuance of said license, keep a disorderly house, * * * * * * * and shall pay all damages, fines, and forfeitures that may be adjudged against said * * *, under the provisions of chapter 61 of the General Statutes of the state of Nebraska passed at the sixteenth legislative assembly, and approved February 28, 1887, then, in such case, the above obligation to be void, otherwise in full force and effect." The bonds did not differ except in the names of the principal and sureties and some other unessential particulars.

Section 6 of chapter 50 of the Compiled Statutes, gen-

erally known and referred to as the "Slocumb Law," provides that the bond of a retail liquor dealer shall stipulate "that he will not violate any of the provisions of this act; and that he will pay all damages, fines, and penalties and forfeitures which may be adjudged against him under the provisions of this act." It is stated by counsel that the trial court sustained the objection to the introduction of the bonds in evidence on the ground that the statement in the condition of each of them, "shall pay all damages, fines, and forfeitures that may be adjudged against said * * *, under the provisions of chapter 61 of the General Statutes of the state of Nebraska passed at the sixteenth legislative assembly, and approved February 28, 1887," did not refer to, or was not a designation of, the provisions of the act in regard to the sale of intoxicating liquors, and hence the bonds were nugatory. To determine whether the description in the condition of the bonds in question was sufficient and referred to the so-called "Slocumb Law" it will be necessary to examine a portion of the record history of its enactment and publication, etc. It seems proper here to first direct attention to the manner in which such of the record of the enactment of laws and their publication, as will be noticed in our opinion, are authorized to be and are made. In section 24 of article 3 of the constitution is the following statement: "All laws shall be published in book form within sixty days after the adjournment of each session, and distributed among the several counties in such manner as the legislature may provide;" and among the duties of the secretary of state is "to print and supervise the distribution of the laws and journals, and keep an account thereof;" also, "in the publication of the laws of this state * * * the secretary of state shall cause to be published in each volume a general certificate to the effect that the same as contained in such volume are true copies of the laws and resolutions of the legislature, as the case may be, on file in his office" (Com-

piled Statutes, 1893, ch. 83, art. 2, sec. 4); and in section 14 of chapter 68, Compiled Statutes, 1893, under the head of "Printing," we find the following: "It shall be the duty of the secretary of state to classify and arrange for publication the laws, joint resolutions, and memorials passed at each session, and to make out a full index and marginal notes to the laws as fast as shall be necessary. The signatures of the speaker of the house, president of the senate, and governor shall not be printed at the end of each law and chapter, but only at the end of the volume. The date of approval by the governor shall be affixed to each law." The foregoing, and other provisions of our laws not particularly alluded to, fully authorize the preparation in book form, arranged in appropriate chapters and properly indexed, and the publication and distribution of all laws passed at any session of the legislature. In a volume of the Laws of Nebraska, 1881, page 270, being the laws passed by the legislative assembly of this state at its sixteenth session, and duly certified by the secretary of state, under page heading "General Laws," is "Chapter 61," which contains our present "liquor law" and the one under the provisions of which licenses to sell intoxicants were obtained by the two principal defendants in this action and the bonds in question were executed, and it further appears that it was approved February 28, 1881. It seems quite clear that the statement in the bonds, "under the provisions of chapter 61 of the General Statutes of the state of Nebraska passed at the sixteenth legislative assembly, and approved February 28, 1887," pointed directly to the chapter 61 of the general laws passed by the legislature at its sixteenth session, in the volume of such laws, published and authenticated by the duly authorized officer of the state, and this being the liquor law, the description was sufficient. The fact that in the bonds the year in the date of approval was given as 1887 when it should have been, to be correct, 1881, we do not deem of particular moment,

as we do not consider it such an essential or governing portion of the reference to the law under which the damages, if any, accruing to any persons by virtue of the bonds were to be adjudged, that its lack of correctness renders the bonds invalid. The law was fully and correctly indicated without it, and it may be rejected as surplusage without materially changing the completeness of the allusion in the conditions of the bonds to the law, the provisions of which were to be covered. Nor does it, we think, when read in connection with the other portions of the statement, tend to mislead the reader in respect to the particular law to which it is its purpose to direct attention. Returning to a consideration of some other statements of the conditions of the bonds, it is true that when we speak of the "Revised Statutes" we usually mean the volume published in 1866, and the volume published in 1873 we call the "General Statutes," and the later publications are known either as the "Compiled Statutes," or the "Consolidated Statutes," and the volumes published under the direction and as arranged by the secretary of state are ordinarily called "Session Laws," yet the reference to laws or statutes in the bonds was not to "General Statutes" in the sense of the volume published in 1873, or the "Compiled Statutes," but unmistakably to the "General Statutes" (which we may read general laws, as the word "statutes" means laws and is here plainly used in such sense) passed at the sixteenth legislative assembly, this portion of the statement limiting that in regard to general laws to the ones enacted at the particular session of the legislative body stated, and chapter 61 proving to be a chapter of an authorized arrangement and publication of the general laws passed at the designated session of the legislature and to be the Slocumb law, or liquor law, the conclusion, it seems to us, must be that the description of the law in the conditions of the bonds, the provisions of which were to be covered by the bonds, was clear and complete and the bonds were valid,

and the action of the trial court, by which they were excluded from the evidence for the reason stated, was erroneous and the judgment of dismissal of the case as to the bondsmen, which followed, must be

REVERSED.

LEONORA Z. JOHNSON ET AL. V. JOSEPH G. THORPE, JR., ET AL.

FILED JUNE 18, 1895. No. 6002.

Mortgage Foreclosure: CONFIRMATION OF SALE: REVIEW. In an error proceeding to secure a review of an order of confirmation of a sale of real estate, made by virtue of an order of sale issued to enforce a decree of foreclosure of a mortgage, where an examination of the record and evidence presented and considered on the hearing of the motion to confirm the sale, discloses that the conclusion reached by the trial judge was fully sustained by such record and evidence, the order of confirmation will be affirmed.

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

L. D. Holmes, for plaintiffs in error.

Isaac Adams, contra.

HARRISON, J.

In an action to foreclose a mortgage upon the north one-half of lot 19 in J. E. Riley's subdivision of lots Nos. 54 and 55 of S. E. Rogers' plat of Oklahoma addition to the city of Omaha, such proceedings were had as resulted in a decree of foreclosure of the mortgage, to enforce which an order of sale was duly issued, directed to one Joseph Coleman as special master commissioner, and who, pur-

suant to its commands, advertised and sold the premises and made return of the sale. The property was purchased by the defendant in error. A motion to confirm the sale was made on behalf of defendant in error, in opposition to which there was filed by plaintiff in error a number of objections to a confirmation, supported, in respect to the facts involved, by affidavits. Affidavits to sustain the motion were also filed. The court, on hearing, reached a conclusion favorable to the motion and ordered the sale confirmed, and the unsuccessful parties have prosecuted an error proceeding to this court to secure a review of such order.

Of the objections presented in the trial court to the confirmation of the sale, the plaintiff in error urges but three in this court, viz.: First, "because it does not appear that the purchaser had paid the amount of his bid before confirmation;" second, "because the property was not sold to the highest bidder;" third, "because the property was sold after the hour at which the sale was advertised had expired." We have carefully examined the whole record, including the affidavits of the parties, and it convinces us that the conclusions reached by the trial judge, that "the sale had been made in all respects in conformity to law," was warranted by the facts, and the order of confirmation, based upon such finding, proper and right; hence it will be

AFFIRMED.

IRVINE, C., not sitting.

LEONORA Z. JOHNSON ET AL. v. FREDERICK HUBBARD.

FILED JUNE 18, 1895. No. 6003.

Mortgage Foreclosure: CONFIRMATION OF SALE: REVIEW. Following the decision in the case of *Johnson v. Thorpe*, 45 Neb., 347, the decree or order of confirmation in this case is affirmed.

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

L. D. Holmes, for plaintiffs in error.

Isaac Adams, contra.

HARRISON, J.

This case in the points argued and presented for adjudication and the facts and incidents connected with them as disclosed by the record do not differ in any material instance from those involved in the case of *Johnson v. Thorpe*, 45 Neb., 347, and following the decision in that case, filed of this date, the decree or order in this is

AFFIRMED.

IRVINE, C., not sitting.

WESLEY J. COOK ET AL. V. BYRON F. MONROE.

FILED JUNE 18, 1895. No. 6222.

1. **Corporations:** OWNERSHIP OF DIVIDENDS. Dividends declared by a corporation upon shares of its stock belong to the parties in whose names the shares of stock are registered in the books of the corporation at the time the dividends are declared, but such dividends may be made the subject of a valid contract, in like manner and to the same extent as other personal property.
2. **Tort-Feasors:** DAMAGES. One who interferes with personal property not his own, at the instance and request or by the authority of another who is not the owner of the property or authorized to act, is a wrong-doer and, as such, liable to the owner of the property for his wrongful act.
3. **Corporations:** OWNERSHIP OF DIVIDENDS: EVIDENCE. The admitted, coupled with the undisputed facts, in this case fully warranted the trial court in directing the jury to return a verdict for plaintiff for the amount claimed.

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

F. W. Fitch and *D. Z. Mummert*, for plaintiffs in error.

Jesse T. Davis and *Edward R. Duffie, contra.*

HARRISON, J.

It is alleged in substance in the petition filed in this action commenced in the district court of Washington county that on January 30, 1892, the defendant in error (plaintiff in the district court and hereinafter referred to as plaintiff) was the owner of twenty shares of the capital stock of the Keeley Institute at Blair, Nebraska, of the face value each of $100, and on that day he sold and transferred the stock stated to Clement L. Hart, one of the plaintiffs in error (hereinafter called defendant and defendants), who, as a consideration of such sale and transfer of stock, executed and delivered to plaintiff his three certain promissory notes in the sum of $1,000 each, payable one in twenty days, one in six months, and one in one year after date, and also conveyed to plaintiff a quarter section of land situated in Howard county. Some time thereafter defendant became dissatisfied with the trade and began an action in the district court of Douglas county against the plaintiff, praying that he might be enjoined from selling or disposing of the notes and land, and that a decree be entered ordering the plaintiff to return the notes to the defendant Hart and reconvey the land to him. During the pendency of the injunction suit, the plaintiff sold and assigned one of the notes to E. H. Monroe, who commenced an action in the district court of Washington county against plaintiff and Clement L. Hart to collect the amount due on the note. That on November 11, 1892, the plaintiff and the defendant entered into a stipulation by which their legal differences arising out of the trade were settled, and which was as follows:

"CLEMENT L. HART, PLAINTIFF, v. BYRON F. MONROE, DEFENDANT. } Stipulation of Dismissal.

"It is hereby stipulated and agreed by and between the parties plaintiff and defendant in the above entitled cause that this case be, and the same is hereby, dismissed upon the following terms and conditions:

"1. That the defendant herein return to the plaintiff the three certain promissory notes in plaintiff's petition described of one thousand dollars each, dated Blair, Nebraska, January 30, 1892, and payable in twenty days, six months, and one year from the date thereof, respectively, to Byron F. Monroe and signed by C. L. Hart, and redeed and quitclaim to the plaintiff the land in the plaintiff's petition described, consisting of one hundred sixty acres in Howard county, Nebraska, being the southeast one-fourth (¼) of section twenty-nine (29), township fourteen (14), range nine (9) west of the 6th P. M., as free from incumbrance and bearing as good title as it did January 30, 1892.

"2. The plaintiff agrees to pay the costs now accrued in this cause and in the cause of Monroe v. Hart in the district court of Washington county, Nebraska, and return to the defendant the twenty certain shares of capital stock of the Keeley Institute at Blair, Nebraska, and assign the same to defendant, together with all accretions, interests, and gains thereto belonging, and pay to the defendant the sum of $175."

That pursuant to the stipulation the notes were returned to defendant and the land reconveyed to him, the shares of the stock were assigned to plaintiff's wife, the $175 paid, and the suits at law dismissed. On March 25, 1892, and during the time the shares of stock stood on the books of the Keeley Institute in the name of defendant and were in his possession, the institute declared a dividend, the owner of the shares of stock in question being entitled to the sum

of $252.18, which amount remained in the treasury of the institute until January 4, 1893, and until after the stock was reassigned by defendant and returned to plaintiff; that on the 4th day of January, 1893, the defendant Wesley J. Cook, by means of an order therefor, signed by his co-defendant, drew the $252.18 from the treasury of the institute and appropriated the same to his own use and benefit and to the use and benefit of Clement L. Hart; and it is further charged that this was done with full knowledge on the part of Cook of the conditions of the agreement of settlement between plaintiff and C. L. Hart, and was done for the purpose of cheating and defrauding the plaintiff of the amount stated. Clement L. Hart filed what was denominated a special answer, which contained a plea to the jurisdiction of the court on the grounds that the answering defendant was not a resident of Washington county and not therein at the time the action was begun or the summons issued or served; that any service of process in the suit issued from Washington county and made upon him in Douglas county was illegal and void; that Wesley J. Cook was not a proper party to the action, but was made a defendant for the sole purpose of obtaining service of process upon him in Washington county that a summons might issue to Douglas county to be served there upon the answering defendant. Defendant Wesley J. Cook answered, admitting the declaring of the dividend on the date and in the sum stated in the petition, and alleging that at some date early in the month of January, 1893, he was in Omaha on business of his own and there met his co-defendant, who informed the defendant that the dividend had been declared by the institute and its amount, and that he was the owner of it and requested the answering defendant to draw the dividend and send it to Hart at Omaha, and gave him an order to enable him to receive the money, which he did, and on the 5th day of January, 1893, or the next day after he received the money, he was again in Omaha and

saw his co-defendant and gave the money to him, taking his receipt therefor. It is further stated that this was all done to accommodate Hart and without any compensation, and without knowledge of the stipulation between the plaintiff and Hart, or any of its terms or conditions, or that the plaintiff had or claimed any right or interest in or to the money. It was also alleged that the action was commenced against the answering defendant for the sole purpose of serving process upon him in Washington county in order to give the court there jurisdiction of the case and to issue process to be forwarded to Douglas county and served upon the defendant Hart, there being no cause of action against the answering defendant, and as to all other allegations of the petition this answer was a general denial. A reply was filed to the answer of the defendant, whose answer we have just noticed, which consisted of a denial of the allegation of the payment of the money received from the institute by Cook to Hart, and also a denial that Cook was made a defendant in order that the suit might be maintained in Washington county and summons issued and served upon Hart in Douglas county. A trial was had of the issues joined between plaintiff and defendant Wesley J. Cook, and at the close of the testimony counsel for such defendant moved the court to instruct the jury to return a verdict for the defendant. The court did not do this, but did instruct the jury to return a verdict for plaintiff for the sum claimed, which the jury accordingly did, and after motion for a new trial on behalf of defendants was heard and overruled, judgment was rendered on the verdict, and the case is presented here by an error proceeding on the part of defendants.

There are several questions discussed in the briefs in regard to the ownership of the dividends when drawn and the liability of Clement L. Hart, and also of Wesley J. Cook, to plaintiff, for their amount, based upon the action of these parties in collecting the dividends from the insti-

tution. The rulings of the trial court in refusing to instruct the jury, as requested by defendant to return a verdict in favor of defendants, or generally, as set forth in a number of instructions offered and rejected, and also in directing a verdict for the plaintiff, and some other alleged errors, we think, all depend upon the determination of the main questions as to whether Hart had any right, as between him and the plaintiff, to draw the dividends, and if not, and his doing so, or causing it to be done, rendered him liable to plaintiff for the amount received, did the participation of the defendant Cook in the transaction render him also liable to plaintiff for the sum drawn. It is doubtless true that when a dividend is declared by a stock concern or corporation, it belongs, as between the corporation and the owners of the stock, to the person in whose name the stock then appears upon the stock books or lists of the corporation; but a stockholder may sell or transfer his shares of stock with or without gains or accrued dividends, and a dividend which has been declared may be made the subject of a contract, or a contract may be entered into regarding it, in the same manner and to the same extent, and as valid and binding as one in reference to any other kind of personal property. (Cook, Stock & Stockholders, secs. 540, 541; Morawetz, Private Corporations, sec. 162.) The contract embodied in the stipulation pleaded in the petition, and in evidence in this case, was one by which the parties clearly sought to completely rescind the exchange or trade which had at a prior date been effected between them, and without doubt transferred to the plaintiff such a right or ownership to the dividends in controversy as entitled him to bring this action against the defendant Clement L. Hart for drawing them or causing them to be drawn, and receiving and appropriating them to his own use. In reference to the liability or non-liability of the defendant Wesley J. Cook, if all that is claimed in his behalf, that he had no knowledge of the settlement and stipulation between the

plaintiff and Clement L. Hart, or that the plaintiff had or claimed any interest or ownership in or to the dividends, and that he received the order from Hart and took it to Blair and there drew the dividends and carried the amount to Omaha and delivered it to Hart, and, moreover, without the receipt of any compensation for so doing, be true, still must he be held to respond to the suit of the plaintiff for the amount of the dividends, for, as was stated by REESE, J., in the case of *Stevenson v. Valentine*, 27 Neb., 338: "Under the usually adopted principle of law that he who intermeddles with personal property which is not his own must see to it that he is protected by the authority of one who is the owner or has authority to act, or that he will be himself liable; and that if he do an unlawful act, even at the command of another acting as principal, and without right, a liability will attach." In the case at bar Clement L. Hart possessed no further right as against or relative to the right of plaintiff to draw, or exercise any acts of ownership in respect to the dividends, and consequently could confer no valid authority upon Cook to perform any such acts, and the act by which Cook obtained possession of the dividends was wrongful, although it was by or through the request or order of Hart, for whom and at whose instance he claims he was acting in collecting the dividends from the institute. His receipt of the money embraced in the dividends was wrongful and he must abide the consequences. Nor will it avail him as a defense to the action of the plaintiff for the property or money so received that he has delivered or paid the same to the party for whom he claims to have drawn it. (Dicey, Parties to Actions, 277.) On the admitted or undisputed facts of the case, the action of the trial court in directing a verdict for the plaintiff was fully warranted and proper. The judgment of the district court is

AFFIRMED.

FREMONT BUTTER & EGG COMPANY v. PETERS & SON.

FILED JUNE 18, 1895. No. 6297.

1. **Actions Against Corporations:** VENUE: STARE DECISIS. It is conceded by counsel for plaintiff in error that the facts in the case at bar and the rules of law applicable thereto are substantially similar to those in the case of *Fremont Butter & Egg Co. v. Snyder*, opinion in which is reported in 39 Neb., beginning on page 632, and to the extent that the points of alleged error stated in the briefs and relied upon in this case were in that considered and decided, it is followed and adhered to, and such points will not be here again discussed or the conclusions restated in the syllabus.

2. **Record for Review:** EVIDENCE IN SUPPORT OF MOTIONS: PRACTICE: BILL OF EXCEPTIONS. Where certain papers of the files of the trial court, evidential of the facts supporting the grounds of a motion filed and which are referred to in the motion and made a part thereof, to be considered with it, which appear to be necessary to its proper examination and determination, must be brought up with the record and preserved in the bill of exceptions. If this is not done the ruling of the trial court upon the questions presented by the motion cannot be reviewed in this court.

3. **Trial:** EVIDENCE. Statements or admissions made by a witness out of court in conflict with his testimony on the trial may be shown in cross-examination. *Markel v. Moudy*, 13 Neb., 322, followed.

4. ———: ———. The action of the trial court in sustaining objections to a certain interrogatory during redirect examination examined, and *held* not erroneous.

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

George W. Simpson and *Frick & Dolezal*, for plaintiff in error.

George I. Wright and *J. R. Gilkeson, contra.*

HARRISON, J.

This action was commenced in the district court of Saunders county by Peters & Son against the Fremont Butter & Egg Company, a corporation, to recover the sum of $312.80, alleged to be due on account for merchandise sold and delivered to the corporation. The answer of the corporation contained a general denial and also a further plea of certain facts which it is claimed, if proved, would establish that the court had no jurisdiction over the subject-matter nor the corporation. Judgment was rendered against the corporation in the trial court and it has removed the case to this court for review. The cases of F. J. Snyder & Co. and Killian Bros. & Co. against the same corporation, tried in the district court of Saunders county, and in both of which the corporation was unsuccessful and brought to this court by proceedings in error, were, as to the issues joined by the pleadings, similar to the case at bar, and assignments of error in those cases raised for examination and decision points similar to the questions presented to this court in the case at bar with two exceptions. The cases referred to have been reached for decision and an opinion was filed in the one, which was followed in the other, for a report of which see 39 Neb., 632–636. The conclusions therein reached and announced, being applicable in the present case, will be followed and adhered to. Before the trial of this case in the district court a motion was filed on behalf of Peters & Son, as follows: "Now comes the plaintiff and moves the court to strike out of the defendant's answer the second defense therein set forth, for the reason that the same is immaterial and waived and cannot at this time be pleaded in bar to the action. Plaintiff refers to and makes a part of this motion the transcript of the lower court, the appeal bond, the original summons, and the answer of the said defendant in the lower court, which are now on file in this court in this case." This

was sustained, and the portion of the answer alluded to was ordered stricken out, to which action counsel for defendant excepted and have made it the subject of one assignment of error. Presumably the trial court had before it the papers in the case, to which reference is made in the motion, and the facts disclosed by them entered into its consideration and assisted it in arriving at the conclusion it did in regard to the disposition to be made of the motion. The transcript, appeal bond, original summons in the case, and answer filed in the court inferior to the district court are not in or of the bill of exceptions or other portion of the record filed in this court. Owing to this incompleteness of the record in relation to the motion we are unable to determine whether the ruling of the trial judge was erroneous or wholly right and proper, and cannot, therefore, review it.

The only further assignments of error which we need notice are as follows:

"The court erred in admitting in evidence the paper marked 'Exhibit DD, Dec. 7, 1892, Geo. F. Corcoran, Official Reporter,' and to the admission of which plaintiff in error duly excepted.

"The court erred in refusing to allow the plaintiff in error to prove by the witness George Haskell the facts offered by plaintiff in error to be proved by said witness in relating to said letter Exhibit 'DD,' aforesaid, and to which plaintiff in error then excepted, as shown on page 177 of bill of exceptions."

Exhibit "DD," referred to in the asssigment quoted, was as follows:

"FREMONT, NEBRASKA, Sept. 2, 1889.

"To whom it may concern: This is to certify that Mr. J. Darrah, of Wahoo, is our authorized agent to purchase butter and eggs. Any drafts he may make on us in payment for same will be duly honored. Yours truly,

"FREMONT BUTTER & EGG CO.,
"J. DIXON AVERY, *Mgr.*"

It is insisted by counsel for the corporation that it was error to admit this exhibit, for the reason that it was not competent as proof of the agency of the party named in it, Mr. Darrah, being a statement made by the witness, Mr. Haskell, at a time when he possessed no other position than that of book-keeper for the corporation and had no authority to and could not bind it by his statements, either verbal or written, in regard to its agents; second, that it was no part of a cross-examination; and they further contend that after admitted it was error for the court to refuse to allow them to interrogate the witness in respect to it in the redirect examination. Counsel for Peters & Son insist that the letter or exhibit in question was not introduced on their part as substantive evidence of the fact of the agency of Mr. Darrah, but for the sole purpose of showing that the witness then undergoing cross-examination had made a written statement in relation to such fact differing from and contradictory of his testimony during the trial. The witness to whom reference has been made was G. E. Haskell, who, while testifying as a witness called on the part of the corporation, was interrogated during his direct examination in regard to J. Darrah and his connection with the corporation in the capacity of agent and answered as follows:

Q. Now, were you acquainted with J. Darrah during the time he was in business in Wahoo?

A. Yes, sir.

Q. Do you know of his being in business here?

A. I do.

Q. What do you say?

A. Yes, sir.

Q. In what business?

A. In the butter and egg business.

Q. You may state whether he had any connection with the Fremont Butter & Egg Company, defendant in this action, while he was in business here, if he was connected with the defendant in any way?

A. He was not.

And during his cross-examination testified in this connection and also in respect to "Exhibit DD." We here further quote the record showing the actions of the court and counsel with reference to the admission of the exhibit:

Q. Then unless it was at the time he had charge of, the time he was working the butter at the creamery, he never had any connection with the defendant company as an agent?

A. Never while I was there as an agent.

Q. Never did at any time?

A. No, sir.

Q. Did he ever make a statement he was an agent of the company?

A. He did.

Q. That was in the fall of 1889?

A. Yes, sir.

Q. You may look at exhibit marked "DD" and answer whether or not that is a statement you made in reference to his being an agent of the defendant?

A. I wrote that.

Q. That is something you wrote?

A. Yes, sir.

Plaintiff offers letter marked Exhibit "DD" in evidence as part of the cross-examination of this witness. Objected to, incompetent, immaterial, irrelevant, because no sufficient foundation has been laid, and because not proper cross-examination. Overruled. Defendant excepts.

Exhibit "DD" read to the jury.

The quotation we will now give shows what was done as to this branch of the testimony during the redirect examination of this witness:

Q. You did not have any of the direction or control?

A. None, only as I was told.

Q. By whom?

A. Mr. Avery.

Q. You may state whether or not you had any authority to sign Mr. Avery's name to any papers?

A. Only as he instructed me to sign letters when he was away.

Q. Did you have any authority or direction from him to sign the letter to which your attention has been called or directed, and has been introduced in evidence here?

Objected to, not proper re-examination, immaterial, incompetent. Sustained. Defendant excepts.

The defendant offers to prove by this witness that the letter introduced in evidence that is marked Exhibit "DD" was a letter written by himself without any authority from Mr. Avery or any one else, and thereby he had no authority to write that letter, and it was written at the special instance of Mr. Darrah, for a special purpose, on a special promise made to the witness by Mr. Darrah. Offer objected to, incompetent, immaterial. Sustained. Defendant excepts.

From a perusal of the record of the testimony of the witness when asked if Mr. Darrah had ever acted as agent for the corporation and of the introduction in evidence of the exhibit and the testimony given immediately preceding its introduction, we conclude to accept the statement of counsel offering it, as to the purpose for which it was offered —that it was to impeach or discredit the witness and his evidence by proving by it his contradictory or different statement to that made in his testimony given at the trial. The question then arises, was it error or was it proper to allow it to be introduced and read during the cross-examination, or should the action at the time indicated have been restricted to its identification by the witness, and its offer and reception in evidence occurred as a proper portion of the testimony for Peters & Son? The latter course is the usual, proper, and established one, and ordinarily should be followed; but the order in which testimony should be received is discretionary with the trial court, and may be

varied, and where no prejudice results, if its admission out of the regular order is erroneous, it is not reversible error; but in the case at bar the piece of evidence (Exhibit "DD") was material and competent for the purpose of impeachment as a statement directly contradictory of what had been said by the witness on the same subject, both during his examination in chief and cross-examination, and might have been introduced (as it was) in connection with and at the time of his admission that he had made it. See *Markel v. Moudy*, 13 Neb., 322, where "on the cross-examination of Joseph Moudy, one of the parties to the suit, who had testified in chief in support of the alleged unprofitableness of the business, he was shown the following notice which he admitted was given by himself: 'For Sale.—Railroad eating house, with furniture and good-will, on the line of the Union Pacific R. R. in Nebraska; regular eating house for all trains; large trains and large profits; terms, part cash and part on time. For particulars address J. Moudy, Fremont, Neb.' Thereupon it was offered in evidence, but the court excluded it on an objection made by the defendants in error that it was 'irrelevant, incompetent, and not proper cross-examination.' This was error. The notice was certainly admissible over this objection. It was a concession by the witness made out of court, and in conflict with the testimony he had given to the jury. It was the right of the plaintiffs in error to have the notice itself go hand in hand with the admission of the witness that he had given it." Under the rule announced by this court in that case, there was no error committed in admitting the statements contained in Exhibit "DD" during cross-examination in this case. Counsel for the corporation strenuously insist that if it was for any purpose or in any sense proper to admit Exhibit "DD" in evidence, then the trial court erred in refusing to allow the witness to answer an interrogatory during redirect examination in relation to the authority or direction which the witness had, if

any, from Mr. Avery, the general manager of the corporation, to sign such statement. Counsel had the right during the re-examination of the witness to ask any questions which tended to elicit from the witness an explanation of the sense and meaning of the matters contained in the exhibit, if any of the expressions therein were doubtful in such particulars, or to show the motives of the witness which actuated him to make the statements (1 Greenleaf, Evidence, sec. 467), but the question asked, "Did you have any authority or direction from him [Mr. Avery] to sign the letter to which your attention has been called or directed and has been introduced in evidence here?" was not calculated to call forth a response from the witness in respect to either the meaning of the declarations of the letter or the motives which induced the witness to make them. Had the exhibit been introduced by the parties by whom it was offered, as a piece of substantive evidence in their behalf, at the proper time for such introduction, and to prove the facts contained in the statements, then, at the proper time for such interrogatories on behalf of the corporation, the question quoted would have been competent, but, as the letter was introduced merely for the purpose of showing that the utterances therein were contradictory of those made by the witness at another time, and for no other purpose, the interrogatory was not proper during redirect examination, and the action of the court sustaining the objection to it was not erroneous. The judgment of the district court is

AFFIRMED.

EDWARD C. CARNES ET AL. V. LOUIS HEIMROD.

FILED JUNE 18, 1895. NO. 6292.

1. **Costs: ATTORNEYS' FEES: INJUNCTION.** Attorneys' fees, ordinarily, are not recoverable in this state for services rendered in an attempt to dissolve a temporary restraining order pending the hearing of a motion to allow a temporary injunction.
2. **Review: MOTION FOR NEW TRIAL.** In the absence of a motion for a new trial the supreme court cannot determine whether or not there were errors of law in a trial in the district court.

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

Frank T. Ransom and *Blair & Goss*, for plaintiffs in error, cited, as to the right to recover attorneys' fees: *Miles v. Edwards*, 6 Mont., 180; 1 Sutherland, Damages, p. 141; High, Injunctions, secs. 973, 974; *Ah Thaie v. Quan Wan*, 3 Cal., 216; *State v. Wakeley*, 28 Neb., 437.

Smith & Sheean and *Mahoney, Minahan & Smyth, contra*, cited: High, Injunctions, secs. 1685, 1692; *Hicks v. Michael*, 15 Cal., 107; *Winkler v. Roeder*, 23 Neb., 709; *Atkins v. Gladwish*, 25 Neb., 390; *Oelrichs v. Spain*, 15 Wall. [U. S.], 211.

RYAN, C.

This action was brought in the district court of Douglas county for the recovery, as damages, of such attorneys' fees as plaintiff alleged had been earned in procuring to be dissolved a temporary restraining order made in an action which had been pending in said district court wherein said E. C. Carnes was plaintiff and Louis Heimrod was defendant. The undertaking which formed the basis of the plaintiff's alleged cause of action was not introduced in

evidence, and there is to be found in the record no copy of the original restraining order by which such undertaking was required. In *State v. Wakeley*, 28 Neb., 431, it was held that an order of this kind did not amount to, or take the place of, a temporary injunction, for which reason the application for a *mandamus* requiring the district judge to fix the amount of the penal sum of an undertaking of the nature of that above referred to was denied. In the case just cited was this language: "It is very clear that the legislature never intended to give the force and effect to a restraining order which attaches to an injunction when regularly allowed. It simply suspends proceedings until an opportunity can be given for the parties to be heard, and upon that hearing having been had, and a decision rendered upon the application, the whole force of the restraining order ceases by its own limitation." The restraining order above contemplated was one which had force and effect until the motion for the allowance of a temporary injunction could be disposed of. It might be, that such an order in this case fixed a very early date as that on which the motion just mentioned would be heard or determined. In such case the preparation would be for the hearing of the motion to allow the temporary injunction prayed, for the reason that little or nothing could be gained by moving to dissolve the restraining order. Possibly this consideration may have influenced the district court to hold that the services rendered, for which compensation is now sought to be recovered, were rendered rather with reference to defeating an order for temporary injunction than dissolving the temporary restraining order which preceded the hearing of the motion for the allowance of such temporary injunction. The evidence of Mr. Ransom, who alone testified as to the nature and value of the services rendered by the attorneys, coupled such services as having been rendered to secure a dissolution of the restraining order with the effort to prevent the allowance of

the temporary injunction. Whatever proportion of fees was allowable for the latter class was not contemplated by the undertaking upon which this suit was brought, therefore, for this no recovery could be had on such undertaking. Attorneys' fees for the dissolution of a temporary restraining order are recoverable, if at all, only in exceptional cases, of which that under consideration is not one. It seems to be laid down in *Miles v. Edwards*, 6 Mont., 180, that a different rule should prevail. The views of the court by which the above case was decided are so radically different from the understanding which this court has of the purpose of a restraining order that the case cited tends to mislead rather than to aid our judgment. By that court a restraining order is regarded as having much the same purpose, and therefore as being subject to like rules with those which govern temporary injunctions. The district court properly denied the right to a recovery of attorneys' fees in the case at bar, for such a recovery was not within the conditions of the undertaking sued upon. The defendant, in his answer, sought to recover such fees as had been earned, and which he alleged were due him for services rendered while he was deprived of the office of oil inspector and its emoluments. Proof was tendered of the amount of these fees, but was rejected by the district court. We are not able to enter upon an investigation of the question, for the reason that while the record recited the ruling on defendant's motion for a new trial, the motion itself cannot be found. The judgment of the district court is

AFFIRMED.

WILLIAM G. BALL v. MARY J. WICKS.

FILED JUNE 18, 1895. No. 6534.

Corporations: FAILURE TO PUBLISH NOTICE OF INDEBTEDNESS: ACTION AGAINST STOCKHOLDERS. An action to enforce the statutory liability of a stockholder arising from a corporation's failure to publish an annual notice of its indebtedness as required by law, cannot be maintained until after a judgment has been rendered against such corporation by which has been judicially ascertained the amount owing by it. Following *Globe Publishing Co. v. State Bank of Nebraska*, 41 Neb., 175.

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

C. C. Flansburg, for plaintiff in error.

James McNeny, contra.

RYAN, C.

In the petition of the defendant in error it was alleged that said defendant in error had entrusted to the Nebraska & Kansas Farm Loan Company, a corporation, a promissory note for the sum of $700 and interest for collection; that said collection had been made, but that the said corporation at the time it received and collected said note was insolvent, and had failed to pay the amount collected; that the defendant was a stockholder in said corporation, which for more than a year before it became liable for the aforesaid collection had failed to publish the notice of its indebtedness required by law, wherefore it was claimed that the plaintiff was individually liable for the payment of the amount of the aforesaid collection. Upon a trial, without a jury, the district court of Harlan county, wherein this cause was pending, held the plaintiff in error responsible for the default of the said corporation and rendered judgment accordingly.

The Nebraska & Kansas Farm Loan Company was a Nebraska corporation and became indebted to the defendant in error in April, 1891. The judgment against the plaintiff in error was rendered on May 25, 1893, although against the delinquent corporation no judgment was ever alleged or shown to have been rendered. The case therefore falls within the rule laid down in *Globe Publishing Co. v. State Bank of Nebraska*, 41 Neb., 175. The judgment of the district court is

REVERSED.

TOLERTON & STETSON COMPANY V. MCCLURE, HAGGERTY & COMPANY.

FILED JUNE 18, 1895. No. 6313.

1. **Trial to Court:** ADMISSION OF INCOMPETENT TESTIMONY. In a cause tried to the court without the intervention of a jury the admission of incompetent evidence is not reversible error. Following *Whipple v. Fowler*, 41 Neb., 675.
2. **Sufficiency of Evidence:** REVIEW. The findings of fact of the district court which are supported by sufficient evidence will not be disturbed in error proceedings upon the assignment that the judgment is against the weight of the evidence.

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

W. H. Farnsworth, for plaintiff in error.

H. M. Uttley, contra.

RYAN, C.

In this court Tolerton & Stetson Co., an Iowa corporation, is the plaintiff in error, and the firm of McClure, Haggerty & Co. is the sole defendant in error. The party

last named began this action May 18, 1888, in the district court of Holt county for the foreclosure of a mortgage made by John C. Hayes and his wife. This mortgage was of date, and was filed for record, November 3, 1887. On the day last mentioned suit was begun in said district court by plaintiff in error against John C. Hayes, in which suit on the same day an attachment was levied upon the real property described in the aforesaid mortgage. There was rendered a judgment on December 12, 1887, in favor of plaintiff in error against John C. Hayes in the aforesaid attachment suit for the sum of $1,033, and the attached property was ordered sold. In the foreclosure action the plaintiff in error, as a judgment creditor of John C. Hayes, was joined with him as a defendant and answered in denial of the existence of an indebtedness from Hayes to the petitioner for foreclosure, and alleging that the mortgage was fraudulent as to creditors of Hayes. A decree was entered as prayed by the defendant in error.

There are assignments of error pertaining to the competency of certain evidence which need not be considered, since this cause was tried to the court without the intervention of a jury. (*Whipple v. Fowler*, 41 Neb., 675.) There was ample evidence to sustain the findings of the district court. Its judgment is therefore

AFFIRMED.

CHADRON BUILDING & LOAN ASSOCIATION, APPELLEE, v. E. L. HAMILTON ET AL., IMPLEADED WITH L. A. BROWER ET AL., APPELLANTS.

FILED JUNE 18, 1895. No. 5616.

1. **Lien of Judgment.** The lien of a judgment does not exceed the actual interest the judgment debtor had in the land at the time a transcript of such judgment rendered by a justice of the

peace was filed in the office of the clerk of the district court of the proper county, and such judgment lien is subject to every equity at that time existing against the judgment debtor.

2. ———: MORTGAGES. Where land intended to be included in a mortgage is omitted by mistake, and a transcript of a judgment against the mortgagor is subsequently filed in the office of the clerk of the district court of the proper county, the lien of the judgment creditor is subject to the equity of the mortgage.

APPEAL from the district court of Dawes county. Heard below before KINKAID, J.

Spargur & Fisher, for appellants.

T. F. Powers and *J. L. Caldwell, contra.*

RYAN, C.

On July 30, 1891, the Chadron Building & Loan Association filed in the office of the clerk of the district court of Dawes county its petition praying for the foreclosure of a mortgage executed August 15, 1889, to it by E. L. Hamilton and his wife. This mortgage was filed for record September 9, 1889. Incidentally there was sought the reformation of said mortgage so as to describe correctly the west half of the southeast quarter instead of the mistaken description of the west half of the southwest quarter of the same section as was included in the mortgage. There were made defendants with the mortgagors certain judgment creditors of E. L. Hamilton, to-wit, Lewis Ross & Co., L. A. Brower, and Charles Morrissey, of whom only the two last named appeal. The judgment in favor of L. A. Brower was by confession in the county court for the sum of $100, and of it a transcript was filed in the office of the clerk of the district court of Dawes county March 3, 1891. Charles Morrissey obtained his judgment against E. L. Hamilton before Omaha H. Wilson, a justice of the peace of Dawes county, for the sum of $150 on June 22, 1891, and on the same day a transcript thereof was filed in the office

of the clerk of the district court aforesaid. The service of the summons in the foreclosure proceedings was made on both Morrissey and Brower, August 9, 1891. It is claimed by the appellees that upon the summons were indorsed the words "Injunction allowed," and as it was the duty of the clerk to make this indorsement, it is presumable that this claim is well founded, in the absence of a showing by the appellant's transcript what indorsements, in fact, were upon said summons. There was issued on a judgment rendered in favor of Lewis Ross & Co. against E. L. Hamilton an execution, on which the land, against which the mortgage was sought to be made operative in the foreclosure proceeding, was, on August 12, 1891, sold to Charles Morrissey. On the 24th day of the last named month said execution sale was confirmed and a deed was then ordered to issue to Charles Morrissey. It does not appear from the record that the sheriff ever issued a deed under this confirmation. In the foreclosure proceedings the answer of Morrissey and that of Brower were simply general denials. It is quite evident that the intention of Morrissey in the foreclosure case was to avail himself of the mistake in the mortgage being foreclosed by virtue of his status, first, as a judgment creditor, and second, as a purchaser under the execution which issued on the judgment in favor of Lewis Ross & Co., which latter was obtained long after the filing for record of the mortgage sought to be questioned. The evident purpose of Brower was to avail himself of the lien of his judgment against Hamilton to accomplish the same design entertained by Morrissey. The same principles apply as to the claims of each, therefore only one will be discussed. The attempt of Morrissey to avoid the effect of the loan and building association's reformation of Hamilton's mortgage by a purchase was ineffectual, for the reason that his purchase was with knowledge of the pendency of the association's foreclosure action in which the reformation was prayed, and in avoidance of

the injunction sought as auxiliary thereto, which was not only against the sale on the judgment in Morrissey's favor, but as well was against a sale on the judgment in favor of Lewis Ross & Co. In any event Morrissey's evidence of title was not complete, for no sheriff's deed appears to have ever issued to him. The mere judgment lien in favor of Morrissey did not exceed the actual interest which E. L. Hamilton held at the date of the filing of the transcript of the judgment against him in the office of the clerk of the district court of Dawes county, and was subject to every equity existing against said judgment debtor at that time. This was recognized as the correct rule in *Galway v. Malchow*, 7 Neb., 285, and in that case it was also held that the lien of a judgment could not prevail over that of a prior mortgage with respect to lands by mistake omitted therefrom. This doctrine is also recognized and approved in *Dorsey v. Hall*, 7 Neb., 460, and in *Norfolk State Bank v. Murphy*, 40 Neb., 735. These considerations served to justify the decree of the district court, which was adverse to the claims of Brower and Morrissey.

Other questions are argued, such as the fact that the mortgage was security for a bond and that no proof was made of the amount really due thereon. It is true, the obligation secured was designated a bond, and yet it in fact was merely an obligation to pay a certain sum of money under prescribed conditions, which conditions it was alleged existed at the time the foreclosure decree was entered. There was sufficient proof of the existence of these conditions. No other evidence was therefore required except the undertakings of the bond and mortgage. The judgment of the district court is

AFFIRMED.

WILLIAM F. HAVEMEYER ET AL., APPELLEES, V. GEORGE J. PAUL, APPELLANT, ET AL.

FILED JUNE 18, 1895. No. 7400.

1. **Mortgage Foreclosure:** SUPPLEMENTAL PETITION: FAILURE TO NOTIFY DEFENDANT: EFFECT OF DECREE: EVIDENCE. In a suit to foreclose a mortgage the owner of the equity of redemption was personally served and answered in the time fixed by statute, traversing the material allegations of the petition. After such answer day, by leave of court, but without notice to said defendant, the plaintiff filed a supplemental petition to recover moneys which he alleged he had paid out to insure the mortgaged property subsequent to the bringing of the suit. *Held*, (1) The court erred in permitting the supplemental petition to be filed without notice thereof to the defendant; (2) the defendant, having answered, was bound to take notice of any reply to such answer which the plaintiff might make, but he was not compelled to take notice of the supplemental petition filed in the case; (3) the defendant had a right to presume that the court would render no other or different decree in favor of the plaintiff than that prayed for by him in his original petition; (4) that because the defendant had answered the petition of the plaintiff within the time required by law, it would not be presumed that he had actual knowledge of the filing of the supplemental petition; (5) that the plaintiff, by filing the supplemental petition, in effect brought another suit against the mortgaged property and all the parties to the original action; and the defendant, without notice of the filing of such supplemental petition, in the absence of some act of his by which he waived such notice, was no more concluded by the decree rendered thereon than he would have been by a decree rendered in favor of the plaintiff on his original petition without the notice or service of summons; (6) the evidence examined and found insufficient to support the finding and decree of the district court in favor of the plaintiff on the cause of action set out in his supplemental petition.

2. ———: NOTICE OF DEFENDANT'S CROSS-BILL. To such suit a number of persons were made co-defendants with said owner, but not served with process. After the answer day of such owner the co-defendants filed answers claiming liens upon the mortgaged property. No notice of the filing of these answers was given

the owner either before or after they were filed. *Held*, (1) That though the Code abrogated the old chancery practice requiring defendants claiming affirmative relief to file cross-bills and serve notice thereof on parties to be affected thereby, it did not abolish the principle that a party is entitled to notice of judicial proceedings instituted against him or his property; (2) that the answers of the co-defendants were in effect suits against the owner of the mortgaged property, and he was not charged with notice of the filing of such answers, because he had been served with process and answered the petition of the plaintiff within the time required by law.

3. **Parties:** PLEADING: NOTICE OF CROSS-BILLS. A party made defendant to an action and duly served with process is charged with notice of whatever answer any of his co-defendants may file in the action only when such answer is filed by such co-defendant within the time required by law. *Arnold v. Badger Lumber Co.*, 36 Neb., 841, and cases there cited followed and reaffirmed.

4. **Contracts:** RATE OF INTEREST. The mortgage bond made the subject of said suit drew interest at six per cent per annum from date until maturity, and ten per cent per annum after maturity. *Held*, That a decree based on said bond drawing interest at seven per cent per annum was not one of which the mortgagor could complain.

5. **Negotiable Instruments:** RATE OF INTEREST. Where a note provides for a lawful rate of interest from date until maturity and a higher and lawful rate of interest afterwards, the rate of interest which the note draws from its date to maturity is the contract rate for that time; and the rate which the note draws after maturity is the contract rate from that date within the meaning of section 3, chapter 44, Compiled Statutes, 1893. First point of the syllabus in *Richardson v. Campbell*, 34 Neb., 181, overruled.

6. **Contracts:** JUDGMENTS: RATE OF INTEREST. Said section 3 construed and *held*, (1) that where parties to a contract for the payment of money have not agreed upon any rate of interest or agreed upon a rate less than seven per cent, the judgment based on such contract draws interest at the rate of seven per cent per annum from the date of its rendition; (2) that where the parties to a contract for the payment of money have agreed upon a rate of interest lawful, greater than seven per cent, the judgment based on such contract will draw the contract rate of interest.

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

George W. Shields, for appellant, cited: *Cockle Separator Mfg. Co. v. Clark*, 23 Neb., 702; *Arnold v. Badger Lumber Co.*, 36 Neb., 841; *Hapgood v. Ellis*, 11 Neb., 131; *Burge v. Gandy*, 41 Neb., 149.

Wharton & Baird, contra, cited: *Johnson v. Missouri P. R. Co.*, 18 Neb., 690; *School District v. Caldwell*, 16 Neb., 68; *Van Sant v. Butler*, 19 Neb., 351; *Bell v. White Lake Lumber Co.*, 21 Neb., 525; *Dillon v. Russell*, 5 Neb., 484.

Mahoney, Minahan & Smyth, McClanahan & Halligan, John P. Breen, William A. Redick, and *Howard B. Smith*, also for appellees.

RAGAN, C.

William F. Havemeyer and W. F. R. Mills (the latter as receiver of the Hamilton Loan & Trust Company) brought this suit in equity in the district court of Douglas county, making William J. Paul, the Phenix Loan Association, George J. Paul, Fred Reumping, the Midland State Bank, George B. Christie, George L. Green, William D. Mead, Jr., and a large number of other persons whose connection with this case is immaterial here, parties defendant. Said William J. Paul had executed two mortgages to the Hamilton Loan & Trust Company, and it had assigned one of said mortgages to Havemeyer. The suit was brought to foreclose these two mortgages. The record does not disclose, nor is the inquiry material here, why or upon what theory Havemeyer and the receiver of the loan and trust company brought this action jointly. The action was brought on the 8th day of January, 1894, and a summons was issued for all the parties made defendants. This

summons was returned on the 13th of January duly served on George J. Paul, the Midland State Bank, and Fred Reumping only. None of the other above mentioned parties made defendants to the action, so far as the record shows, were ever served with process. The answer day fixed by the summons was February 12, 1894. On the 8th of February, 1894, George J. Paul filed his answer to the petition of Havemeyer and Mills, traversing its averments, and setting out that he was the owner of the the mortgaged premises, having become such at a date subsequent to the date of the mortgages being foreclosed. On the 30th of January, 1894, the Midland State Bank filed its answer and cross-petition claiming a lien upon the mortgaged premises. On the 15th of March, 1894, by leave of the court, but without any notice thereof ever having been served upon or given to George J. Paul, Havemeyer filed a supplemental petition in the action, setting out that since the bringing of the suit, in order to protect his mortgage lien he had paid out $222.77 as insurance premiums on the mortgaged premises, and prayed that he might be given a lien for said sum and interest against the mortgaged property. On the 24th of April W. D. Mead, Jr., filed an answer and a cross-petition claiming a lien upon said mortgaged property. On the 25th of April George L. Green filed an answer and a cross-petition claiming a lien. On the 27th of April George B. Christie filed an answer and a cross-petition claiming a lien against said property. And on the 16th of June the Phenix Loan Association filed an answer and a cross-petition claiming a lien against said mortgaged property. It is to be observed that these last four answers and cross-petitions were filed after the answer day and without notice to George J. Paul or the other parties to the suit. The record does not disclose that George J. Paul ever appeared in the case, either personally or by counsel, after the filing of his answer on February 8 until after the decree. The answer of Fred Reumping, if in-

deed he ever filed one, does not appear in the record. On the 27th and 28th days of June, 1894, the court heard the evidence in the case, Havemeyer, Mills, the Midland State Bank, Mead, Jr., Green, Christie, and the Phenix Loan Association appearing. George J. Paul did not appear on the trial, either in person or by attorney. On the 30th day of June, 1894, the court made the following findings: (1) That there was due Havemeyer on his mortgage bond and coupons, and for insurance paid since the bringing of the suit, $37,415.92, and that he had a first lien upon the mortgaged property; (2) that there was due Mills, receiver, on his mortgage $1,104.24, which was a second lien upon the mortgaged property; (3) that there was due the Phenix Loan Association on the bonds and mortgages set out in its answer $12,420.30, which was a third lien upon the mortgaged property; (4) that there was due Fred Reumping on the judgment set out in his answer and cross-petition $496, which was a fourth lien; (5) that there was due William D. Mead, Jr., on the judgment set out in his answer and cross-petition $2,184.24, with seven per cent interest thereon from December 29, 1890, and costs, taxed at $333.16, which was a fifth lien on the premises; (6) that there was due the Midland State Bank on the judgment set out in its answer and cross-petition $419.80, with interest thereon at ten per cent per annum from January 6, 1891, which was a sixth lien on the premises; (7) that there was due G. L. Green on the judgment set out in his answer and cross-petition $65, with interest at seven per cent per annum from May 11, 1891, which was a seventh lien; (8) that there was due George B. Christie on the judgment set out in his answer and cross-petition $2,013.33, which was an eighth lien. The decree provided that unless the said sums found due should be paid within twenty days that the mortgaged premises should be sold and the amounts found due paid out of the proceeds of said sale. To reverse this decree George J. Paul has appealed.

1. The first complaint of the appellant relates to the action of the court in including in the amount found due Havemeyer the amount alleged by him to have been paid for insuring the mortgaged property after the bringing of the suit. Section 149 of the Code of Civil Procedure provides: "Either party may be allowed, on notice, and on such terms as to costs as the court may prescribe, to file a supplemental petition, answer, or reply, alleging facts material to the case, occurring after the former petition, answer, or reply." The claim of Havemeyer for payments made for insurance on the mortgaged property after the bringing of this action was a separate and independent cause of action and one that arose subsequent to the bringing of this suit, and was properly presented to the court by a supplemental petition. But we are of the opinion that the learned judge erred in permitting Havemeyer to file this supplemental petition without notice thereof to George J. Paul and other parties to the action who would be affected thereby. Paul, having been duly served with summons, was bound to take notice of any reply to such answer which Havemeyer might make, but he was not compelled to take notice of the supplemental petition filed in the case by Havemeyer. If the record disclosed that Paul was present in court and consented to the filing of this supplemental petition, that would of course be a waiver of his right to insist upon a formal notice thereof, but the record contains no such disclosure. If it appeared from the record that Paul appeared either in person or by counsel and participated in the trial of the case, perhaps he could not now be heard to complain of his want of notice of the filing of such supplemental petition. But as already stated the record does not show that Paul, either in person or by attorney, was present or participated in the trial of the case. So far as the record shows, Paul had no knowledge whatever of the existence of the supplemental petition in question until after the rendition of the decree appealed from. By the

summons served upon Paul he was notified that he had been sued by Havemeyer and that he was required to appear and answer his petition by the 12th of February. He appeared and he answered; and he had a right to presume that the court would render no other or different decree in favor of Havemeyer than that prayed for by him in his original petition. If a cause of action accrued to Havemeyer against the mortgaged property subsequent to the date of the filing of his petition, and if he desired a judgment or decree on such cause of action, he pursued the proper course in presenting the matter to the court by a supplemental petition. But Paul, without notice of the filing of such supplemental petition, or without some act of his by which he waived such notice, is no more concluded and bound by the judgment rendered thereon than he would have been by the decree rendered in favor of Havemeyer on his original petition, had such decree been rendered against the property without any summons having been served on him. Paul was not bound to take notice of the filing of the supplemental petition of Havemeyer because of the fact that he had been served with a summons in the original action and had appeared and answered. He was no more bound to take notice of the supplemental petition than if he had not answered; and it will scarcely be questioned that Paul, had he not appeared in the action, though duly served with summons, would not have been bound by the decree which the court rendered on the supplemental petition of Havemeyer, in the absence of all notice thereof. By the filing of the supplemental petition Havemeyer, in effect, brought another suit against the mortgaged property and all the parties to the original action; and it is only because the cause of action set out in the supplemental petition was connected with and grew out of the subject-matter on which the original foreclosure suit was based that Havemeyer could present to the court for adjudication such cause of action by supplemental pleadings. But this decree in favor

of Havemeyer is erroneous for another reason. As already stated, the amount of the lien given Havemeyer was $37,415.92. It appears from the evidence in the bill of exceptions that all of this decree, except $224.92, was made up of amounts due Havemeyer from William J. Paul on certain bonds and coupons, but $224.92 of the decree is for money which Havemeyer alleged in his supplemental petition he had paid out as premiums for insurance on the mortgaged property after the bringing of his foreclosure suit. There is no evidence in the bill of exceptions which shows, or tends to show, that Havemeyer, or any one for him, had paid out any sum of money whatever for insuring the mortgaged property after the bringing of the suit. The solicitor for Havemeyer testified on the hearing that he had made a computation of the amount due his client up to the first day of the term of court at which the decree was rendered, and that the amount was $37,415.92, that that amount included $224.77 of insurance paid, and interest thereon of $2.15; and this is all the evidence in the record on the subject to support the decree rendered in favor of Havemeyer on his supplemental petition. It is hardly necessary to remark it is insufficient.

2. After February 12, 1894, the answer day fixed by the summons issued in the case and served on George J. Paul, to-wit, on April 24, 25, 27, and June 16, Mead, Jr., Green, Christie, and the Phenix Loan Association, respectively, on said dates, without ever having been served with process in the case, some of them by leave of court and others without such leave, filed their answers in the nature of cross-petitions claiming liens upon the mortgaged premises, and were by the decree of the court awarded liens against said property as already stated. The next complaint of the appellant is directed against the decrees awarded said last four named parties. Appellant's contention is that the decrees are erroneous as against him because the answers or cross-petitions of said parties were filed out of time

without any notice to him. It is to be remembered in this connection that George J. Paul was duly served with summons, and before the answer day fixed thereby filed his answer to the petition of Havemeyer and Mills, the plaintiffs below; that aside from this the record discloses no appearance at any time in the action by Paul, either in person or by attorney. The answers of Mead and others were in effect suits against Paul and the mortgaged property brought for the purpose of establishing certain liens against said property. Was Paul bound to take notice of the answers filed by his co-defendants Mead, Green, Christie, and the Phenix Loan Association because of the fact that he, Paul, had been duly served with process in the action and had appeared and answered the petition of the plaintiffs? We think not. If this suit had been brought under the old chancery practice prevailing before the adoption of the Code, and Mead and others had been made defendants to the action of Havemeyer and Mills and served with process in that action, before Mead and others would have been allowed to file their cross-petitions or cross-bills for affirmative relief, they would have been first required to answer the bills or petitions of Havemeyer and Mills; and to their cross-petitions or cross-bills they would have been compelled to make Havemeyer and Mills, the plaintiffs in the original action, and all the defendants in such original action, defendants, and notified them of the filing of such cross-petitions or cross-bills by the process of the court in the nature of a summons. The Code has changed this practice, but it has not abolished the principle that a party is entitled to notice of judicial proceedings instituted against him or his property.

In *Hapgood v. Ellis*, 11 Neb., 131, it was held: "In a foreclosure suit where several parties are made defendants as lien-holders, subsequent purchasers, or lessees of the mortgaged premises, their several answers claiming rights as such lien-holders, subsequent purchasers, or lessees may

be regarded also as cross-petitions for relief as against their respective co-defendants as well as against the plaintiff; and any such defendant, regularly served with process, who fails to answer any material allegation contained in the answer of his co-defendant is bound thereby as well as by the decree founded thereon, and unless he appeals therefrom the same becomes as to him *res adjudicata.*" But an examination of that case leads us to the conclusion that the learned judge who wrote the opinion meant no more than this: That the defendant to an action duly served with process therein is bound by or charged with notice of the averments of the answer of his co-defendant who had answered within the time fixed by law.

In *Cockle Separator Mfg. Co. v. Clark*, 23 Neb., 702, the rule was thus stated: "While all parties to an action are bound to take notice of pleadings properly filed within the time required by law, yet where a party in default obtains leave of court to file a pleading affecting other parties, the parties so affected should be notified of the filing of such pleading."

Carlow v. Aultman, 28 Neb., 672, was a suit brought by one Curtis against Carlow to foreclose a mortgage. Aultman & Co. was made a party defendant and service obtained upon it by publication and the answer day fixed for May 17. Carlow was personally served with a summons, and the answer day for him fixed on May 10. On the 17th of May, Aultman & Co. appeared and filed its answer in the nature of a cross-bill, asking for affirmative relief against Carlow. It was urged in this court that the judgment or decree pronounced in favor of Aultman & Co. against Carlow was erroneous because no notice of the filing of its cross petition by Aultman & Co. was given to Carlow, but the court, speaking through the present chief justice, said: "When a defendant in an action files his answer and cross-petition within the time fixed by law, he is not required to give to the other parties to the suit any notice of the filing of such pleading."

Arnold v. Badger Lumber Co., 36 Neb., 841, was an action brought by the lumber company to foreclose a mechanic's lien. Arnold, the owner of the real estate, was made a defendant and duly served with summons. The answer day, as fixed by the summons, was April 22. A number of other persons were made defendants to this action, who were also served with summons at the same time that Arnold was, and the time fixed for them to answer was the same. Arnold made no appearance to the action, and a decree was rendered against her by default. After the 22d of April, the answer day, a number of the co-defendants of Arnold, by leave of court or otherwise, filed answers in the nature of cross-petitions in the action, claiming liens against the property of Arnold, and were by the court awarded liens as prayed. On appeal from this decree by Arnold the court said: "After answer day, if a defendant files a pleading, in the nature of a cross-petition, against his co-defendants who have not appeared in the action, such co-defendants can be concluded in respect thereto only by their appearance, or after the service on them of a notice in the nature of a summons, as to such pleading."

These authorities then established this rule: That a party made defendant to an action and duly served with process is charged with notice of whatever answer any of his co-defendants may file in the action only when such answer is filed by such co-defendant within the time required by law. If Mead and others had been served with the summons that was served upon Paul, and had filed their answers on or before February 12, or if, on or prior to that date, they had obtained from the court an order extending the time for them to file their answers and had filed them within the time given, then doubtless Paul would have been charged with notice of the averments in such answers. If Mead and others had been served with notice of this suit by publication and had filed their answers

within the time fixed therefor by the publication notice, or on or prior to the expiration of that time had obtained an extension of time in which to answer, and had answered within such extension, then doubtless Paul would have been charged with notice of the averments of their answers. If the record disclosed that Paul or his counsel consented to the filing of these answers of Mead and others, then of course such consent would amount to a waiver of a formal notice thereof, but the record contains no such disclosure. If it appeared from the record that Paul, either in person or by counsel, had appeared and participated in the trial of the case, it may be that such appearance and participation would estop him from insisting that the decrees rendered against him and his property in favor of Mead and others were erroneous, because the answers and cross-petitions on which they were based were filed out of time and without notice to him, but no such fact appears in the record.

3. The next complaint which we notice is that the decree pronounced in favor of Fred Reumping is not sustained by sufficient evidence. The decree of the district court is as follows: "The court further finds that there is due the defendant Fred Reumping on his judgment described in his answer and cross-petition the sum of $496, and interest thereon from December 4, 1890, at the rate of ten per cent per annum, and the costs of suit, for which the said Reumping is entitled to a valid fourth lien on said premises from December 27, 1890." As already stated, the answer and cross-petition of Reumping, if one was ever filed, is not in the record. The evidence in the bill of exceptions to support this decree is as follows: "James H. Adams offered proof on the claim of Fred Reumping." The court: "What is the amount due Mr. Adams?" Mr. Adams: "$496; interest ten per cent from December 4, 1890, and it is a lien from December 27, 1890, the date of the filing of the transcript. This is the judgment of Fred Reumping." Then follows: "P. 72," referring to page 72 of the bill of exceptions, which is as follows:

"Execution Docket 1, page 258.

Parties.	Date of Judgment.	Amt. Received.	Amt. of Costs.	Total Amt. of Judgment, Int. & Costs.
Fred Reumping	County Court	$496.20	$3.15	——
v.	Douglas Co.		.75 Inc. L. C.	——
William J. Paul.	Dec. 4, 1890.		.50 file pd.	——
	Interest 10 %.		.10 "	——
			2.00 Ex. & ret.	——

"1890, Dec. 27. Filed transcript. Filed præcipe for execution. Issued execution.

"June 17. Execution returned indorsed as follows, to-wit:

"Received this writ December 27, 1890, and, not being able to find any property of the within named defendant in Douglas county on which to levy, the same is returned wholly unsatisfied. JOHN F. BOYD, *Sheriff*,

"By HENRY GREBE, *Deputy*.

"Fees, $1.10.

"Execution Docket 1, page 258."

It would seem that Reumping owned a judgment against William J. Paul and he claimed that such judgment was a lien upon the real estate in controversy in this action. If we assume that he filed an answer, as the decree of the district court indicates, setting out this judgment, the evidence offered in his behalf did not prove the averments of his cross-petition or answer. (*Burge v. Gandy*, 41 Neb., 149; *Morrison v. Boggs*, 44 Neb., 248.) A judicial record of this state may be proved by the producing of the original, or by a copy thereof, certified by the clerk or the person having the legal custody thereof, authenticated by his seal of office, if he have one. (Code of Civil Procedure, sec. 413.)

4. Havemeyer's original petition was based on a real estate mortgage bond due five years from date, drawing interest at the rate of six per cent per annum, payable semi-annually, until maturity, and ten per cent per annum, payable semi-annually, after maturity. The district court

awarded Havemeyer interest on the decree rendered on this bond at seven per cent per annum from the first day of the term of court at which the decree was rendered. The appellant assails the correctness of this decree in this respect, his contention being that interest should have been awarded Havemeyer on this decree at the rate of six per cent only. By the law in force on the subject of interest prior to the act of June 1, 1879, the present law, the highest legal contract rate of interest was twelve per cent per annum; and where no rate of interest was fixed by the contract, it drew ten per cent per annum; and judgments and decrees for the payment of money from the date of the rendition thereof drew interest at the rate of ten per cent. (See General Statutes, 1873, ch. 34.)

Gregory v. Hartley, 6 Neb., 356, was decided under the old statute. In that case the note appears to have drawn interest at the rate of seven per cent per annum, payable semi-annually, until maturity, and ten per cent thereafter. The district court by its decree awarded the plaintiff below interest thereon at the rate of twelve per cent, and on error proceedings to this court the decree was reversed, the court holding that there was no authority under the statute to render a decree drawing twelve per cent interest, except in cases where the debt upon which the decree was predicated was drawing that rate of interest. But the court did not decide, so far as the recorded opinion shows, what rate of interest the district court should have awarded the complainant in the decree.

In *Weyrich v. Hobelman*, 14 Neb., 432, the note drew interest at ten per cent per annum from date until maturity, and contained a provision that if not paid at maturity it should draw interest at twenty-four per cent per annum thereafter. The court construed the provision for twenty-four per cent per annum from maturity as a penalty, and held that the holder of the note was entitled to a judgment for the face of his note with interest thereon at the rate of

ten per cent per annum. The question raised and argued in the case seems to have been whether the note was usurious, whether the holder of the note was entitled to a judgment for the face of his note with ten per cent interest from its date until payment; and whether he was entitled to have such judgment draw interest at the rate of ten per cent per annum from its rendition is not decided in the case, although such seems to be the fair inference.

In *Kellogg v. Lavender*, 15 Neb., 256, the note drew interest at the rate of twelve per cent per annum from date. The district court gave the holder of the note interest at twelve per cent from its date to maturity; from maturity to June 1, 1879, the date of the taking effect of the present interest law, ten per cent; and from June 1, 1879, seven per cent. On appeal this court modified the decree of the district court and gave the holder of the note interest thereon at the rate of twelve per cent per annum from the date of the note to the date of the decree. What rate of interest the decree should draw does not appear to have been made a question in the case, nor is any opinion expressed by the court as to what rate of interest the decree should draw.

In *Hager v. Blake*, 16 Neb., 12, the note drew interest at the rate of twelve per cent per annum from date until paid, and contained a provision that overdue interest should draw interest. The question presented by the case was whether the provision for compound interest made the note usurious. The court, after disposing of that question by holding that such provision did not render the contract usurious, cites *Kellogg v. Lavender*, 15 Neb., 256, as an authority for the proposition that the contract rate mentioned in the note continues until the payment thereof, and said: "The rate of interest agreed upon in a written contract, not in excess of that allowed by statute, continues until payment."

In *Upton v. O'Donahue*, 32 Neb., 565, a case decided

under the present interest law, the note drew interest at the rate of six per cent per annum, payable semi-annually, until maturity, and ten per cent after maturity. The court held that the agreement to pay interest at ten per cent per annum after the maturity of the note was in the nature of a penalty and did not increase the rate of interest previously agreed upon by the parties, again citing *Weyrich v. Hobelman*, 14 Neb., 432. The decree was reversed and the cause remanded to the district court with instructions to enter a decree for the amount of the note and six per cent interest thereon.

In *Richardson v. Campbell*, 34 Neb., 181, the construction of the present interest law was again before the court, and in the first point of the syllabus it is said: "Where money has been loaned at a specific rate of interest, as ten per cent, and the note contains a provision that if not paid at maturity the maker shall pay twelve per cent thereafter, the higher rate is in the nature of a penalty and the contract rate will continue as before the maturity of the note." This last case lays down the rule that where a note draws interest at six per cent per annum from date to maturity and a higher lawful rate of interest afterwards, the higher rate is to be regarded as a penalty and not enforceable, and that the rate which the note drew from its date to maturity is to be regarded as the contract rate fixed by the parties. It is to be observed that the rule here announced is predicated on *Weyrich v. Hobelman*, 14 Neb., 433, but in that case the rate of interest which the note drew after maturity was twenty-four per cent, or an unlawful rate, while in *Richardson v. Campbell*, *supra*, the rate of interest after maturity was a lawful one. It may be that if a promissory note provides for the payment of an unlawful rate of interest after its maturity the courts would regard such unlawful rate of interest as a penalty and refuse to enforce it, but no reason exists for refusing to enforce the lawful contracts of parties in the absence of fraud, mistake, or their being

unconscionable. We think, therefore, that the rule as laid down in the first point of the syllabus of *Richardson v. Campbell, supra*, is too broad, and that the correct rule is this: Where a note provides for a lawful rate of interest from date to maturity and a higher and lawful rate of interest afterwards, that the rate of interest which the note draws from its date to maturity and the rate which the note draws after maturity are both the contract rates of the parties, and since they are lawful, are enforceable.

Section 3, chapter 44, Compiled Statutes, 1893, provides, in substance, that all decrees and judgments for the payment of money shall draw interest at the rate of seven per cent per annum from the date of the rendition thereof until paid, but if such judgment or decree is founded upon a contract, by the terms of which a greater rate of lawful interest shall have been agreed upon, then such judgment or decree shall draw the same rate of interest which the contract on which such judgment or decree is based drew. In the case under consideration, as already stated, the bond drew interest at the rate of six per cent per annum from date until maturity and ten per cent after maturity. We conclude that the contract rate between the parties to the bond was six per cent per annum to its maturity and ten per cent thereafter, and that the decree rendered thereon should draw interest at the rate of ten per cent. The construction placed on said section 3 by the court is: Where parties to a contract for the payment of money have not contracted for any rate of interest, or contracted for a rate less than seven per cent per annum, a judgment based on such contract will draw interest at the rate of seven per cent per annum from the date of its rendition. Where the parties to a contract for the payment of money have agreed upon a rate of interest lawful greater than seven per cent per annum, the judgment based on such contract will draw the contract rate of interest. The precise question is this: What rate of interest does a judgment draw based on a

contract for the payment of money which by its terms draws less than seven per cent per annum? This question has never been presented to nor passed upon by this court. The opinion of the writer is that where parties to a contract for the payment of money have agreed upon a rate of interest lawful, and such contract is reduced to judgment, the judgment should bear the same rate of interest which the contract drew, for the reason that though the contract is merged in the judgment, still a judgment is not the making of a new contract for the parties, but one step which the law takes to carry out the contract made. The district court did not err as against the mortgagor in allowing Havemeyer interest at seven per cent per annum on the decree rendered in his favor on the mortgage bond.

For the other errors mentioned the entire decree is reversed and the cause remanded to the district court for further proceedings, and with instructions to tax the entire costs of this case, including the costs of this appeal, to Havemeyer, Mead, Jr., Green, Christie, Phenix Loan Association, and Reumping, in such proportions as the court may deem just, and to require each of said parties to pay the amount of costs taxed against him as a condition precedent to such party's right to be further heard in this case.

REVERSED AND REMANDED.

KEARNEY ELECTRIC COMPANY V. BRIDGET LAUGHLIN, ADMINISTRATRIX.

FILED JUNE 18, 1895. No. 6431.

1. **Death by Wrongful Act:** ACTION FOR DAMAGES: PARTY PLAINTIFF: SUFFICIENCY OF PETITION: CONSTRUCTION OF STATUTE. A widow, as administratrix, sued a corporation for negligently causing the death of her husband. The action was

based on chapter 21, Compiled Statutes, 1893. The petition alleged that the deceased left seven minor children, the oldest thirteen years and the youngest five months of age, "wholly dependent" on the deceased "for their support and maintenance." *Held*, (1) That the petition was not open to the objection that it did not aver facts showing that the persons for whose benefit the suit was brought had, by reason of the death of the intestate, sustained pecuniary injuries within the meaning of said statute; (2) that the words "support and maintenance," as used in the petition, meant food, clothing, and shelter; and the words "wholly dependent" implied that the deceased was the person, and the only person, whose legal and moral duty it was, and to whom the children looked, and upon whom they relied, to furnish the necessaries of life; (3) that it is not absolutely necessary that a petition based on this statute should contain the words, "damage, injury, or loss." It is sufficient in that respect if it appears from the averments of the petition that by reason of the death of the intestate a pecuniary loss, injury, or damage has resulted to the wife and next of kin of the deceased.

2. ———: CONSTRUCTION OF STATUTE. Such an action as the one at bar was unknown to the common law, and is purely a creature of statute; but solely because of that the courts will not give the statute a technical or narrow construction.

3. ———: ———. Whether the rule of the common law, that statutes in derogation thereof are to be strictly construed, is in force in this state, doubted.

4. ———: NEGLIGENCE: EVIDENCE. The intestate was killed by the caving in of the earth while driving a tunnel for the corporation. The evidence, set out at length in the opinion, examined, and *held* to support the finding of the jury that the negligence of the corporation was the proximate cause of the death of the intestate.

5. **Master and Servant:** RISK OF EMPLOYMENT: DEFECTIVE MACHINERY. The rule that a servant by his contract of employment assumes the ordinary risks and dangers incident thereto cannot be successfully invoked as a defense by a master, unless he shows that the machinery, tools, and appliances furnished by him to the servant were reasonably safe and fit for the performance of the work in hand, and which the servant in the execution of his work, by the exercise of ordinary care on his part, might use with reasonable safety to himself; and that the appliances, machinery, or tools, which caused the injury to the servant, were, when used by him, obviously defective and dangerous. (*Missouri P. R. Co. v. Baxter*, 42 Neb., 793.)

6. **Review:** RULINGS ON EVIDENCE: ASSIGNMENTS OF ERROR. Under an assignment that the court erred in admitting or rejecting evidence this court cannot review anything. Under an assignment that the court erred in admitting the evidence of a named witness, if the record shows that any part of the evidence of such witness was properly received, the assignment will be overruled.

7. **Master and Servant:** NEGLIGENCE: INSTRUCTIONS. On the trial, the court instructed the jury as follows: "You are to determine from all the facts and circumstances, as shown by the evidence, whether the deceased was exposed to unusual or extraordinary danger in digging the tunnel; and if you find that he was, this would be negligence on the defendant's part and the plaintiff could recover," etc. *Held*, (1) That the court might have properly told the jury that if the deceased, by working in the tunnel at the time and in the manner and under the circumstances that he did, was thereby exposed to unusual or extraordinary danger without knowing it and without opportunity to know it, that that fact was evidence of negligence on the part of the company; but it was not for the court to say that the fact rendered the company guilty of negligence; whether it did was for the jury; (2) that the giving of the instruction was reversible error.

8. ———: ———: ———. On the trial the district court instructed the jury as follows: "If the danger was unusual and not incident to the employment, and the employe had no knowledge of the unusual danger, and could not with ordinary care and prudence have discovered it, he would not be deemed to have consented to incur such unusual risk." *Held*, That the instruction was correct.

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

The facts are stated by the commissioner.

Marston & Nevius, for plaintiff in error:

The petition does not state a cause of action. (*Hurst v. Detroit City R. Co.*, 84 Mich., 539; *Perry v. Georgia Railroad & Banking Co.*, 11 S. E. Rep. [Ga.], 605; *Smith v. East and West R. Co.*, 10 S. E. Rep. [Ga.], 602; *Pennsylvania R. Co. v. Lilly*, 73 Ind., 254; *Gilligan v. New York*

& H. R. Co., 1 E. D. Smith [N. Y.], 453; *Baldwin v. Western Railroad Corporation*, 4 Gray [Mass.], 333; *Tomilson v. Derby*, 43 Conn., 562; *Taylor v. Monroe*, 43 Conn., 42; *Dunn v. Cass Avenue Street R. Co.*, 21 Mo. App., 205; *Matthews v. Missouri P. R. Co.*, 26 Mo. App., 84.)

In support of the contention that there was not sufficient evidence to support the verdict and none to show negligence on part of plaintiff in error, counsel cited the following authorities: Wood, Master & Servant, sec. 382; *Rasmussen v. Chicago, R. I. & P. R. Co.*, 21 N. W. Rep. [Ia.], 583; *Olson v. McMullen*, 24 N. W. Rep. [Minn.], 318; *Peterson v. City of Rushford*, 42 N. W. Rep. [Minn.], 1063; *Songstad v. Burlington, C. R. & N. R. Co.*, 41 N. W. Rep. [Dak.], 755; *Simmons v. Chicayo & T. R. Co.*, 110 Ill., 340; *Naylor v. Chicago & N. W. R. Co.*, 53 Wis., 661; *Leonard v. Collins*, 70 N. Y., 90; *District of Columbia v. McElligott*, 117 U. S., 621; *Tuttle v. Detroit, G. H. & M. R. Co.*, 122 U. S., 189; *Griffin v. Ohio & M. R. Co.*, 24 N. E. Rep. [Ind.], 888.

There was error in the instructions of the court. (*City of Plattsmouth v. Mitchell*, 20 Neb., 228; *Stevens v. Howe*, 28 Neb., 547; *Johnson v. Missouri P. R. Co.*, 18 Neb., 690; *Village of Orleans v. Peny*, 24 Neb., 831; *Gravelle v. Minneapolis & St. L. R. Co.*, 11 Fed. Rep., 569; *Wolcott v. Studebaker*, 34 Fed. Rep., 8; *Anderson v. Winston*, 31 Fed. Rep., 528; *Quincy v. Kitts*, 3 N. W. Rep. [Mich.], 240; *Pittsburgh, C. & St. L. R. Co. v. Adams*, 5 N. E. Rep. [Ind.], 187; *Reese v. Biddle*, 3 Atl. Rep. [Pa.], 813.)

Oldham & Murphy, contra.

RAGAN, C.

Bridget Laughlin, as administratrix of the estate of Daniel Laughlin, deceased, sued the Kearney Electric Company (hereinafter called the "company") in the district court of Buffalo county for negligently, as she alleges,

causing the death of her intestate and husband. The administratrix had a verdict and judgment, and the company, to reverse said judgment, has prosecuted to this court a petition in error, assigning the following errors:

1. That the petition of the administratrix does not state a cause of action. The petition, among other things, contained the following averments: "That the deceased, Daniel Laughlin, died intestate and left surviving him as heirs of his estate and his next of kin the plaintiff, who was his wife, and the following named minor children, namely, Nora, age thirteen years; May, age twelve years; Kate, age ten years; Margaret, age eight years; James, age six years; Daniel, age five years; Michael, age three years; and Samuel, age five months; that the plaintiff and above named children were wholly dependent on the said Daniel Laughlin for their support and maintenance." This assignment is predicated upon the contention that there is no allegation in the petition that the widow or her children have suffered any pecuniary damage by reason of the death of the intestate. This action is brought under chapter 21, Compiled Statutes, 1893, which provides:

"Sec. 1. That whenever the death of a person shall be caused by the wrongful act, neglect, or default, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or company or corporation which would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

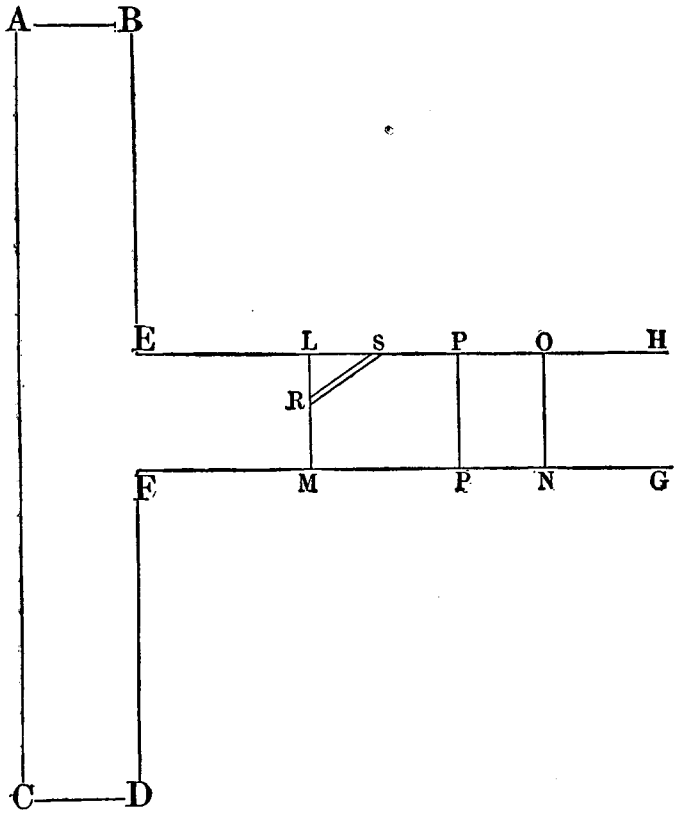
"Sec. 2. That every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of

such deceased person, and shall be distributed to such widow and next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such action the jury may give such damages as they shall deem a fair and just compensation, with reference to the pecuniary injuries resulting from such death, to the wife and next of kin of such deceased person, not exceeding the sum of five thousand dollars; *Provided*, That every such action shall be commenced within two years after the death of such person."

It is not doubted that the petition based on this statute must aver facts showing that the persons for whose benefit the action was brought have, by reason of the death of the intestate, sustained pecuniary loss, injury, and damages. Such an action as the one at bar was unknown to the common law. It is purely a statutory action; but solely because of that the courts will not give it a technical or narrow construction. Indeed, it is doubtful whether the rule of the common law, that statutes in derogation thereof are to be strictly construed, is in force in this state. The courts are prohibited by positive statute from applying such rule to any of the provisions of the Code of Civil Procedure. (See sec. 1, Code of Civil Procedure.) The petition assailed alleges that the widow and administratrix and her minor children were wholly dependent upon the deceased for support and maintenance. "Support and maintenance," as here used, mean food, clothing, and shelter. The words "wholly dependent," as here used, fairly imply that the deceased was the person, and the only person, whose legal and moral duty it was, to whom they looked and upon whom they relied, to furnish the necessaries of life; and the result of the decease of this man was to inflict upon his widow and minor children a pecuniary loss. A pleader should state the facts which constitute his cause of action or defense; but it is not absolutely necessary in such an action as the one at bar that the petition should contain the words "dam-

age, injury, or loss." It is sufficient in that respect if it appear from the petition that by reason of the death of the intestate that a pecuniary loss has resulted to the wife and next of kin of the deceased. We have examined the cases cited by counsel for the company in support of his contention that the petition in this action does not state a cause of action. Some of these authorities we do not regard as being in point, and others, if in point, we are not disposed to follow. The case of *Hurst v. Detroit City R. Co.*, 48 N. W. Rep. [Mich.], 44, cited by counsel to support his argument, was a suit brought by a father as administrator of his deceased child, a year and eleven months old, under a statute similar in its terms to the one quoted above. The petition alleged that the Detroit City railway had negligently caused the death of the child. The court said: "No proof was made by the plaintiff of any pecuniary loss, and there is no such allegation in the declaration." It will thus be seen that this case is not an authority for the contention of counsel for the company here. We think the petition assailed states a cause of action.

2. The second assignment is that the finding of the jury, that the negligence of the company was the proximate cause of the death of Laughlin, is not supported by sufficient evidence. The record contains no cut or drawing showing the situation and the place of the company's works where Laughlin was killed; but from the evidence it seems that on the day before the unfortunate casualty the situation of the company's works and the place where the casualty occurred were as follows:



A, B, C, D represent a part of a canal —— feet wide and thirty feet deep, which had been constructed some six years. E, F, G, H represent the survey of another canal to be constructed opening into the first. E, F, M, L and O, N, G, H represent parts of the second canal complete. L, M, N, O represent unexcavated ground through which a tunnel was to be constructed, and said tunnel had already been driven from the line O, N to the line P, P. On the afternoon of April 7, 1891, the canal, E, F, M, L, formed a *cul-de-sac*, the line L, M being a dirt wall —— feet wide and thirty feet high. This wall at that time was

not perpendicular, as Laughlin, prior to said date and preparatory to commencing driving the tunnel east from the line L, M, had cut or sloped off the wall, L, M, from the top of the proposed tunnel, R to S. It seems that the company was engaged at the city of Kearney, in this state, in the manufacture and sale of electricity for illuminating and power purposes, and had its power house located on or near the canal previously constructed from the Platte river to a point at or near the property of the company described above. Laughlin had been in the employ of the company for something over two years. He was familiar with the improvements made and being constructed. He had assisted in cutting the canal, E, F, M, L and H, O, N, G and in constructing part of the original tunnel, represented by P, P, N, O. One O'Brian, a civil engineer, was the general superintendent of the company, and the engineer who planned for the company the improvements made and under way. He had under him a man named Hanlon, who was a general foreman. There was a man named Cleary, also in the employ of the company, who was foreman of and in control of men while they were working on the canal and tunnel. Laughlin was not employed for any specific purpose, nor did he perform any particular work. He was subject at all times to the orders of O'Brian. When at work anywhere outside the canal or tunnel he seems to have been subject to the orders of Hanlon, and when at work in the tunnel or canal, under the direction of Cleary. On the afternoon of April 7 the two men, Cleary and Laughlin, began the work of driving the tunnel east from the line L, M. After excavating for a short distance, or forming the beginning or mouth of the tunnel, to prevent the earth composing the roof of the tunnel from caving or falling, they put a board or plank three inches thick and sixteen inches wide across the roof or mouth of the tunnel overhead and supported it by upright timbers. Cleary and Laughlin performed some little work that afternoon towards

the excavation. The next day Laughlin worked alone in the tunnel, and after he had driven it in several feet beyond the plank support, above mentioned, the tunnel above him "caved in," the earth fell on him, and he was killed. O'Brian, the superintendent, had laid out the plan for this work and given Cleary general directions as to how the tunnel should be supported while in process of construction. The superintendent was present when Cleary and Laughlin put in the supports at the mouth of the tunnel, or very soon afterwards, and approved the supports made and the way in which they were made. He directed Cleary to use the timbers which he and Laughlin did use, and instructed him how to construct the supports. The superintendent was in the tunnel the day Laughlin was killed while he was at work and again examined the supports. On the trial the superintendent testified as follows:

Q. It is not necesssary to wall the top of your tunnel?

A. In our work I timbered every foot just as we went along with posts.

Q. You considered in order to make proper protection and to make it safe was to prop every foot?

A. I don't mean to prop every foot, but the timbers extended along the whole length.

Q. There should be some support on top of the tunnel all along in order to take proper precaution?

A. I will say, generally, that is the way we did it.

Q. You did it for the purpose of protecting the men and guarding against the caving in of the tunnel?

A. Yes, sir; and it might be to keep the shape of the tunnel. No great amount of earth can fall out of an arch in this country.

Q. The top of the tunnel had not been walled up?

A. No, sir.

In the last answer of this witness he is speaking of that part of the tunnel in which Laughlin met his death. In the former questions he is speaking about that part of the

tunnel represented by O, P, P, N, which had been constructed prior to the time Laughlin was killed. No person but Laughlin appears to have worked in the tunnel the day he was killed. Nor does the evidence show that the superintendent, or any one else, instructed Laughlin to build supports to the roof of the tunnel as fast as the driving proceeded; nor that the company, or any of its officers, took any steps looking to that end, although they knew that Laughlin was at work therein; and it is not claimed that any other support was ever placed in the tunnel where the accident happened than the one built by Laughlin and Cleary when the work was begun. We think that the failure of the company and its officers to give any instructions or to take any steps looking to the bracing and the propping of the roofs of this tunnel as the work of driving it proceeded was sufficient evidence of negligence on the part of the company to support the finding of the jury that such negligence was the proximate cause of Laughlin's death.

3. Another assignment is that the finding of the jury, that the negligence or contributory negligence of Laughlin was not the proximate cause of his death, is not supported by sufficient evidence. The facts have already been stated. While the act of Laughlin in driving or excavating the tunnel to a point several feet beyond the plank support that he and Cleary had put at the mouth of the tunnel, without first putting up other supports, was evidence of negligence on his part, yet it was for the jury to say from this evidence whether by digging and excavating beyond the support at the time and under the circumstances that he did he was thereby guilty of negligence.

It is said in argument here that Laughlin was not ordered to work in the tunnel; that he was there voluntarily; but this argument falls to the ground in the face of the evidence which shows that Laughlin was an employe of the company; that he worked wherever he was directed to

work, and was told that when he had nothing else to do that he might work in the tunnel. The superintendent of the company—the reading of whose evidence impresses one with the idea that he is not only a skillful engineer and a truthful witness, but also a gentleman imbued with the cultured instincts of humanity—testifies that Laughlin was a ready and willing servant; that he was always at work somewhere, could always find something to do; that he, the superintendent, was in the mouth of the tunnel a few hours before Laughlin was killed, examined the supports, thought they were sufficient, and he does not say nor pretend that he ever suggested to Laughlin or any one else the necessity of building any other support in the tunnel than the one there. The result shows that the engineer was mistaken as to the sufficiency of these supports. He had had years of experience in tunneling. We think that the jury made no mistake under all this evidence when it said in effect that Laughlin was not guilty of negligence by remaining in this tunnel and continuing this excavation, as he had a right to rely upon the vigilance, the knowledge, and the judgment of his superintendent; that if there was any probability of the earth caving, or any necessity for additional supports, the superintendent would have spoken. The superintendent did not speak. His silence perhaps was Laughlin's death warrant; and though his failure to speak was the result of honest mistake on his part, that mistake the jury rightfully charged to the master instead of the servant.

4. The next assignment is that the judgment is contrary to law. It is argued in support of this contention that the accident which caused Laughlin's death was one of the risks which he assumed by virtue of his employment; that the ordinary risks incident to constructing a tunnel is the caving in of the earth; that that was something which would probably happen, and that Laughlin was bound to know might happen; and that by continuing the work he

assumed the risk of injury to himself from such accident. In support of this contention counsel cite us to *Griffin v. Ohio & M. R. Co.*, 24 N. E. Rep. [Ind.], 888, in which it was held: "One who is employed to dig out gravel from under a thin stratum of clay cannot recover from his master for injuries received from the clay falling on him, since that is a danger incident to the business." Under the facts in that case we think it was correctly decided. Griffin was employed for the express purpose of digging out gravel overlaid with a thin stratum of clay. The master took no precautions whatever to support the clay after the gravel was removed. The danger of this clay falling was obvious and imminent to any man; and with this knowledge, without any protest or objection, or promise on the part of the master to provide a support for this clay, and without the master's taking any steps looking towards the building of supports for the clay, Griffin continued the excavation. By so doing he of course assumed the risk of the clay falling and injuring him. In *Missouri P. R. Co. v. Baxter*, 42 Neb., 793, the railway company employed Baxter to brake on one of its trains. He had previously been in the employ of another railroad company in the capacity of brakeman. At the time the Missouri Pacific Company employed Baxter it had taken no steps to block the frogs of its switches, nor did it take any such steps after employing Baxter, nor did it make him any promises that it would do so. Baxter was a full grown man and entered in the employ of the Missouri Pacific Company as brakeman and served it in that capacity for some months, passing twice per day on certain parts of its road on which the frogs of its switches were unblocked. He caught his foot in one of these frogs and was killed. It was held that since the danger of catching his foot in an unblocked frog was open, notorious, and obvious to him at the time he entered the service of the company and continued to be so all the time he was in its service, and that he continued in the service without pro-

test or objection or promise on the company's part to block its frogs, he must be deemed to have assumed that risk; and in said case it was held: "A servant, by his contract of employment, assumes the ordinary risks and dangers incident thereto. If the machinery, tools, or appliances furnished the servant by his master are obviously defective and dangerous, and the servant, notwithstanding, continues in the service, he thereby assumes the risks of any injury which he may sustain by reason of such defective appliances, unless he is induced to continue in such service by the promise of the master to remedy such defect." But the jury by its verdict has found that the supports for the roof of this tunnel furnished by the company were not reasonably safe and fit for the purposes for which they were designed; that the support did not afford Laughlin reasonable safety while executing with ordinary care the work of driving the tunnel; and the evidence supports this finding. Again, the evidence on behalf of the company, and especially that of its superintendent, is to the effect, not only that the support made in the tunnel was not obviously defective or imperfect, but that, in the opinion of the superintendent, it was amply sufficient and that it was skillfully and mechanically constructed. The rule then that a servant, by his contract of employment, assumes the ordinary risks and dangers incident thereto is not a defense to the company in this action. This rule can never be successfully invoked as a defense by a master unless he shows that the machinery, tools, or appliances furnished by him for the servant were reasonably safe and fit for the performance of the work in hand; and which the servant in the execution of his work, by the exercise of ordinary care on his part, might use with reasonable safety to himself; and that the appliances, machinery, or tools which caused the injury to the servant were, when used by the servant, obviously defective and dangerous. (*Sioux City & P. R. Co. v. Finlayson*, 16 Neb., 578; *Lee v. Smart*, 45 Neb., 318.)

5. Another assignment of error is that the damages awarded by the jury are excessive, appearing to have been given under the influence of passion and prejudice. We have failed to discover anything in this record that will support this assignment. The amount of the verdict is $2,000. The deceased was a strong, healthy man, capable of earning, and earning at the time of his death, about $10 per week. He was thirty-eight years of age, and left eight minor children and a widow wholly dependent upon him for support.

6. Another assignment is, "The court erred in admitting improper evidence on behalf of the plaintiff." The argument in the brief in support of this assignment is that the court erred in admitting the evidence of a witness named Mannix. We cannot review the assignment, for the reason that it is too indefinite. If a litigant is of the opinion that a court errs in admitting the evidence of any witness, he should object on the trial to the reception of the particular evidence, and specifically assign the ruling of the court in his petition in error here. Under an assignment that the court erred in admitting or rejecting evidence, this court cannot review anything. Under an assignment that the court erred in admitting the evidence of a named witness, if the record shows that any of the evidence of such witness was properly received, the assignment will be overruled.

7. The next assignment is that the court erred in giving upon its own motion the following instruction to the jury: "Negligence is the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do." This is the definition of negligence given by the court in *Blyth v. Birmingham Water-Works Co.*, 11 Exch. [Eng.], 784, and approved in *Smith v. London & S. W. R. Co.*, 5 C. P. [Eng.], 102. In *Baltimore & P. R. Co. v.*

Jones, 95 U. S., 439, the supreme court of the United States defines "negligence" as follows: "Negligence may consist in either failing to do what, under the circumstances, a reasonable and prudent man would ordinarily have done, or in doing what he would not have done." The definition given by the district court in this case, and complained of, is substantially, with the exception that it does not contain the phrase "under the circumstances," the definition adopted by the highest court in this nation. The instruction of the district court was substantially correct; and even if we should be of the opinion that it was technically defective, we are still unable to say that the company was prejudiced by it.

8. The next assignment of error is that the court erred in giving instruction No. 7 of the instructions given by the court on its own motion. That instruction is as follows: "You are instructed that one who contracts to perform labor or render services for another takes upon himself those risks, and only such, as are usually incident to the employment engaged in; and the deceased in this case, when he engaged in digging the tunnel, assumed the ordinary risks and dangers only which are incident to such employment." We think this instruction correct in every respect.

9. The next assignment is that the court erred in giving on its own motion to the jury the following instruction: "Where the employer places one employe under the direction and control of another, and the latter, in the exercise of the authority so conferred, orders the former into a place of unusual danger, and thus exposes to extraordinary peril, of the existence and extent of which he is not advised, the employer would be liable in the event of injury to such employe." Counsel for the company admit that this instruction is correct as a proposition of law, but insists that there is no evidence upon which to base it. His contention is that Laughlin was not under the control or direction of any one while digging this tunnel. We have already

quoted the evidence, and we repeat that while the evidence does not disclose that any officer of the company ordered Laughlin to dig this tunnel, yet the evidence does show that he was in the employ of the company; that he did any kind of work that he was told to do; and that he was told by an officer of the company that when he was not busy at anything else that he might work in the tunnel. This was equivalent to a command to Laughlin that when not otherwise engaged he should put in his time in the tunnel; that he began the excavation of the tunnel with his foreman Cleary; that he was at work on the tunnel on the 8th of April when he was killed; that the superintendent of the company was there while he was at work; that he was neither ordered to desist, nor was any objection made by the company to his working at that particular work. In other words, the evidence is sufficient to show that Laughlin was excavating this tunnel in pursuance of his employment by the electric company, and that what he did in the tunnel he did under the advice and direction of the officers of the company. Under the facts and circumstances in evidence in the case the instruction complained of was correct.

10. The next assignment of error is that the court erred in giving to the jury instruction No. 10 of the instructions given on its own motion. The instruction is as follows: "You are to determine from all the facts and circumstances as shown by the evidence whether the deceased was exposed to unusual or extraordinary danger in digging the tunnel; and if you find that he was, this would be negligence on the defendant's part and the plaintiff could recover, unless you further believe that the deceased knew, or, in the exercise of ordinary care and prudence, might have known, that the danger was extraordinary or unusual, in which event a recovery could not be had." This instruction was erroneous. By it the court told the jury, in effect, that if Laughlin's presence in the tunnel, without his knowing it

or having opportunity of knowing it, exposed him to unusual danger, that that fact was negligence on the part of the company. It has been time and again decided by this court that it is for the presiding judge to say what acts or omissions are evidence of negligence, but that it is for the jury to say what conclusion such evidence warrants. The court might have properly told the jury that if Laughlin, by working in the tunnel at the time and in the manner and under the circumstances that he did, was thereby exposed to unusual or extraordinary danger, without knowing it and without opportunity to know it, that that fact was evidence of negligence on the part of the company; but it was not for the court to say that the fact rendered the company guilty of negligence, whether it did was for the jury. (See *Missouri P. R. Co. v. Baier*, 37 Neb., 235; *Omaha Street R. Co. v. Craig*, 39 Neb., 601; *Chicago, B. & Q. R. Co. v. Oleson*, 40 Neb., 889.)

11. The district court modified an instruction offered on the trial by the company and given by the court. The modification was as follows: "If the danger was unusual and not incident to the employment, and the employe had no knowledge of the unusual danger, and could not, with ordinary care and prudence, have discovered it, he would not be deemed to have consented to incur such unusual risk." To this modification counsel for the company took an exception; and the action of the court in thus modifying the instruction is the next assignment urged here. What we have already said in answer to the argument of counsel, that Laughlin, by working in the tunnel, assumed the risk of dangers incident thereto, must dispose of this assignment. We do not think the court erred in the modification complained of.

12. The next assignment is that the court erred in refusing to give the following instruction asked by the company: "If the negligence or carelessness of the deceased contributed directly to the injury which caused his death,

the plaintiff cannot recover, and your verdict should be for the defendant." The court did not err in refusing to give this instruction, for the reason that the court, at the request of the company, had already instructed the jury as follows: "The deceased, Daniel Laughlin, was bound to exercise ordinary care for his personal safety while engaged in the excavation in question in this case; and if you believe from the evidence that his negligence or carelessness, if any, contributed directly to the injury which caused his death, then you will find for the defendant."

13. The final assignment of error is that the court erred in refusing to give to the jury an instruction in the following language: "Fellow-servants are persons employed and engaged in the same kind of work, for the same employer, and one servant cannot recover from the employer for an injury which resulted from the carelessness or neglect of a fellow-servant; and if the witness Cleary, and the deceased, in putting in the timber supports were doing so for the electric company, and after putting in such supports worked at the excavating, either together or separately, then you are instructed that they were fellow-servants; and if the caving of the earth resulted from the carelessness of either or both of them, in not properly supporting the bank, then the defendant would not be liable for the injury caused by such caving." We think the court correctly refused to give this instruction, for the reason that there was no evidence upon which to base it. It is true that the support put in the tunnel was put there by Cleary and Laughlin, but there was no evidence that the caving in of the earth which killed Laughlin resulted from the negligence of either Cleary or Laughlin or both of them in not properly supporting the tunnel. In other words, as already stated, the evidence shows that Cleary was the foreman of Laughlin; that they built the support in the tunnel of the timbers of which the superintendent directed it to be built; that Cleary and Laughlin constructed the support

under the general direction of the superintendent; that he was present at the time it was constructed, or soon after, and approved of the manner in which it was constructed; and had Cleary himself been killed by the caving in of this tunnel as was Laughlin, the material of which the support was constructed, the manner of its construction, and the fact that Cleary built the support, would, under the circumstances, have been no evidence of negligence on his part. Again, the question of fellow-servant was not in this case. If it be conceded that Cleary and Laughlin were fellow-servants while working in this tunnel and building the supports for it, still there is no evidence to show that Laughlin's death was the result of the negligence of Cleary in constructing the supports at the time and in the manner and of the material that he did. If this material was improper or defective, if the support was insufficient, if it was not properly put up, the fault was that of the general superintendent under whose directions it was done.

For the error of the court in giving instruction No. 10 of the instructions given on his own motion, the judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

S. L. TRUE v. W. C. BULLARD ET AL.

FILED JUNE 18, 1895. No. 5981.

1. **Negotiable Instruments:** INDORSEMENTS IN BLANK: LIABILITY OF INDORSER: ORAL AGREEMENTS. Boston made and delivered his promissory note due in nine months to True. True before maturity of the note indorsed it in blank and sold it to Bullard & Co., and Bullard & Co. before the note's maturity sold and delivered it to a bank. The bank sued Boston as maker and True as indorser of the note and recovered a judgment.

True then sued Bullard & Co. to recover the amount of the judgment which had been rendered against him in favor of the bank as indorser of said note, alleging that at the time he indorsed the note in blank and sold and delivered it to Bullard & Co. he did so under and by virtue of an oral agreement between them that, notwithstanding he indorsed the note in blank, he was not to be liable thereon as indorser. He did not aver in his petition that he had paid the judgment, or any part thereof, rendered against him in favor of the bank.

2. ———: ———: ———. When the payee of a note indorses his name thereon in blank and delivers said note to a purchaser thereof, the law in effect writes over the signature of said indorser an agreement on his part that if the holder of said note shall present it to the payor thereof at its maturity for payment and it be dishonored, and that if such holder shall then give such indorser notice in a reasonable time of the dishonor of said note, that he, the indorser, will pay it.

3. ———: ———: ———. And on the part of the indorsee of such a note, the contract created by law is that he will present said note at its maturity to the payor thereof for payment, and if it be dishonored, that he will within a reasonable time notify the indorser thereof of such dishonor.

4. ———: ———: ———: EVIDENCE. Between the original parties a blank indorsement may be modified by parol, the entire transaction may be shown by reason of which the indorsement was made, and parol evidence is admissible for the purpose of proving the actual contract made between the indorser and the indorsee at the time of the blank indorsement. (*Holmes v. First Nat. Bank of Lincoln*, 38 Neb., 326.)

5. ———: ———: ———. The contract pleaded between True and and Bullard & Co. amounted to this: That the latter agreed that so far as they were concerned as holders of the note they would not look to True for payment thereof; that he was not to be liable to them as an indorser; but they did not agree not to sell and indorse the note, nor did they agree that if they should do so, they would advise the purchaser of the contract existing between them and True.

6. ———: ———: ———. The fact that Bullard & Co. transferred the note before maturity to a bank, and that as against the bank True could not set up as a defense the contract under which he indorsed it to Bullard & Co., did not invest True with a right of action against Bullard & Co.

7. ——: ——: ——. Under no view of the case can True have any cause of action against Bullard & Co. until he shall have paid the judgment rendered on said note or some part thereof.

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

J. W. Cole, for plaintiff in error, cited: *Taylor v. Coon*, 48 N. W. Rep. [Wis.], 123; *Gregory v. Hartley*, 6 Neb., 356; *Holmes v. First Nat. Bank of Lincoln*, 38 Neb., 326; *Bradford v. Prescott*, 85 Me., 483; *Sturtevant v. Randall*, 53 Me., 149; *Smith v. Morrill*, 54 Me., 48; *Patten v. Pearson*, 57 Me., 428; *Jones v. Childs*, 8 Nev., 124; *Wright v. Whiting*, 40 Barb. [N. Y.], 240; *Bellom v. Freeborn*, 63 N. Y., 388; *Furnas v. Durgin*, 119 Mass., 500; *Hall v. Nash*, 10 Mich., 304.

William O. Woolman, also for plaintiff in error.

L. H. Blackledge, contra, cited: *Dale v. Gear*, 9 Am. Rep. [Conn.], 353; *Charles v. Denis*, 24 Am. Rep. [Wis.], 383; *Doolittle v. Ferry*, 27 Am. Rep. [Kan.], 166; *Weller v. Eames*, 2 Am. Rep. [Minn.], 150; *Churchill v. Hunt*, 3 Den. [N. Y.], 321; *Valentine v. Wheeler*, 23 Am. Rep. [Mass.], 404.

RAGAN, C.

The material facts in this case are: On the 9th of December, 1889, one R. W. Boston made his certain promissory note of that date for $265, due September 9, 1890. This note was payable to the order of and delivered to one S. L. True. Before the maturity of this note True sold and delivered it to W. C. Bullard & Co., and indorsed it in blank. Before the note matured Bullard & Co. sold it to a bank, and it not being paid at maturity, the bank sued the maker of the note and True as an indorser and obtained a judgment against them. True then brought this suit in

the district court of Hitchcock county against Bullard & Co., reciting the foregoing facts, and alleging that at the time he sold the note to Bullard & Co. and indorsed it, it was orally agreed between him and Bullard & Co. that the sale and indorsement of the note to them should be and was without recourse on him, True; or, in other words, notwithstanding that he indorsed the note in blank, he was not to be or become liable thereon as an indorser. True in his petition did not aver that he had paid the judgment rendered on the note or any part thereof. The district court sustained objections to the evidence offered by True to support the allegations of his petition on the ground that the petition did not state facts sufficient to constitute a cause of action, and directed a verdict for Bullard & Co., on which judgment of dismissal of True's action was rendered, and he prosecutes to this court a petition in error.

The record presents two questions: May the payee of a promissory note, who has indorsed his name on the back thereof and delivered said note to a purchaser, show by parol, in a suit between himself and said purchaser, that by so indorsing and delivering said note, that the liability created thereby was a different liability from that which the law implies against a party by reason of such an indorsement of commercial paper? Or, applied to the facts in the case at bar, is it competent for True to prove by parol that at the time he indorsed and delivered the note in question to Bullard & Co. that the agreement between them was that he, True, should not be liable on said note as an indorser by reason of such indorsement and delivery? When the payee of a note indorses his name thereon in blank and delivers said note to a purchaser thereof, the law in effect writes over the signature of said indorser an agreement on his part that if the holder of said note shall present it to the payor thereof at its maturity for payment and it be dishonored, and that if

such holder shall then give such indorser notice in a reasonable time of the dishonor of said note, that he, the indorser, will pay it; and on the part of the indorsee of said note, the contract created by the law is that he will present said note at its maturity to the payor thereof for payment, and if it be dishonored, that he will within a reasonable time notify the indorser of said note of such dishonor. It must be admitted that many eminent authorities hold that parol evidence is not admissible to contradict or vary the contract which the law raises by reason of the indorsement in blank and delivery of commercial paper, either on the part of the holder or the indorser; but in *Holmes v. First Nat. Bank of Lincoln*, 38 Neb., 326, this court held that between the original parties a blank indorsement might be modified by parol; that the entire transaction might be shown by reason of which the indorsement was made, and that parol evidence was admissible for the purpose of proving the actual contract made between the indorser and indorsee at the time of the blank indorsement. On the authority of that case we hold that it was competent for True to show by parol that at the time he indorsed and delivered the note to Bullard & Co. that, notwithstanding such indorsement and delivery, he, True, was not to be held liable as an indorser of the note; and that Bullard & Co. in effect purchased the note without recourse on True. But we must not be understood as deciding that the payee of a promissory note, who indorses it in blank and delivers it before maturity, could set up the defense that he in fact sold and indorsed without recourse, as against a subsequent indorsee of said note who purchased it before maturity, in the usual course of business, and without knowledge of the contract between the indorser and first indorsee.

As already stated, True in his petition did not aver that he had paid any part of the judgment which had been rendered against him on said note in favor of the bank to whom it had been sold and assigned by Bullard &

Co. So far, then, as the petition shows, True has not been damaged. Under no view of the case can he have any cause of action against Bullard & Co. until he shall have paid the judgment rendered on said note or some part thereof. (*Churchill v. Moore*, 15 Kan., 255; *Lott v. Mitchell*, 32 Cal., 24; *Jeffers v. Johnson*, 21 N. J. Law, 73.)

But what was the contract between True and Bullard & Co.? The petition avers that Bullard & Co. "expressly agreed, and it was understood and made a part of the consideration of the sale and transfer of said note, that said defendants Bullard & Co. were to accept and take said note without any liability or recourse whatever on the part of this plaintiff on account of the non-payment of said note at maturity." The most that can be said for this language is that by it Bullard & Co. agreed that so far as they were concerned as holders of the note they would not look to True for payment thereof; that he was not to be liable to them as an indorser. But Bullard & Co. did not agree, so far as the pleadings show, not to sell and indorse this note, nor did they agree that if they did sell and indorse the note they would advise the purchaser of the contract existing between them and True. The mere fact that Bullard & Co. transferred this note before maturity to the bank, and that as against the bank True could not set up as a defense the contract under which he indorsed it to Bullard & Co., does not invest True with a right of action against Bullard & Co. In other words, Bullard & Co. have not violated their contract with True. The petition does not state a cause of action. The judgment of the district court is right and is

AFFIRMED.

JOHN L. DAVIS ET AL V. BENJAMIN T. SNYDER.

FILED JUNE 18, 1895. NO. 4354.

1. **Trial to Court: WAIVER OF RIGHT TO JURY TRIAL: REVIEW.** Where the record in a civil case shows that a legal action was tried to the court without a jury and the record discloses no protest or objection thereto on the part of a litigant, and no application by him for a jury to try the issues, this court will presume that a jury was waived.
2. **Record for Review.** In reviewing cases in this court the transcript filed here is the sole, conclusive, and unimpeachable evidence of the proceedings in the district court. (*Chadron Banking Co. v. Mahoney*, 43 Neb., 214.)
3. **Alteration of Instruments: EVIDENCE: REVIEW.** Action of replevin for property covered by a chattel mortgage, brought by an indorsee before maturity of the note which the mortgage was given to secure. Defense, the note had been materially altered after its execution and delivery without the knowledge or consent of the maker. Evidence examined, and *held* to support the finding of the court in favor of the maker of the note.

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

Darnall, Kirkpatrick & Scott and *A. A. Kendall*, for plaintiffs in error.

Aaron Wall and *Nightingale Bros.*, *contra.*

RAGAN, C.

This is an action of replevin brought by John L. Davis against Benjamin T. Snyder in the district court of Sherman county. Davis claimed to have a special ownership in and to be entitled to the property replevied by virtue of a chattel mortgage made thereon by Snyder to one Hogue on the 21st of May, 1888, to secure a note of $406.78 with interest, due seven months after date, made and delivered by Snyder to Hogue and by him transferred

to Davis in the ordinary course of business for a valuable consideration before due. Snyder's defense to the action was that on the 21st of May, 1888, he had given a note to Hogue for the sum of $106.78 and pledged the property replevied by a chattel mortgage to Hogue to secure that note and interest, and that the note and mortgage had been materially altered without his knowledge or consent after their execution and delivery by him to Hogue in this: That the word "one" in the note and mortgage had been erased and the word "four" written in its place, thus making the note and mortgage read $406.78 instead of $106.78 as originally written and delivered. There was a trial to the court without a jury, with a finding and judgment in favor of Snyder, to reverse which Davis has prosecuted to this court a proceeding in error. Two points are made in this case:

1. It is first argued by Davis that the court erred in depriving him of the right of trial of the issues made by the pleadings to a jury. Of course this was a legal action, and for the trial of the issues made by the pleadings either party was entitled to a jury. (Sec. 6, art. 1, Constitution, 1875; sec. 280, Code of Civil Procedure.) But the record does not disclose that Davis demanded a jury to try the issues of this case. Where the record in a civil case shows that a purely legal action was tried to the court without a jury, and the record discloses no protest or objection thereto on the part of a litigant and no application by a litigant for a jury to try the issues, this court will presume that a jury was waived. Again, the record in this case affirmatively shows that the case came on to be heard on the 7th of December, 1889, on the petition of Davis and the answer of Snyder, "parties present in court with their attorneys, and a jury being waived, was submitted to the court," etc. This record imports absolute verity. In reviewing cases in this court the transcript here filed is the sole, conclusive, and unimpeachable evidence of the proceedings in the

district court. (IRVINE, C., in *Chadron Banking Co. v. Mahoney*, 43 Neb., 214.)

2. The second assignment is that the finding of the district court is not supported by sufficient evidence. This finding was based on conflicting testimony. Hogue and his wife testified on the trial for Davis that neither the note nor mortgage had been altered; that Snyder on the 21st of May, 1888, was indebted to Hogue in the sum of $406.78; that as an evidence of that debt he executed the note for that amount in question in this case, and to secure it executed and delivered the chattel mortgage in question. On the other hand Snyder positively swears that on the 21st of May, 1888, he already owed Hogue $406.78, and on that date paid him $300, and executed a note to him for $106.78 and secured it by a chattel mortgage; that the note and mortgage executed were the ones put in evidence in this case, and that they had been changed so as to read $406.78, etc. There was some other evidence on behalf of both Davis and Snyder which tended to corroborate their respective theories. In addition to these, "experts," so called, testified to the question whether the note showed that the word "one" had originally been written in it, that erased and the word "four" written in its place. The opinion of these experts, as is usual, tended to support the theories of the party calling them. In the bill of exceptions filed in this court we have not the original note and mortgage which were before the district judge. We have only typewritten copies, and therefore are deprived of the privilege of entering the lists and competing with the experts who testified below. With the evidence in this condition we cannot say that the finding of the district court, that the note and mortgage had been materially altered after their execution and delivery, and without the knowledge or consent of Snyder, is not supported by sufficient evidence. The judgment must be, and is,

AFFIRMED.

OMAHA & REPUBLICAN VALLEY RAILWAY COMPANY v. JAMES B. HALE.

FILED JUNE 18, 1895. No. 6001.

1. **Penalties:** RIGHT OF INFORMER TO MAINTAIN SUIT. An informer cannot maintain an action in his own name to recover a penalty, unless authorized so to do by statute.
2. **Railroad Companies:** FAILURE TO WHISTLE OR RING BELL AT PUBLIC CROSSINGS: PENALTY: CONSTRUCTION OF STATUTE. Section 104, chapter 16, Compiled Statutes, construed, and *held*, (1) that the statute is highly penal in its nature and should be strictly construed; (2) that a corporation, by violating the law, forfeits to its sovereign, the state, not to the informer, the penalty denounced by the act; (3) that the statute does not authorize the informer to bring the action in his own name, nor, when brought, to control it.

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

See opinion for statement of the case.

J. M. Thurston, W. R. Kelly, and *E. P. Smith,* for plaintiff in error:

The plaintiff in error insists that this action cannot be maintained, because, in this state, no officer is known as an informer, nor is power given to any person as such; and, in the section upon which this action is predicated, no authority is given to any person to commence suit in his own behalf, or for himself and any second party, to recover therein the penalty, or any portion thereof, mentioned in the statute. (*Foster's Case,* 6 Coke, [Eng.], 56; *State v. Sinnot,* 15 Neb., 472; *Iler v. Cronin,* 34 Neb., 424; *Graham v. Kibble,* 9 Neb., 182; *Stone v. Lannen,* 6 Wis., 485; *Shields v. Klopf,* 70 Wis., 69; *City of Hastings v. Thorne,* 8 Neb., 160; *City of Tecumseh v. Phillips,* 5 Neb.,

312; *State v. City of Lincoln*, 6 Neb., 12; *State v. Herns*, 14 Neb., 477; *Fleming v. Bailey*, 5 East [Eng.], 313; *Barnard v. Gostling*, 2 East [Eng.], 569; *Davis v. Edmonson*, 3 B. & P. [Eng.], 382; *Colburn v. Swett*, 1 Met. [Mass.], 232; *Smith v. Look*, 108 Mass., 139; *Wheeler v. Goulding*, 13 Gray [Mass.], 539; *Nye v. Lamphere*, 2 Gray [Mass.], 295; *Lynch v. Steamer "Economy,"* 27 Wis., 69; *United States v. Laescki*, 29 Fed. Rep., 701; *State v. Hannibal & St. J. R. Co.*, 1 S. W. Rep. [Mo.], 134; *Arzbacher v. Mayer*, 53 Wis., 380; *Willard v. Reas*, 26 Wis., 540; *Willard v. Comstock*, 58 Wis., 565; *Neville v. Clifford*, 55 Wis., 161; *St. Louis, A. & T. R. Co. v. State*, 19 S. W. Rep. [Ark.], 573; *Otis v. Thorne*, 18 Ala., 395; *Davis Avenue R. Co. v. Mallon*, 57 Ala., 168; *Dubbers v. Goux*, 51 Cal., 154.)

Pound & Burr and *Roscoe Pound, contra*, cited as to right of James B. Hale to maintain the action: *Chicago & A. R. Co. v. Howard*, 38 Ill., 414; *Drew v. Hilliker*, 56 Vt., 641; *Winne v. Snow*, 19 Fed. Rep., 507; *Middleton v. Wilmington & W. R. Co.*, 95 N. Car., 167; *Commonwealth v. Howard*, 13 Mass., 222; *State v. Bishop*, 7 Conn., 181; *State v. Smith*, 49 N. H., 155; *Vandeventer v. Van Court*, 2 N. J. Law, 155; *Mitchell v. State*, 12 Neb., 538; *Doss v. State*, 6 Tex., 433; *Caswell v. Allen*, 10 Johns. [N. Y.], 118; *Wardens v. Cope*, 2 Ired. [N. Car.], 44; *Rayham v. Rounseville*, 9 Pick. [Mass.], 44; *Cincinnati, S. & C. R Co. v. Cook*, 37 O. St., 265.

W. H. Woodward, for Lancaster county.

RAGAN, C.

James B. Hale, suing for himself and the state of Nebraska, brought this suit in the district court of Lancaster county against the Omaha & Republican Valley Railway Company to recover the penalty denounced by section 104,

chapter 16, Compiled Statutes, 1893, against corporations owning railroads that had neglected to sound a whistle or ring a bell at railroad and street crossings. The petition contained seventy-six causes of action, substantially alike, and prayed judgment as follows: "Wherefore the plaintiff prays judgment against the defendant for the sum of $3,800 and costs of suit." Hale had a verdict and judgment, and the railroad company has prosecuted to this court a petition in error. The section of the statute on which this action is based (said section 104) is as follows: "A bell of at least thirty pounds weight or a steam whistle shall be placed on each locomotive engine, and shall be rung or whistled at the distance of at least eighty rods from the place where the said railroad shall cross any other road or street, and be kept ringing or whistling until it shall have crossed said road or street, under a penalty of fifty dollars for every neglect, to be paid by the corporation owning the railroad, one-half thereof to go to the informer, and the other half to this state, and also be liable for all damages which shall be sustained by any person by reason of such neglect." Can the informer mentioned in said statute maintain an action in his own name to recover the penalty provided for therein? There seems to be some conflict among the authorities on this question.

In *United States v. Laescki*, 29 Fed. Rep., 699, it was held that such an action must be brought in the name of the informer, and that the penalty could not be recovered by indictment at the instance of the government. But the statute on which that action was predicated provided: "Every person who violates this section shall be liable to a penalty of one hundred dollars, recoverable, one-half to the use of the informer." The word "recoverable" in this statute would seem to authorize a suit for the penalty by the informer.

The *Chicago & A. R. Co. v. Howard*, 38 Ill., 415, was an action brought by Howard, suing for himself and the

state of Illinois, against the railroad company. The statute on which the action was based provided that if the railroad company should fail to sound a whistle or ring a bell, etc., "it shall forfeit a penalty of fifty dollars, one-half to the informer and the other half to the state." It is to be observed that this statute is almost identical with ours. The court held that the suit was properly brought in the name of Howard.

In *Lynch v. Steamer "Economy,"* 27 Wis., 69, it was held that the informer might maintain an action in his own name for the penalty. The court said: "The action is evidently a *qui tam* action, and, we are inclined to hold, may be brought in the name of the complainant (informer) alone. It is a general rule that a common informer cannot sue for a penalty unless authorized so to do by statute; but many cases hold, where the statute gives the forfeiture, or a part of it, 'to any person who shall prosecute therefor,' that this, or equivalent language, confers express authority upon him to sue in his own name. * * * But if there were any doubt upon this point, it is removed by the language making the penalty a demand or lien against the boat, 'to be sued for and collected in the manner provided' for the collection of demands against boats and vessels. This language, we think, shows that the statute contemplated that the complainant (informer) should be the plaintiff in the action, and that the proceeding should be analogous to an ordinary suit for the collection of a demand against a vessel."

The statute of Arkansas provided that railroad companies should cause a whistle to be sounded or bell rung, etc., "under a penalty of two hundred dollars for every neglect, to be paid by the corporation owning the railroad, one-half thereof to go to the informer and the other half to the county," etc. One Bell sued in his name, for the use of the state of Arkansas and Miller county, a railroad company to recover the penalty provided for by said statute.

The court said: "The demurrer to the complaint was properly sustained, as it showed that the plaintiff was not, and that the state was, the party entitled to prosecute the action." (*St. Louis, A. & T. R. Co. v. State*, 19 S. W. Rep. [Ark.], 572.)

In *Nye v. Lamphere*, 2 Gray [Mass.], 295, the court sustained a suit brought by an informer in his own name to recover a statutory penalty, but the statute on which the action was based provided that the penalty was "'to be recovered in any court proper to try the same, one-half to the use of the said town and the other half to any person who shall prosecute therefor.'" This statute expressly conferred authority on the informer to prosecute the action. The court said: "The defendant's objection to the maintenance of this action is that the plaintiff is an informer, and therefore cannot sue in his own name, because authority so to sue is not given him by statute. And undoubtedly it is a general rule that a common informer cannot sue for a penalty, without express statute authority. * * * But by what terms in a statute is such authority conferred? Certainly by terms like those used in the statute on which this action is brought; namely, by giving the forfeiture, or a part of it, 'to any person who shall prosecute therefor.'"

In *Higby v. People*, 4 Scam. [Ill.], 166, a suit was brought to recover a penalty in the name of the people. The statute provided that the penalty sued for should go to the informer and the county; and the court held that the state had no interest in the recovery; that "the statute not authorizing the suit to be instituted in the name of the people, it was improperly brought, and the court erred in not dismissing it."

In *Colburn v. Swett*, 42 Mass., 232, it was held: "As a general rule, a common informer cannot maintain an action for a penalty, unless power is given to him for that purpose by statute."

In *Fleming v. Bailey*, 5 East [Eng.], 313, it was held

that at common law an informer could not sue in his own name to recover a penalty; that he had no right to maintain an action for a penalty except such right was conferred by statute. To the same effect see *Barnard v. Gostling*, 2 East [Eng.], 569.

These authorities, we think, without serious conflict, recognize this rule, an informer cannot maintain an action in his own name to recover a penalty unless authorized so to do by statute. The statute on which this action is based does not expressly authorize the penalty denounced by said statute to be sued for and recovered by an informer, nor does the statute contain any language from which such an authority may be inferred. The act provides that the penalty shall be paid by the corporation owning the railroad. Paid to whom? We think, paid to the state. The corporation, by violating the law, forfeited to its sovereign, the state, not to the informer, the penalty denounced by the act. It is true that the law holds out an inducement to the citizen to inform the officers charged with the execution of the law of its violation and in effect offers the informer a reward for his information; but it does not authorize the informer to bring the action, nor, when brought, to control it.

Counsel for the defendant in error insist that section 617 of the Code of Civil Procedure authorizes an informer to maintain an action for the penalty in his own name, or at least that said section is a legislative recognition of the right of an informer to maintain a suit. The section is as follows: "If any informer, under a penal statute, to whom the penalty, or any part thereof, if recovered, is given, shall dismiss his suit or prosecution, or fail in the same, he shall pay all costs accruing on such suit or prosecution, unless he be an officer whose duty it is to commence the same." We think this argument is untenable. If a statute fixes a pecuniary penalty for its violation and gives a part of such penalty to an informer, and if the statute, or some other,

authorizes such informer to maintain an action in his own name for such penalty, then, by the section of the Code referred to, if such informer should bring his action and dismiss it or fail in the same, he would be liable for the costs. The statute on which the case at bar is based is one highly penal in its nature, and it must be strictly construed; and since this statute, nor any other, neither expressly, nor by implication, authorizes the penalties prescribed therein to be sued for and recovered by the informer, we hold that Hale cannot maintain this action. The judgment of the district court is reversed and the action dismissed.

REVERSED AND DISMISSED.

JOHN V. FARWELL & COMPANY ET AL. V. CHARLES KLOMAN ET AL.

FILED JUNE 18, 1895. No. 5796.

Sales: FRAUD OF PURCHASER: RESCISSION: VOLUNTARY ASSIGNMENTS: LIEN ON PROPERTY IN HANDS OF ASSIGNEE: EQUITY: TRUSTS: PRINCIPAL AND AGENT. A wholesale merchant sold goods on credit, induced to do so by the fraud of his vendee. The latter disposed of the goods for money and other property, but no particular property remaining in his hands could be identified as having been purchased with the fraudulently acquired property. The vendee made a general assignment for the benefit of his creditors. The wholesale merchant discovered the fraud practiced upon him, rescinded the contract of sale, and filed a bill in equity, praying that the entire estate of the insolvent vendee might be declared a trust fund in the hands of his assignee, of which the wholesale merchant should be the beneficiary, and that he be decreed a first lien upon all said estate to secure the amount due him from his vendee for the property so fraudulently acquired. *Held*, (1) That the relation existing between the wholesale merchant and his vendee at the time of the sale of the goods was that of an ordinary debtor and creditor, not that of principal and agent; (2) that the original

contract of sale, although induced by fraud, was not absolutely void, but voidable at the election of the vendor within a reasonable time after discovering the fraud; (3) that the vendor, having discovered the fraud and rescinded the contract of sale within a reasonable time, might replevy the goods parted with; (4) that the goods having been disposed of by the fraudulent vendee, a court of equity would award the vendor any particular property, or a lien thereon, which could be identified as having been purchased solely with the property fraudulently acquired by the vendee; (5) but equity would not decree the entire estate of the insolvent vendee a trust fund, of which the defrauded vendor was the beneficiary, and give him a lien on such estate for the amount due him from his vendee.

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

The opinion contains a statement of the case.

Tenney, Church & Coffeen and *Harwood, Ames & Kelly*, for plaintiffs in error:

The contention of plaintiffs is that by reason of the facts recited in the petition, all of Cline's property, including his stock in trade, real estate, notes, and book accounts, became impressed with a trust in favor of plaintiffs for the value of the goods thus fraudulently obtained; that the assignee took them subject to that trust, and that plaintiffs are entitled to a preferential lien upon the whole fund for the amount of such value. (Perry, Trusts, secs. 835, 836, 838; *Whitecomb v. Jacob*, 1 Salk. [Eng.], 161; *Miller v. Race*, 1 Burr. [Eng.] 452; *Docker v. Somes*, 2 M. & K. [Eng.], 655; *Pennell v. Deffell*, 4 De Gex, M. & G. [Eng.], 372; *Murray v. Pinkett*, 12 Cl. & Fin. [Eng.], 764; *Knatchbull v. Hallett*, 13 L. R., Ch. Div. [Eng.], 696; *Ex parte Cook*, 4 L. R., Ch. Div. [Eng.], 123; *Dow v. Berry*, 18 Fed. Rep., 121; *Frelinghuysen v. Nugent*, 36 Fed. Rep., 239; *Cook v. Tullis*, 18 Wall. [U. S.], 332; *Central Nat. Bank v. Connecticut Ins. Co.*, 104 U. S., 54; *Florida Land & Improvement Co. v. Merrill*, 52 Fed. Rep., 77; *Clapp v.*

Emery, 98 Ill., 523; *First Nat. Bank of Elgin v. Schween*, 127 Ill., 573; *King v. Hamilton*, 16 Ill., 190; *Peak v. Ellicott*, 1 Pac. Rep. [Kan.], 499; *Merket v. Smith*, 5 Pac. Rep. [Kan.], 394; *Continental Nat. Bank v. Weems*, 6 S. W. Rep. [Tex.], 802; *People v. Dansville Bank*, 39 Hun [N. Y.], 187; *People v. Rochester City Bank*, 96 N. Y., 32; *Newton v. Porter*, 69 N. Y., 133; *Cavin v. Gleason*, 105 N. Y., 256; *New York & Brooklyn Ferry Co. v. Moore*, 18 Abb. New Cas. [N. Y.], 106; *Importers & Traders Bank v. Peters*, 25 N. E. Rep. [N. Y.], 319; *Hooley v. Gieve*, 9 Abb. New Cas. [N. Y.], 8; *Bresnihan v. Sheehan*, 125 Mass., 11; *Englar v. Offutt*, 16 Atl. Rep. [Ind.], 497; *McLeod v. Evans*, 66 Wis., 401; *Francis v. Evans*, 33 N. W. Rep. [Wis.], 93; *Bowers v. Evans*, 36 N. W. Rep. [Wis.], 629; *Lee v. Simmons*, 27 N. W. Rep. [Wis.], 174; *Harrison v. Smith*, 83 Mo., 210; *Stoller v. Coates*, 88 Mo., 514; *Snorgrass v. Moore*, 30 Mo. App., 232; *Independent District of Boyer v. King*, 45 N. W. Rep. [Ia.], 908; *Davenport Plow Co. v. Lamp*, 45 N. W. Rep. [Ia.], 1049; *Bunton v. King*, 45 N. W. Rep. [Ia.], 1050; *Third Nat. Bank of St. Paul v. Stillwater Gas Co.*, 30 N. W. Rep. [Minn.], 440; *Brocchus v. Morgan*, 5 Cent. L. J. [Tenn.], 53; *Leland v. Collver*, 34 Mich., 418; *Carter v. Lipsey*, 70 Ga., 417; *Farmers & Merchants Nat. Bank v. King*, 57 Pa. St., 202; *Sadler's Appeal*, 87 Pa. St., 154; *Greene v. Haskell*, 5 R. I., 456; *First Nat. Bank v. Hummell*, 23 Pac. Rep. [Col.], 986; *Jewett v. Dronger*, 30 N. J. Eq., 291; *Farmers & Traders Bank v. Kimball Milling Co.*, 47 N. W. Rep. [S. Dak.], 402; *Cogswell v. Griffith*, 23 Neb., 344; *Wilson v. Coburn*, 35 Neb., 530; *Taylor v. Plumer*, 3 M. & Sel. [Eng.], 574; *Barnard v. Campbell*, 65 Barb. [N. Y.], 289; *Hodgeden v. Hubbard*, 18 Vt., 504; *Amer v. Hightower*, 11 Pac. Rep. [Cal.], 697; *Preston v. Spaulding*, 120 Ill., 228; *Farwell v. Hanchett*, 120 Ill., 577; *Masson v. Bovet*, 1 Den. [N. Y.], 69; *Hammond v. Pennock*, 61 N. Y., 145; *Guckenheimer v. Angevine*, 81 N. Y., 394.)

Where one has been fraudulently induced to enter into any contract or agreement under which he parts with the possession of his property to the wrong-doer, even although the apparent title accompanies the possession, he may, on discovery of the fraud, if the property still remains in specie and distinguishable in the hands of the wrong-doer, rescind or disaffirm the contract and retake the property by replevin or other suitable means or process. (Wells, Replevin, secs. 318, 319; *Kellogg v. Turpie*, 93 Ill., 265; *Beach v. Schmultz*, 20 Ill., 185; *Diversey v. Johnson*, 93 Ill., 547; *First Nat. Bank v. Schween*, 127 Ill., 573.)

If one charged with the custody of money or other personal property of another wrongfully intermingles it with his own so that all which is certainly known respecting its identity, is that it forms a part of a mass of similar property still in the hands of the wrong-doer, the law will award the party wronged the possession of the whole mass, leaving the wrong-doer to identify and reclaim his own if he can.

If the wrong-doer has not only intermingled the property with his own, but has converted or transmuted the general mass into other property, whether by one or many successive transmutations, so that all which is certainly known respecting the original is that it has contributed to produce the fund or other property then in the hands of the wrong-doer, equity, more lenient than the law, will impose upon such resulting product a charge or lien for an amount sufficient to reimburse the party wronged. (*Harford v. Lloyd*, 20 Beav. [Eng.], 310; *Long v. Majestre*, 1 Johns. Ch. [N.Y.], 305; *Wallace v. Duffield*, 2 S. & R. [Pa.], 521; *Davenport Plow Co. v. Lamp*, 45 N. W. Rep. [Ia.], 1049; *Bunton v. King*, 45 N. W. Rep. [Ia.], 1050; *Dow v. Berry*, 18 Fed. Rep., 121; *Wells v. Stout*, 38 Fed. Rep., 807; *Voight v. Lewis*, 9 Chicago Legal News [Pa.], 65; *Thompson v. Perkins*, 3 Mason [U. S. C. C.], 232; *Cragie v. Hadley*, 99 N. Y., 131; *Smith v. Combs*, 24 Atl. Rep. [N. J.], 9.)

Darnall & Kirkpatrick, contra, cited: *School Trustees v. Kirwin*, 25 Ill., 73; *Goldthwaite v. Ellison*, 12 So. Rep. [Ala.], 812; *Preston v. Spaulding*, 120 Ill., 228; *Philadelphia Nat. Bank v. Dowd*, 38 Fed. Rep., 172; *Wilson v. Coburn*, 35 Neb., 530; *Union Nat. Bank v. Goetz*, 27 N. E. Rep. [Ill.], 907; *Slater v. Oriental Mills*, 27 Atl. Rep. [R. I.], 443; *Monotuck Silk Co. v. Flanders*, 58 N. W. Rep. [Wis.], 383.

RAGAN, C.

On and for three years prior to January, 1890, John V. Farwell & Co. (hereinafter called "Farwell & Co.") were wholesale merchants domiciled and doing business in the city of Chicago, in the state of Illinois, and W. H. Cline was a retail merchant resident and doing business in the city of Broken Bow, Nebraska. Farwell & Co. brought this suit in equity in the district court of Custer county against Charles Kloman, the assignee of said Cline. Farwell & Co., in their petition, alleged that for three years prior to January, 1890, they had been in the habit of selling goods on credit to Cline; that on January 31, 1890, Cline made a statement in writing to them, Farwell & Co., setting forth his assets and liabilities, representing to them that he was at that time possessed of property beyond all his debts of the value of $16,000; that Farwell & Co., believing this statement to be true, and relying thereon, on the 27th of June, 1890, and at divers times between that date and November 20, 1890, sold and delivered merchandise on credit to Cline to the extent of $8,500; that on the 10th of January, 1891, Cline made an assignment, under the statute of Nebraska, for the benefit of his creditors; that said Charles Kloman was the assignee of said Cline; that the inventoried value of the estate turned over by said Cline to his said assignee was $29,000; that said assets consisted of merchandise, real estate, notes, and book accounts, and

that his scheduled liabilities were about $60,000; that the statement made by Cline to them, Farwell & Co., on January 31, 1890, was false, and known by Cline to be false; that Cline, at the time he made the statement, was insolvent; that in selling said goods upon credit to Cline, Farwell & Co. relied entirely upon the truth of the statement made by him, and which statement Cline made for the purpose of obtaining credit; that only a very small portion of the goods, if any, which Farwell & Co. sold to Cline between June and November, 1890, now remain in the possession of Cline's assignee; that if any of said goods now remain they are in broken lots and cut pieces and so mixed and confused with goods of a like character that their distinct identity cannot be ascertained; that Cline, prior to the time he made an assignment, had sold all or nearly all the goods purchased of Farwell & Co. and invested the proceeds thereof either in real estate or other goods or in paying for goods previously bought by him and now on hand, or said proceeds are now represented by outstanding notes and accounts due him; that by reason of the fraud of Cline in procuring and in confusing said goods he never acquired any valid right or title to the same or to the proceeds thereof as against Farwell & Co.; that about the 4th of February, 1891, they, Farwell & Co., discovered for the first time that the statement made to them by Cline was false, and thereupon they at once elected to and did rescind the contract of sale of said goods to him; that a large number of creditors of Cline have filed their claims with said assignee, the amount of said claims greatly exceeding in amount the value of Cline's estate. The prayer of the petition was for a decree that Cline held the property which he purchased and the proceeds thereof in trust for Farwell & Co., and that they might be decreed to have a first lien upon the entire estate of Cline to secure the amount due them. The district court sustained a general demurrer to this petition, and Farwell

& Co. refusing to plead further, the petition was dismissed; and to reverse this order they have prosecuted to this court a petition in error.

The case amounts to this: A vendor of merchandise parts with the title and possession of his goods on credit to his vendee, induced to do so by the fraud of the latter. The vendee disposes of the fraudulently acquired property for money and other property, but no particular property remaining in the hands of the vendee can be identified as having been purchased with the property fraudulently acquired. The vendee makes a general assignment for the benefit of his creditors. The vendor discovers the fraud practiced upon him by the vendee, rescinds the contract of sale, and asks a court of equity to decree that the property which the vendee fraudulently acquired and its proceeds is a trust fund in his hands, of which the vendor is the beneficiary, though the identical property fraudulently acquired has been by the vendee disposed of, and the identity of the property acquired by the vendee with the fraudulently acquired property or its proceeds cannot be ascertained, and that the vendor be given a first lien upon the entire estate of his vendee to secure the amount due for the property fraudulently parted with. It is not doubted that where goods are sold upon credit induced by the fraudulent representations of the vendee, the vendor may rescind the sale upon the discovery of the fraud and replevy the goods. (*Tootle v. First Nat. Bank of Chadron*, 34 Neb., 863; *McKinney v. First Nat. Bank of Chadron*, 36 Neb., 629.) And if the identical property cannot be found by the officer, the action will proceed as one for damages, and a judgment for the value of the goods fraudulently obtained would be rendered in favor of the vendor. But this doctrine does not proceed upon the theory that the original contract of sale, although induced by fraud, was absolutely void, but merely voidable at the election of the vendor within a reasonable time after discovering the fraud. In

the case at bar, Farwell & Co., after discovering that Cline had obtained their goods by fraud, had the right to rescind the contract of sale within a reasonable time and to replevy the goods parted with; and it may be that a court of equity, a fraud being established, would give to Farwell & Co. any particular property, or a lien thereon, which could be clearly shown to have been purchased solely with the proceeds of the property fraudulently acquired by Cline from them. But does it follow, because Cline obtained goods from Farwell & Co. by fraud, that a court of equity will give them the entire estate of Cline, or a lien thereon, when it appears that such estate was not entirely acquired with the property or its proceeds fraudulently acquired from them?

Counsel for Farwell & Co., in their argument here, say: "The contention of plaintiffs is that by reason of the facts recited in the petition, all of Cline's property, including his stock in trade, notes, and book accounts, became impressed with a trust in favor of plaintiffs for the value of the goods thus fraudulently obtained; that the assignee took them subject to that trust, and that plaintiffs are entitled to a preferential lien upon the whole fund for the amount of such value." To support this contention counsel have furnished us an able and ingenious argument and cited us to a large number of authorities. These authorities we do not regard as in point; and if any authority cited supports the contention of counsel, with all due respect, we decline to follow it. Among the authorities is *Sherwood v. Central Michigan Savings Bank*, 61 N. W. Rep., 352, in which the supreme court of Michigan held, where a mortgagee, who was also a depositor in a bank, gives the bank a mortgage for collection with instructions not to place the amount collected to his credit but to notify him of the collections, as he has a place for it, the money, when collected, belongs to the mortgagee and is held for him in trust by the bank. It is the duty of the bank

under such circumstances to collect and pay over to the mortgagee the money, and in doing so it acts as his agent. If it takes checks in payment, the money received upon such checks belongs to the mortgagee, notwithstanding it may be mingled with other money belonging to the bank. Where in such a case the money of the mortgagee is mingled by the bank with its funds, he has a lien upon the entire fund for the amount belonging to him, and the law presumes that the trust fund remains intact so long as the entire fund is not reduced below the amount of the trust fund. In this case the mortgagee claimed a preferential lien upon the entire assets of the insolvent bank, and the court awarded it to him. A similar rule was announced by this court in *State v. State Bank of Wahoo*, 42 Neb., 896. These authorities have no application to the facts of the case at bar. In the case cited from Michigan, and in the Wahoo bank case, the relation of debtor and creditor, or banker and depositor, never existed between the bank and the claimant of a preferred lien, but rather the relation of principal and agent. In other words, it was always a trust fund and was by the trustee misapplied. In the case at bar the relation between Farwell & Co. and Cline at the time the former parted with their goods was that of vendor and vendee. Farwell & Co. did not put these goods or any part of them in the hands of Cline as their trustee or agent. True it is that Cline having obtained the goods fraudulently and Farwell & Co. having ascertained the fraud and rescinded the contract of sale within reasonable time, from that moment Cline held the identical goods which he had purchased as Farwell & Co.'s trustee, and these goods they might retake or reclaim; and any specific property in Cline's hands which he had acquired with the goods fraudulently obtained from Farwell & Co. a court of equity might decree theirs, held in trust by Cline. But in the case at bar the goods fraudulently obtained of Farwell & Co. by Cline have been disposed of, and it is averred

in the petition that no particular part of his estate can be identified as having been acquired by Cline with the property, or its proceeds, which he fraudulently acquired from Farwell & Co.

In 2 Story, Equity Jurisprudence [13th ed.], 1259, it is said: "The right [to follow the trust fund] ceases only when means of ascertainment fail; which of course is the case when the subject-matter is turned into money and mixed and confounded in a general mass of property of the same description." A great part of the argument of counsel for Farwell & Co. here is devoted to a vehement assault upon this rule. For our part we think the rule a sound one. To overthrow it and adopt the contention contended for by the learned counsel would lead to endless litigation and confusion and work injury and injustice to the innocent. But the rule assailed has received the sanction of this court. In *Wilson v. Coburn*, 35 Neb., 530, Coburn was the assignee of the Bank of Omaha, which had made an assignment, under the statute, for the benefit of its creditors. Wilson filed a petition in the county court, alleging that he had deposited with said bank a sum of money prior to the bank's making an assignment; that at the time he made such deposit the bank was insolvent to the knowledge of its officers, and that such deposit was received with the intention of cheating and defrauding him. He prayed for a judgment declaring him a preferred creditor, and for the payment of his claim in full out of the assets of the insolvent bank. POST, J., speaking for the court, said: "Under the allegations of the petition, is the claimant entitled to preference over other creditors of the insolvent bank, or, in other words, does the petition state a cause of action? We think not. * * * The fact that a bank is insolvent within the knowledge of its officers, and receives the money of a depositor under circumstances which amount to a fraud upon him, is not of itself sufficient to entitle the latter to preference from

the funds of the bank in the hands of an assignee. He may follow his money while he can trace and distinguish it, or the proceeds thereof, but not after it has passed into the hands of the assignee, mingled with the other funds of the bank." This case was decided upon the correct principle that the relation of creditor and debtor, or banker and depositor, existed between Wilson and the bank at the time the former parted with his money, and that as the money he had deposited had become mixed and mingled with the other funds of the bank, the money and its proceeds were incapable of specific identification, and could not therefore be recovered in specie; nor would a court of equity decree that the assignee of the insolvent bank held its entire estate in trust for the security and payment of the creditor so defrauded. The rule laid down in this case controls the case at bar. The judgment of the district court was right, and is accordingly

AFFIRMED.

HARRISON, J., not sitting.

MILTON MONTGOMERY ET AL. V. GEORGE H. WILLIS.

FILED JUNE 18, 1895. No. 6372.

1. **Landlord and Tenant:** HOLDING OVER TERM: AGREEMENT. Where a tenant for a year remains in possession over his term, and is recognized as a tenant by the landlord, and no new contract is shown, he becomes a tenant from year to year.

2. ——: ——: EVIDENCE. The above rule is, however, only a rule of presumption, which may be rebutted by proof of a different agreement, or of facts inconsistent with the presumption.

3. ——: ——: ——. Therefore, where before the expiration of a lease for one year the tenant informs the landlord that he will not remain for another year, but will remain for a short

period, and pay rent at the old rate for any time he may remain in possession, and the landlord acquiesces, and thereafter receives the rent, a tenancy from year to year, or for another year, is not created.

4. ———: ———: NOTICE OF INTENTION TO QUIT. In such case the tenant, before surrendering possession, is not required to give any notice of his intention to quit.

5. ———: ACTION FOR RENT: BURDEN OF PROOF. Where an action is brought for rent, and the answer does not admit facts sufficient to raise a presumption of a lease entitling the landlord to the rent demanded, the burden of proof is upon the landlord to establish such a lease.

6. Instructions: HARMLESS ERROR. The refusal to give a correct instruction relating solely to the measure of damages is not prejudicial error, where the jury by a verdict for the defendant has shown that it was not brought to a consideration of the measure of damages.

ERROR from the district court of Dawes county. Tried below before KINKAID, J.

The facts are stated by the commissioner.

Albert W. Crites, for plaintiffs in error:

By holding the premises over the period of the lease, the defendant became a tenant from year to year. (*Hunter v. Frost*, 49 N. W. Rep. [Minn.], 327; *Scott v. Beecher*, 52 N. W. Rep. [Mich.], 20; *Haynes v. Aldrich*, 31 N. E. Rep. [N. Y.], 94.)

The measure of damages by reason of defendant's abandonment of the premises is the difference between the rent plaintiffs should have received and the amount they actually did receive on reletting. (*Respien v. Porta*, 26 Pac. Rep. [Cal.], 967; *Hayward v. Ramge*, 33 Neb., 836; *Allen v. Saunders*, 6 Neb., 436; *Bowen v. Clark*, 30 Pac. Rep. [Ore.], 430; *Underhill v. Collins*, 30 N. E. Rep. [N. Y.], 576.)

The following cases were also cited by plaintiffs in error: *Davidson v. Burke*, 32 N. E. Rep. [Ill.], 514; *Dunbier v.*

Day, 12 Neb., 596; *Newton v. Pope*, 1 Cow. [N. Y.], 109; *Lomer v. Meeker*, 25 N. Y., 361; *Mason v. Lord*, 40 N. Y., 483; *Wilkie v. Roosevelt*, 3 Johns. Cas. [N. Y.], 66; *Rudd v. Davis*, 3 Hill [N. Y.], 287; *Robertson v. Dodge*, 28 Ill., 161; *Dolsen v. Arnold*, 10 How. Pr. [N. Y.], 528; *Kerr v. Simmons*, 8 Mo. App., 431; *Clapp v. Noble*, 84 Ill., 62; *Laguerenne v. Dougherty*, 35 Pa. St., 45; *Finney v. City of St. Louis*, 39 Mo., 177; *Holley v. Metcalf*, 12 Brad. [Ill.], 141; *Esterly v. Pringle*, 41 Neb., 265; *Goldsborough v. Gable*, 38 N. E. Rep. [Ill.], 1025; *Critchfield v. Remaley*, 21 Neb., 178; *Hayward v. Ramge*, 33 Neb., 839; *Prickett v. Ritter*, 16 Ill., 96; *Shirk v. Hoffman*, 58 N. W. Rep. [Minn.], 990.

D. B. Jenckes and *C. H. Bane, contra*, cited: *Wheeler v. Walden*, 17 Neb., 125; *Bowen v. Haskell*, 55 N. W. Rep. [Minn.], 629; *Buffalo County Nat. Bank v. Hanson*, 34 Neb., 455; *Welcome v. Hess*, 27 Pac. Rep. [Cal.], 369.

IRVINE, C.

This was an action for rent by Montgomery and Crites against George H. Willis and John U. Willis, the petition alleging that the plaintiffs leased certain premises to the defendants, who were partners, for one year from the 15th of April, 1890, reserving a rent of $35 per month, payable on the 15th day of each month; that at the expiration of the term the defendants, with the consent of plaintiffs, held over and became bound for another term of one year from the 15th of April, 1891; that on the 15th day of August they abandoned the premises and refused to pay further rent, to the damage of plaintiffs in the sum of $150. The defendant George Willis answered, admitting the lease for one year after April 15, 1890, and averring that prior to the termination of that lease the defendants dissolved partnership, and the plaintiffs released the firm and agreed with the defendant George Willis that he should occupy

the premises for three months; that the defendant paid rent to the 14th day of August, when he vacated the premises, and delivered the keys to the plaintiffs, who received them. There was a verdict and judgment for defendant, and the plaintiffs bring the case here for review.

The defendant Willis testified that before the expiration of the first term he informed Mr. Crites of the dissolution of the partnership, and that he, Willis, would not take the premises for another year, but would occupy them for a short time and pay rent at the old rate for any period which he might occupy them; that Crites acquiesced, and from month to month received the rent from him. Mr. Crites, in the most emphatic terms, denies this transaction, and in the brief contends that the facts should be found in accordance with his testimony. It is not for us, however, to weigh this testimony. It was squarely conflicting, and the verdict of the jury, which has been sustained on motion for a new trial by the trial judge, cannot be disturbed. Accepting Mr. Willis' version of the facts, no tenancy from year to year was established. Such a tenancy will be presumed where a tenant remains in possession after the expiration of his term, and his tenancy is recognized by the landlord, where no new contract was made. (*Critchfield v. Remaley*, 21 Neb., 178.) This rule is, however, only a rule of presumption, and the presumption is rebutted by proof of a different agreement, or of facts inconsistent with the presumption. (*Shipman v. Mitchell*, 64 Tex., 174; *Williamson v. Paxton*, 18 Gratt. [Va.], 475; *Grant v. White*, 42 Mo., 285; *Secor v. Pestana*, 37 Ill., 525.) *Shipman v. Mitchell* was a case analogous to that before us. In that case it was held that if, at or before the expiration of the former lease, the landlord informed the tenant that he would not be permitted to remain another year, but only from month to month, then no tenancy from year to year could be implied. In the case before us it was the tenant who informed the landlord he would not remain another

year. But the principle is the same. Nor was there, under this evidence, any necessity of a notice by the tenant of his intention to quit. If, as he testifies, he agreed to pay rent only so long as he saw fit to occupy the premises, and the landlord acquiesced in this and received rent as such under this agreement, the tenant was at liberty to terminate the lease at any time by surrendering the possession. The foregoing considerations answer the argument of plaintiffs in error that the verdict was not supported by the evidence. In addition to this assignment, there are several assignments relating to the instructions.

The plaintiffs requested the court to instruct that their measure of damages would be the amount of rent that would accrue during the remainder of the year, less any amount realized from other tenants. There was no prejudicial error in refusing this instruction, because, first, the jury having found for the defendant, the question of the measure of damages did not present itself to them for consideration; secondly, the court, on its own motion, instructed the jury that if the finding should be for plaintiffs, then they should recover for the time the premises remained unused, until plaintiffs put other tenants therein. The undisputed evidence shows that when new tenants were procured, it was at the same rent which defendant had paid, so that while the instruction asked by plaintiffs stated the law correctly, the instruction given, under the evidence in the case, had the same effect.

The court of its own motion gave the following instructions:

"5. The jury are instructed by the court if plaintiffs shall recover in this case it must be upon the ground as claimed by them, that defendants continued to hold under said lease of April 14, 1890, until its expiration, and that they continued thereafter to occupy and hold said premises without any new or different agreement, and that they then abandoned and gave up said premises and refused to pay

further rent without the consent of the plaintiffs. If convinced by a preponderance of the evidence that such was the fact, then the verdict should be for the plaintiffs for the time said premises remained unused after such abandonment until plaintiffs took possession thereof by placing other tenants therein.

"6. The jury are instructed by the court, if convinced by the evidence that prior to the expiration of said lease plaintiffs agreed to release said defendants from further liability thereon, and it is further convinced that neither the firm of Willis Bros., as a firm, nor its two individual members, George H. Willis and John U. Willis, together held and occupied said premises after the expiration of said lease of April 14, 1890, and if further convinced that defendant George H. Willis, who is now in court, continued after April 15, 1891, to occupy said premises under and by virtue of an agreement had with plaintiff Crites for plaintiffs that he individually might hold and occupy said premises for an indefinite time at the rate of $35 per month, then your verdict should be for defendants."

It is claimed that each of these instructions was erroneous for misplacing the burden of proof. We do not think so. The answer of defendant Willis contained a general denial of all matter not specially admitted. It did not admit facts sufficient to imply a tenancy from year to year. It admitted a holding over, but under a new agreement. The burden of proof was on the plaintiffs to establish a lease entitling them to recover, and not upon the defendant to establish by a preponderance of evidence the particular lease which he pleaded.

It is also claimed that the sixth instruction was erroneous for submitting to the jury the question as to whether the landlord had released the firm of Willis Bros. and accepted George H. Willis as sole tenant. It is claimed that this was not in issue. It is not necessary to determine whether this would have to be specially pleaded to be

availed of, because it was specially pleaded in the second paragraph of the answer.

After this case was considered and a decision reached the plaintiffs in error filed an additional brief. The authorities therein cited have been considered, but they do not change our opinion that the rule whereby, from a holding over the term, a new tenancy is presumed on the terms of the original lease, is a *prima facie* presumption only, and that the conversation and transactions testified to by Willis were sufficient to overcome that presumption. Whether or not the jury found correctly on the conflicting testimony in the case we cannot determine. The writer, merely as the expression of his individual views, would say that if it were his duty to determine the facts in the first instance from the bill of exceptions he would find them in favor of the plaintiffs. But the rule governing the review of cases on the evidence by this court is so well established that it would not now be departed from, even if it were not thought to be sound.

AFFIRMED.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY v. WILLIAM C. PUTNAM.

FILED JUNE 18, 1895. No. 6177.

1. **Negligence**: PERSONAL INJURIES: PLEADING. In an action to recover damages for personal injuries, alleged to be caused by the negligence of another, it is not necessary for the plaintiff, in his petition, to plead the particular precautions he took to avoid injury.

2. ———: INSTRUCTIONS. In such an action, where the court correctly instructs the jury as to what constitutes negligence and contributory negligence, it is not, in general, erroneous to refuse

instructions directing the attention of the jury to special facts in the case, as demanding greater care than usual.

3. **Damages for Personal Injuries.** Evidence examined, and *held* to sustain the verdict.

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

T. M. Marquett, J. W. Deweese, and *J. A. Kilroy,* for plaintiff in error.

Adams & Scott, contra.

IRVINE, C.

Putnam was at work on a public highway which crossed the tracks of the railroad company. He, with others, was engaged in operating a grading machine propelled by twelve horses. He attempted to cross the track of the railroad with that machine, for the purpose of turning it, when a train approaching collided with the machine and horses, throwing the plaintiff to the ground in such manner that, in the language of the petition, plaintiff was "tramped upon, injured, and bruised by said locomotive and cars, and said horses and plow." He sued the railroad company for the personal injuries so received, alleging that the company was negligent in running a special train out of the usual time, at a high rate of speed, and without giving any signal of its approach to the crossing. He recovered a verdict and judgment for $200, which the railroad company seeks to reverse.

The first contention is that the petition did not state a cause of action, and this contention is based upon the proposition that the petition does not disclose by specific facts pleaded that the plaintiff was himself in the exercise of due care. It is the established law of this state that where the plaintiff proves his case without disclosing negligence on his part, contributory negligence is a matter of defense, the

burden of proving which is on the defendant. (*Anderson v. Chicago, B. & Q. R. Co.*, 35 Neb., 95; *City of Lincoln v. Walker*, 18 Neb., 244.) If this is true, it follows that unless the plaintiff, by the facts which he pleads, disclose contributory negligence, the defendant by proper pleading must raise the defense. The plaintiff in this case alleged generally that the injury was inflicted upon him without any fault upon his part. This was sufficient. He was not required to plead affirmatively the particular precautions he took, because under the rulings referred to he was not obliged affirmatively to prove them. It was just as much necessary for the railroad company, to make out this defense, to plead affirmatively the facts constituting contributory negligence on the part of the plaintiff, as it was for the plaintiff to plead negligence on the part of the company.

Error is assigned on the refusal of the court to give a number of instructions requested by the company. One of these was a peremptory instruction to find for the defendant, because contributory negligence was shown. We shall consider this subject later. One was a general instruction to the effect that if the plaintiff was negligent in going upon the crossing without looking for approaching trains, then he could not recover. This point was covered by a proper instruction on the question of contributory negligence given by the court of its own motion. All the other instructions requested were specific instructions in regard to the degree of care to be exercised under certain circumstances. A fair sample of these instructions is one to the effect that if the approach to the crossing was obstructed, it was all the more the plaintiff's duty, because of that fact, to ascertain before going upon it whether a train was approaching. It is not always erroneous, and it is sometimes quite proper, for the trial court to direct the attention of the jury to special features of the case which might affect the judgment of a man of ordinary prudence and govern his conduct. But it is doubtful whether error

could be predicated upon the refusal of the court to give such an instruction in any case where by other instructions the test of negligence is properly defined. It has been over and over again decided by this court that even where the facts are undisputed, questions of negligence and contributory negligence are for the jury, where different minds may reasonably draw different conclusions upon the subject. The court here left these questions to the jury, under proper instructions as to what constitutes negligence and contributory negligence, and when the court had told the jury, as it did, that negligence was the absence of such care, forethought, and prudence as, under the circumstances surrounding the case, duty required should be given or exercised, that the statute required the giving of certain signals in approaching the crossing, and that the jury should determine whether the accident was caused by negligence of the railroad company in failing to give such signals; and further, that the plaintiff was required in crossing to use such care as persons of ordinary intelligence and prudence would exercise under like circumstances, this was as far as the court was required to go, and no error was committed in refusing to instruct more specifically. If the instructions asked could have been given without error, it would only be because the facts stated in them left the inferences so free from reasonable doubt that the province of the jury was not interfered with. It is argued that the verdict is not sustained by the evidence, because the uncontradicted evidence disclosed contributory negligence on the part of the plaintiff. This argument is based largely upon the proposition that he did not, before attempting to cross, look along the track for approaching trains. It is not necessary to inquire whether in all cases, or in this particular case, the failure to look for trains before attempting to cross would present a state of facts so conclusive of negligence as to bar a recovery, because the plaintiff testified that before crossing he did look, and saw no train. Under all the

evidence in the case, we think the court was justified in submitting it to the jury, and in refusing to set aside the verdict.

JUDGMENT AFFIRMED.

MONROE E. SMITH ET AL. V. FIRST NATIONAL BANK OF CHADRON.

FILED JUNE 18, 1895. No. 5666.

1. **Trial:** CONTINUANCE: ABSENCE OF WITNESS. It is proper to refuse an application to withdraw a juror and continue the case for the purpose of enabling a party to procure the attendance of of a witness, when the other party admits the only fact sought to be proved by such witness, except what is cumulative in its character.
2. **Evidence of Value of Stock of Goods.** Where the value of a stock of dry goods was in issue, *held* not to be competent to inquire of a witness not shown to have seen or to know anything in regard to this stock, what proportion of the original cost would represent the value of a stock of dry goods after it had been in a store three months.
3. **Evidence of Records.** The existence of a record must be proved by its production or by an authenticated copy. The non-existence of a record may be proved by the oath of any one who has made a search therefor.
4. **Trial:** CORRECTION OF VERDICT. When a jury returns an incomplete or defective verdict, it is proper for the court to send it back under proper instructions for its completion or correc ion.
5. **Mortgages to Banks:** ULTRA VIRES: COLLATERAL ATTACK. Where a bank takes a mortgage to secure a debt, a third person cannot attack the transaction or treat the mortgage as void on the ground that it is *ultra vires* of the bank to take such security.
6. **Sales:** FRAUD: TIME TO RESCIND. The vendor of goods, in order to rescind a sale on the ground of fraud, must exercise his election to rescind within a reasonable time after the discovery of the fraud.

ERROR from the district court of Dawes county. Tried below before KINKAID, J.

Spargur & Fisher and *Charles B. Keller*, for plaintiffs in error.

Albert W. Crites, contra.

IRVINE, C.

This was an action in replevin by the plaintiffs in error, partners doing business as M. E. Smith & Co., to recover the possession of certain goods which, it was claimed, had been obtained from them by C. F. Yates & Co. by fraud, and which had passed into the hands of the First National Bank of Chadron under a chattel mortgage given by Yates & Co. to the bank. The action was brought under the same form of petition and upon the same theory as the cases of *Tootle v. First Nat. Bank of Chadron*, 34 Neb., 863, and *McKinney v. First Nat. Bank of Chadron*, 36 Neb., 629. The case arose out of the same failure, and the general features of the law applicable to the case were settled in those decisions. In this case there was a verdict for the defendant, and judgment thereon, from which the plaintiffs prosecute error.

Two briefs have been filed on behalf of the plaintiffs in error. One of them discusses several questions not raised by any assignment of error, and treats so indirectly the questions presented by some of the assignments that it is very difficult to follow the case from the briefs. Inasmuch as our conclusions lead to an affirmance of the judgment, we shall follow the assignments in the petition in error without regard to the rule that such assignments are waived unless called to the attention of the court by briefs or argument.

It is the theory of plaintiffs that Yates & Co., by statements made to an agent of the plaintiffs, and to Dun's and

Bradstreet's agencies communicated to the plaintiffs, had misrepresented their financial condition. Written statements purporting to come from Yates & Co. were offered in evidence and objected to. Whereupon an application was made to withdraw a juror and continue the cause for the purpose of procuring the attendance of a witness by whom it might be proved that these statements were made by Yates & Co. Thereupon the defendant withdrew objection to the introduction of these statements, and agreed that they might be "deemed as made by Mr. Yates directly." The court then overruled the application for a continuance and this order is assigned as error. The admission made by the defendant supplied all the proof which it was sought to make by the absent witness, except as to the value of the property replevied, and as the plaintiffs had other witnesses on the question of value, the testimony of this witness would only have been cumulative. The court, therefore, did not err in refusing the continuance.

The second and third assignments of error relate to the refusal of the court to permit the introduction of certain testimony in rebuttal as to the value of the property, and to its further refusal to permit the plaintiffs to withdraw their rest and offer such testimony in chief. The question of value, the goods having been delivered to the plaintiffs under the writ, was properly opened by the defense to establish its damages. The plaintiffs, as a part of depositions, relating otherwise to matters in chief, had in their principal case offered some evidence as to value. Notwithstanding this, if the testimony offered on rebuttal had been competent, we would hold that the court should have received it at that time. But it was not competent. The witnesses were not asked as to the value of the goods. It was not shown that they had examined these goods, or knew anything of their character. It was merely shown that they had been engaged in selling dry goods, and "to some extent" were acquainted with the value of such goods.

Then they were asked what would be the value of a stock of dry goods that had been kept in a store about three months, as compared with the original cost of such goods? It was this question to which the court sustained the objection. It was not competent either in chief or in rebuttal. The value of such goods must depend to a large extent upon their character, and the manner in which they have been kept, and to a certain extent on the fluctuations of the market. Expert testimony is always a source of danger, and it would not have done to have permitted these witnesses, simply upon showing that they were to some extent familiar with the value of dry goods, to testify what proportion of the cost would represent the value of certain specific goods, which it was not shown they had seen, and of the condition and nature of which it was not shown they had any knowledge.

The fourth assignment is that the court erred "in striking out the material portion of the deposition of S. V. Pitcher," etc. To questions asked this witness ten objections were sustained. Overlooking the fact that the assignment of error does not call attention to any particular one of these rulings, we have no hesitation in saying that they are all correct. Mr. Pitcher was the county clerk of Sheridan county. One of the representations alleged to have been falsely made by Yates was that he was the owner of certain land in that county. The object of taking Mr. Pitcher's deposition was evidently to show that no land stood of record in Sheridan county in the name of Yates. There is no doubt of the proposition that any person who has examined a record may be permitted to testify that a particular fact does not appear therein. (*Gutta Percha Mfg. Co. v. Village of Ogalalla*, 40 Neb., 775.) But in taking Mr. Pitcher's deposition particular pains seem to have been taken not to make such an inquiry. His attention was called not to the records of his office, but to their index, and, except in one instance, he was asked affirma-

tively for the contents of the index, and not as to the result of a search showing the absence of a certain fact from the record. The questions asked him were what facts the index affirmatively disclosed, and also whether Yates' name appeared as grantor. The first class of questions was objectionable as calling for secondary evidence; the second as being immaterial to the issues. It was immaterial what the record showed in the way of conveyances by Yates. The issue was what he owned at the time of the representations.

The fifth assignment is that the court erred in sustaining an objection to a portion of a paper marked "Exhibit E," attached to the deposition of Monroe E. Smith. We cannot find that any such deposition was offered in evidence. We do find an "Exhibit E" attached to the deposition of Arthur C. Smith, this being a report furnished to Smith & Co. by Bradstreet's agency. The portion excluded does not purport to contain information derived from Yates, but on its face conveys information derived from other sources. Very clearly, Yates was not chargeable with the statement. It was immaterial to the case, and properly excluded.

The sixth assignment is that the court erred in admitting the appraisement made for the purpose of executing the writ of replevin. The appraisers were called as witnesses to the value of the property, and they used the appraisement as a memorandum to refresh their memory. But it was not offered or received in evidence, although it appears attached to the bill of exceptions.

The seventh assignment is that the court erred in giving instructions numbered 1, 2, 3, 4, and 5. The assignment is to the giving of these instructions *en masse*. Some of them are clearly correct, and this assignment must, therefore, be overruled.

The verdict as returned by the jury seems to have left blank the finding of the amount of damages sustained by the bank by reason of plaintiff's detention of the property.

The court then instructed the jury, in writing, specifically how the damages should be assessed, fixing the amount of damages as seven per cent interest on the value of the goods, from the time they were taken under the writ. This instruction was correct, and it was proper for the court, when the jury returned an incomplete verdict, to send the jury back under a proper instruction to correct it.

The ninth assignment is that the court erred "in overlooking plaintiff's motion for a new trial." We presume by this that the pleader meant to write "overruling" instead of "overlooking." The motion for a new trial contains sixteen assignments, and there is, therefore, nothing presented by this assignment calling for specific attention.

The tenth and eleventh assignments are that the verdict was not sustained by sufficient evidence, and that it was contrary to law. On these points counsel argue that the evidence clearly established that the goods were obtained by Yates & Co. by fraud. It is not necessary to consider this question, because, aside from this, the verdict may be sustained on either of two grounds. The first is that two of the notes, to secure which the mortgage of the bank was given, were dated the same day as the mortgage, and the president of the bank testified that the notes were given for "cash advanced." There was no evidence tending to show that these notes were given for an antecedent debt, and if they were given for a loan made at the time the notes and mortgage were executed, the bank was certainly a *bona fide* purchaser of the goods. On this point it is argued that it was *ultra vires* of the bank to lend money on such security. Even if it were, this would not render the mortgage void, and the plaintiffs could not attack it for that reason. The violation of law in this respect does not avoid the transaction, and only the government, by appropriate proceedings, can attack it. This also answers the contention that the security was void because the loan was more than ten per cent of the bank's capital. (*Union Nat. Bank*

of St. Louis v. Mathews, 98 U. S., 621; *Gold Mining Co. v. Rocky Mountain Nat. Bank*, 96 U. S., 640; *Town of Lyons v. Lyons Nat. Bank*, 19 Blatch. [U. S.], 279; *Wyman v. Citizens Nat. Bank*, 29 Fed. Rep., 734; *Mills County Nat. Bank v. Perry*, 72 Ia., 15.) But the verdict may be sustained on another ground. The goods were sold by Smith & Co. to Yates & Co. in March, 1889. The mortgage was made June 5, and the action brought June 14. The rule is that the purchaser must rescind, if at all, within a reasonable time after the discovery of the fraud. It is not claimed that any attempt was made to rescind until the action was brought, and the court properly left to the jury the inquiry as to whether the right was exercised within a reasonable time. The evidence justified the jury in finding that it was not.

JUDGMENT AFFIRMED.

HERBERT E. VAIL, APPELLANT, V. OLIVER S. VAN DOREN, APPELLEE.

FILED JUNE 18, 1895. No. 6085.

Usury: NOTE: ANTEDATE. When parties contract for the loan of money at the highest rate of interest allowed by the law, and the note or other evidence of indebtedness is made to bear interest from date and is dated at a time prior to that when the borrower receives the money, as a device to cover usury, and the money was not withheld from investment or otherwise set aside for the use of the borrower during the period between the date of the note and the payment of the money, the transaction is tainted with usury.

APPEAL from the district court of Red Willow county. Tried below before WELTY, J.

The facts appear in the statement of the commissioner.

R. M. Snavely and *J. S. Phillips*, for appellant:

The dating back of a promissory note does not render the transaction usurious. (*Banks v. Antwerp*, 15 How. Pr. [N. Y.], 29; *Muir v. Newark Savings Institution*, 16 N. J. Eq., 537; *Powell v. Jones*, 44 Barb. [N. Y.], 521; *Bevier v. Covell*, 87 N. Y., 50.)

S. R. Smith, contra.

IRVINE, C.

This was an action by Vail to foreclose a mortgage made by Van Doren to one G. B. Bell, to secure a note for $700, dated December 5, 1885, and payable five years after date, with interest at seven per cent, payable semi-annually. Van Doren pleaded usury, and the court found for him on this issue, allowing Vail only his principal less the interest payments which had been made by Van Doren. The plaintiff appeals.

Where usury is the defense, the burden is upon the plaintiff to show that he is a *bona fide* purchaser of the note. (*Wortendyke v. Meehan*, 9 Neb., 221; *Violet v. Rose*, 39 Neb., 660, and cases there cited.) The plaintiff neither pleaded nor proved that he was a *bona fide* purchaser from Bell, so that question is removed from the case. It appears that Van Doren approached one J. W. Dolan, seeking a loan of money. Dolan negotiated the loan, and the evidence clearly sustains the court's finding that in so doing he acted as Bell's agent. At the time the application was made Dolan lent to Van Doren $200, the money either of Dolan himself or of a bank with which he was connected. Usurious interest, Van Doren testifies, was charged on this $200, but it may be dismissed from consideration, because the evidence shows that this was not a part of the Bell loan, and was entirely separate therefrom. About three weeks after the application was made the note

and mortgage were executed and the money paid to Van Doren, Dolan, however, withholding enough therefrom to repay himself the $200, and also a sum equal to three per cent interest on the $700 for five years. The evidence shows that the parties contemplated a loan at ten per cent interest, and that the three per cent so withheld in advance was Dolan's commission. It is probable, so far, that nothing in the way of usury appears. (*Pierce v. Davey*, 43 Neb., 45.) But the evidence shows that while the note was dated December 5, 1885, and made to bear interest from that date, the money was not received by Van Doren for three weeks later. The appellant contends that this was because Van Doren had not perfected title to his land, that the money was during that period set apart for the loan, and that its payment was deferred simply on account of Van Doren's failure to perfect his title sooner. It is argued that under such circumstances the antedating of the note did not taint the transaction with usury. Unfortunately for this contention, it is entirely without evidence to support it. The note, we repeat, was dated December 5, the application for the loan made December 7, and Van Doren testifies that he perfected title to his land three days thereafter. Dolan was on the stand and does not contradict this. It nowhere appears that the money was placed at Van Doren's disposal at any time before he actually received it; or that it was withheld from investment elsewhere for the purpose of this loan. On the contrary, it does appear that when the application was made Dolan informed Van Doren that he would have to arrange for procuring the money from the east. In view of this evidence and the finding of the trial court, the only fair inference is that the money was not set apart on the 5th of December, or at any time until the transaction was consummated, and that the antedating of the note was a device to cover usury. The full legal rate of ten per cent having been reserved and the note having been antedated so

that the full legal rate for five years would be collectible as interest, while the loan would not, in fact, run five years, the finding of the trial court that the transaction was usurious was correct. The fact that only a small excess of interest was reserved does not affect the case.

JUDGMENT AFFIRMED.

ATCHISON & NEBRASKA RAILROAD COMPANY v. AUGUST BOERNER.

FILED JUNE 18, 1895. No. 6121.

1. **Eminent Domain:** CONDEMNATION PROCEEDINGS: JUDGMENT ON APPEAL. *Atchison & N. R. Co. v. Boerner*, 34 Neb., 240, reaffirmed.
2. ———: ———: ———. Instructions examined, and *held* not erroneous.

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

T. M. Marquett, J. W. Deweese, and *E. W. Thomas,* for plaintiff in error.

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

IRVINE, C.

This case was before the court in 1892, when it was reversed and remanded for a new trial. (*Atchison & N. R. Co. v. Boerner*, 34 Neb., 240.) The facts were stated in the former opinion. After the former mandate another trial was had, resulting in a verdict and judgment for Boerner, and the railroad company brings the case here for review.

The principal question argued is the correctness of the former decision, and counsel for the railroad company very frankly state that the case would not be again brought here were it not for their conviction that the former decision was wrong. The court on the former hearing determined that a judgment on appeal from an award of damages in condemnation proceedings is conclusive as to questions actually litigated therein, and as to all matters necessarily within the issues, although not formally litigated; but that the condemnation proceedings and the judgment on appeal therefrom, while they involve all questions of damages caused by the appropriation of that portion of land which was appropriated, and all questions in regard to damage incidentally caused to the remainder of the tract by reason of the appropriation and the proper construction and maintenance and operation of the railroad on the land appropriated, do not involve damages caused to the land by reason of interference with an easement in a public highway by the railway's crossing such highway at some distance from the land. We are satisfied with the conclusions reached on the former hearing, and while we have examined the argument of the railroad company on this point with interest, we do not think that we should depart from the rule already announced in the case. It is not necessary at this time to restate the reasons therefor. We pass on, therefore, to a consideration of the new questions presented on the second trial.

It is assigned as error that the court erred in permitting the plaintiff to prove the value of the property immediately before the construction of the railroad and its value immediately after. This assignment is too general to indicate the precise ruling complained of. Several witnesses testified to the value of the property before the railroad was constructed. All this testimony was objected to, but we think it was clearly admissible as one step in proving the damage. Several questions were asked in different

forms, by which it was sought to show the value after the railroad was constructed. Every objection made to questions of this character was sustained. From the form of the questions we presume that the objections were sustained because the questions did not limit the witnesses to a consideration of the depreciation in value caused by the obstruction of Commercial street at the crossing. At any rate, since the objections were sustained, the railroad company cannot complain.

The following instruction was excepted to: "The jury are instructed that the property of no person can be taken or damaged for public use without just compensation therefor; and if the jury believe from the evidence that plaintiff owned and occupied buildings upon lots 5 and 6, in block 2, of Rulo and Bedard's addition to the city of Rulo, constructed for and suitable for a particular business which the plaintiff was engaged in carrying on therein, and to which the free and uninterrupted use of Commercial street was beneficial, and that the defendant obstructed Commercial street adjoining said property, and that said obstruction made access to said property so difficult or inconvenient as to depreciate the value of said property, that is such a damage as entitles plaintiff to compensation, and your verdict should be for plaintiff in such sum as you believe from the evidence he has been damaged by such obstruction." The first objection to this instruction is because it stated the constitutional provision that property cannot be taken or damaged for public use without just compensation therefor. It is argued that this left the case open to a consideration of all damages whether covered by the condemnation proceedings or not. This is not true, because in several of the instructions given, the court, in the most direct and emphatic terms, informed the jury that they could only consider such damages as the property sustained by reason of the obstruction of Commercial street. It is also argued that the instruction was erroneous because it called

attention to the business which Boerner had carried on on the property, and allowed damages for injury to that business. But when the instruction is read, it will be observed that it limited the jury to a consideration of the depreciation in the value of the property, because of its being rendered less suitable for the business to which it had been adapted, and by other instructions the jury was told that injury to the business itself could not be considered.

The second instruction was objected to because it was too general in its terms. This instruction was as follows: "The jury are instructed that if they believe from the evidence under the instructions of the court that the plaintiff is entitled to recover in this action, your verdict should be for the plaintiff in such sum as you believe from the evidence his property has been injured or damaged by reason of the obstruction of Commercial street." The instruction certainly was not erroneous in its terms, and a specific instruction in regard to the measure of damages was given at the request of the railroad company itself. The other questions argued were either covered by the former opinion, or relate to questions already incidentally decided. We find no error in the record.

JUDGMENT AFFIRMED.

CITY OF NEBRASKA CITY V. JAMES B. NORTHCUTT.

FILED JUNE 18, 1895. NO. 5457.

1. **Municipal Corporations:** CHANGE OF GRADE: DAMAGES: TITLE. In order to recover damages against a city on account of the change of grade of streets, the plaintiff must have either a legal or equitable estate in the property injured.

2. ——: ——: ——: ——. A husband who has erected improvements on the land of his wife, and is in possession thereof, is not entitled to recover in his own name for damages sustained by said property by a change of grade.

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

M. L. Hayward and *C. W. Seymour*, for plaintiff in error.

John C. Watson and *E. F. Warren, contra.*

IRVINE, C.

This was an action by Northcutt against Nebraska City to recover damages caused by a change of grade. There was a verdict and judgment for the plaintiff, which the city seeks to reverse. The property to which it was claimed the damages accrued was lots 1 and 2, in block 72, and lot 12, in Nebraska City. The answer of the city denies that the plaintiff was the owner of the lots. The only evidence in support of his allegation of ownership was the parol testimony of plaintiff himself that he owned the lots and they stood in his name. As against this the city introduced in evidence the record of a deed showing a conveyance of lot 1 to Katie Northcutt, the wife of the plaintiff. The court instructed the jury as follows: "There being a general allegation in plaintiff's petition that he is the owner of the premises described in his petition, and that he, plaintiff, built and erected the buildings situated thereon, and that he, plaintiff, made the improvements upon said lots, which he alleges have been damaged by reason of said grade, and that he has used, occupied, and controlled said premises for years prior to said grade, claiming to own the same, you are instructed that he can recover for damages caused to said improvements, if you find any damage has been sustained thereby, even if the legal title to one of said lots does appear by the evidence to be in the wife of the plaintiff." The evidence was all directed to the entire damage sustained by the lots, although there was some evidence in relation to the cost of adapting the improvements to the new grade. The instruction as given was

erroneous. If this judgment should stand and the city pay it, it would be no bar to an action by Mrs. Northcutt to recover damages sustained by lot 1. The fact that plaintiff made the improvements on the lot did not entitle him to recover, unless he owned the improvements or had some estate in them or in the lot. Presumably, the improvements when made became a part of the realty and the property of its owner, and no right of action accrued to the plaintiff because he made them, unless he retained ownership or had some estate in the land; and in the latter case he could only recover for the injuries sustained by his particular estate. In so holding we must not be understood as deciding that one must be the owner of land in fee-simple in order to recover damages for a change of grade. We simply hold that one must have some legal or equitable estate, and that his damages are confined to the injuries done that estate.

Several other questions are argued, but they have for the most part already been determined in other cases. Some have been decided since the trial of this case in the district court. We would, however, in further proceedings, direct attention of counsel particularly to the cases of *Harmon v. City of Omaha*, 17 Neb., 548, and *City of Lincoln v. Grant*, 38 Neb., 369.

REVERSED AND REMANDED.

ROBERT BARR V. STATE OF NEBRASKA.

FILED JUNE 19, 1895. NO. 7131.

1. **Criminal Law:** CHANGE OF VENUE: DUTY OF CLERK TO TRANSMIT RECORD. Upon a change of venue in a criminal cause to an adjoining county, the clerk of the court in which the indictment or information was filed must transmit to the clerk of the court to which the venue is changed a certified

transcript of the proceedings in the case, together with the original indictment or information.

2. **Record for Review:** ASSIGNMENTS OF ERROR. An assignment in a petition in error that the trial court erred in overruling a motion to strike from the files a certain paper cannot be considered where neither such motion, nor the grounds thereof, appear in the record.

3. **Criminal Law:** INSTRUCTIONS. In a prosecution for a felony error cannot be predicated upon the failure of the trial court to define a lesser offense included in the crime charged, unless requested so to do.

4. ———: ASSAULT: SELF-DEFENSE. A person who is unlawfully attacked by another in such a manner as to excite in him a reasonable belief that he is in danger of losing his life or receiving some great bodily injury, may use such force to repel the attack as at the time appears to him to be reasonably necessary, although he may be mistaken as to the extent of the actual danger, where other reasonable and judicious men would have been alike mistaken. He is justified in acting, in such case, upon the facts as they appear to him, and is not to be judged by the facts as they actually are.

5. **Conflicting Instructions.** Where the law is incorrectly stated in one instruction, the error is not cured by another instruction which correctly propounds the law upon the same subject.

ERROR to the district court for Cuming county. Tried below before NORRIS, J.

The opinion contains a statement of the case.

C. C. McNish, Brome, Burnett & Jones, for plaintiff in error:

The charge of the court was erroneous in authorizing a conviction for assault and battery without defining that offense. (*Ballard v. State*, 19 Neb., 609; *Milton v. State*, 6 Neb., 136.)

A person is not criminally liable for defending himself against an unlawful assault unless, in repelling such assault, he uses more force than a reasonably prudent person in that situation and under those circumstances would have

believed necessary and essential for his safety. (*Campbell v. People*, 16 Ill., 17; *Schnier v. People*, 23 Ill., 17; *Maher v. People*, 24 Ill., 241; *Shorter v. People*, 2 Comst. [N. Y.], 193; *Lander v. State*, 12 Tex., 462; *Williams v. State*, 3 Heisk. [Tenn.], 376; *State v. Harris*, 1 Jones [N. Car.], 190; *Logue v. Commonwealth*, 38 Pa. St., 265; *State v. Brooks*, 99 Mo., 137; *People v. Pearl*, 76 Mich., 207; *Morris v. Platt*, 32 Conn., 75; *Nalley v. State*, 28 Tex. App., 387; *State v. Reed*, 37 Pac. Rep. [Kan.], 174.)

A. S. Churchill, Attorney General, for the state.

NORVAL, C. J.

An information was filed by the county attorney in the district court of Stanton county, charging the plaintiff in error with the crime of mayhem. On application of the accused the venue was changed to the district court of the adjoining county of Cuming, where he was convicted of an assault and battery on December 12, 1893. A motion for a new trial was duly presented, which was heard and overruled on January 25, 1894, as were also a motion in arrest of judgment and a motion to strike the substituted transcript from the files. An exception was taken to the rulings on each of these motions, and the plaintiff in error was sentenced to pay a fine of $25 and the costs of prosecution.

Error is alleged in that the court overruled the motion in arrest of judgment. The ground of this motion is that the court below had no jurisdiction of the subject-matter, for the reason that no transcript of the record or proceedings had in the cause in the district court from which the venue was changed had been filed in the district court of Cuming county. Section 456 of the Criminal Code declares: "When the venue is changed to an adjoining county, the clerk of the court in which the indictment was found shall make a certified transcript of all the proceedings in the

case, which, together with the original indictment, he shall transmit to the clerk of the court to which the venue is changed, and the trial shall be conducted in all respects as if the offender had been indicted in the county to which the venue has been changed." If it were true, as contended by counsel for the accused, that no transcript of the proceedings in the district court of Stanton county was filed in the district court of Cuming county until after the verdict had been returned, there could be no room for doubt that the judgment of conviction would be a nullity for want of jurisdiction or power of the court to try and determine the cause, for it is plain that the district court to which the venue in a criminal prosecution has been changed can acquire jurisdiction of the cause only by the filing in the office of the clerk of said court a certified transcript of the proceedings had in the case in the court ordering a change of the place of trial, together with the original indictment or information. It is obvious that jurisdiction of the offense charged in the information could not be conferred upon the district court of Cuming county in any other mode than that pointed out by statute. An examination of the record before us discloses that a true and correct copy of the journal entries in the cause made out by the clerk of the district court of Stanton county and certified under his official seal was, with the original information and all the files and papers in the case, transmitted to, and filed in, the office of the clerk of the district court of Cuming county on the 21st day of November, 1893, which was nearly three weeks before the plaintiff in error was placed upon trial. The objection that the court below was without jurisdiction is not sustained by the record, and the motion in arrest of judgment was properly denied.

It is argued that there was error in the refusal of the court below to sustain the motion to strike from the files the substituted transcript which was filed after verdict. The ruling of which complaint is made cannot be consid-

ered by us, for the reason that neither the motion nor the grounds thereof appear in the record. As stated above, the plaintiff in error was charged with the crime of mayhem, but was convicted of an assault and battery. The trial court in its instructions defined the crime of mayhem, and charged the jury that if they were not convinced of the defendant's guilt of this offense, but were satisfied beyond a reasonable doubt that he was guilty of an assault and battery, they should so find by their verdict. In none of the instructions to the jury was the crime of which the prisoner was convicted defined. It is insisted that this omission is reversible error. A sufficient answer to this contention is that the trial court was not requested to instruct the jury upon that point. The plaintiff in error should have prepared and submitted to the court a request defining the crime of assault and battery, and not having done so, error cannot be predicated upon the failure to so charge the jury. (*Gettinger v. State*, 13 Neb., 308; *Housh v. State*, 43 Neb., 163.)

Exceptions were taken by the plaintiff in error to the giving of the following instructions requested by the state:

"4. The court instructs the jury that if you find from the evidence that the act of maiming was committed by the defendant while he was fighting with the said Perry Kenney, and if you should further find that the said Perry Kenney was the aggressor in said fight and struck the first blow, that even this would not justify the defendant in maiming the said Perry Kenney as charged in the information, unless you should further find that the said Perry Kenney was attempting great bodily injury to the defendant, and that the defendant had no other means of preventing it except by maiming the defendant, and unless you can so find, then it is your solemn duty to convict the defendant of the crime charged in the information, and you should return a verdict of guilty.

"5. The court further instructs you that if you find from

the evidence that the act of maiming complained of in the information in this case was committed by the said Robert Barr in and upon said Perry Kenney in a sudden rencontre between said parties, still this would not justify you in finding said defendant not guilty, unless you should further find from the evidence that the said Perry Kenney was attempting to inflict some great bodily harm upon the said defendant and that there were no other means of preventing it other than maiming said Perry Kenney, and unless you so find from the evidence, it is your duty to find the defendant guilty in manner and form as charged in the information.

"6. The court further instructs you that it is a rule of law that when a person is assailed by an antagonist the person assailed has a lawful right to repel force with force, but when the person assailed uses more force to defend himself than is necessary, or, in other words, uses excessive force, or resorts to acts of violence upon his antagonist not called for in necessary self-defense, he then in law becomes the assailant, and when such unnecessary force is used the party using such force becomes criminally responsible, regardless of the fact as to who was the aggressor in the fight or who may have stricken the first blow."

It is argued that these instructions do not correctly embody the law of self-defense. In *Davis v. State*, 31 Neb., 240, it was held, substantially, that when a person is assaulted by another in such a manner as to excite in him a reasonable belief that he is in danger of losing his life or receiving great bodily injury, he may lawfully resist the attack by employing such reasonable means within his power as are apparently necessary to defend himself. In order to justify self-defense it is not indispensable that there should exist actual and positive danger. A party who is assaulted in such a way as to induce in him a well grounded and reasonable belief that he is in danger of suffering great bodily harm will be justified in defending him-

self, although the danger be not real, but only apparent. In other words, he is justified in acting upon the facts as they appear to him at the time, and is not to be judged by the facts as they actually are. In *Campbell v. People*, 16 Ill., 17, Caton, J., in delivering the opinion of the court, says: "Men, when threatened with danger, are obliged to judge from appearances, and determine by the actual state of things, from the circumstances surrounding them, at least as much as if placed in other and less exciting positions; and it would be monstrous to say that if they act from real and honest convictions, induced by reasonable evidence, they shall be held responsible criminally for a mistake in the extent of the actual danger, where other reasonable and judicious men would have been alike mistaken. A contrary rule would make the law of self-defense a snare and a delusion. It would become but a mockery of the sacred right of self-preservation." This certainly accords with the doctrine upon the subject as declared by the courts of this country. (*State v. Howard*, 14 Kan., 175; *State v. Bohan*, 19 Kan., 28; *Schnier v. People*, 23 Ill., 17; *Maher v. People*, 24 Ill., 241; *Steinmeyer v. People*, 95 Ill., 383; *State v. Brooks*, 99 Mo., 137; *People v. Pearl*, 76 Mich., 207; *Smith v. State*, 26 S. W. Rep. [Ark.], 712; *State v. Cain*, 20 W. Va., 679; *Housh v. State, supra.*) The instructions copied above are all faulty and erroneous, in that the jury were told that the defendant could not lawfully use force in self-defense, unless the complaining witness was attempting to inflict upon him great bodily injury, and the defendant had no other means of preventing it, and further, if more force than necessary was used, the defendant was criminally responsible. This, as we have seen, is not the law. It was not necessary that it be shown that great bodily injury was in fact about to be inflicted upon the defendant in order to justify him to repel force by force, but all the law required of him was that he honestly and in good faith believed he was about to receive great bodily

harm, and that he used no more force to repel the attack than to him appeared to be reasonably necessary. By these instructions, if the jury found that the plaintiff in error used more force than was actually necessary to defend himself, it was their "solemn duty to convict," although they were satisfied from the facts and circumstances detailed by the witnesses that no more force was employed than a reasonably prudent person in that situation would have deemed necessary for his own safety.

It is true that some of the other instructions given by the court correctly stated the law of self-defense. It was not enough that some of the instructions were correct. They did not cure the errors in the other paragraphs of the charge. Neither this nor the lower court knows but what the jury were guided by the erroneous instructions in finding a verdict of guilty. It is reversible error to give conflicting instructions. (*Warren v. Palmer*, 13 Neb., 376; *Ballard v. State*, 19 Neb., 609.) For the errors indicated the judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

WILSON LOSURE V. JACOB M. MILLER.

FILED JUNE 19, 1895. No. 6137.

Review: MOTION FOR NEW TRIAL: SUFFICIENCY OF EVIDENCE. An objection that the findings and judgment are not sustained by the evidence will not be considered by this court where the record does not disclose that a motion for a new trial, setting up that ground was presented to the trial court and a ruling obtained on the motion.

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

O. W. Rice and *W. L. Henderson*, for plaintiff in error.

J. H. Berryman, contra.

NORVAL, C. J.

This is an action to recover damages for an alleged malicious prosecution. There was a trial to the court, a jury being waived, with findings and judgment for the plaintiff. The defendant prosecutes a petition in error to this court.

But a single proposition is discussed in the briefs, and that is the evidence in the case is insufficient to sustain the findings and judgment; and this question cannot be considered by this court, for the reason the record fails to disclose that a ruling of the trial court was made upon the motion for a new trial. (*Hull v. Miller*, 6 Neb., 128; *Smith v. Spaulding*, 34 Neb., 128; *Scroggin v. National Lumber Co.*, 41 Neb., 195.) The judgment is

AFFIRMED.

WILSON LOSURE V. BAITY THOMPSON.

FILED JUNE 19, 1895. No. 6138.

Review: MOTION FOR NEW TRIAL: SUFFICIENCY OF EVIDENCE. In order to review by petition in error the sufficiency of the evidence to support the judgment, a motion for a new trial assigning such ground must be filed in the court below, and its ruling obtained thereon.

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

O. W. Rice and *W. L. Henderson*, for plaintiff in error.

J. H. Berryman, contra.

NORVAL, C. J.

This is an action for malicious prosecution. The record in this case is identical with that in *Losure v. Miller*, 45 Neb., 465, and for the reason therein stated the judgment is

AFFIRMED.

FANNIE E. RICHARDS, ADMINISTRATRIX, v. WILLIAM J. CONNELL ET AL.

FILED JUNE 19, 1895. No. 6051.

1. **Negligence**: DUTY OF LOT OWNER TO FENCE DANGEROUS EXCAVATION OR POND. The owner of a vacant lot upon which is situated a pond of water or dangerous excavation is not required to fence it, or otherwise insure the safety of strangers, old or young, who may resort to said premises not by invitation, express or implied, but for the purpose of amusement or from motives of curiosity.

2. ———: ———: DAMAGES. The plaintiff's intestate, a boy ten years of age, who was accustomed to play in and about a pond of water on a vacant lot, the property of defendants, fell from a section of wooden sidewalk which he was using as a raft on said pond and was drowned. *Held*, That the defendants are not liable for damages, and their demurrer to the petition was properly sustained.

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

The facts are stated in the opinion.

Breckenridge & Breckenridge and *L. F. Crofoot*, for plaintiff in error, cited: *Barrett v. Southern P. R. Co.*, 27 Pac. Rep. [Cal.], 666; *Penso v. McCormick*, 25 N. E. Rep. [Ind.], 156; *Crogan v. Schiele*, 53 Conn., 186; *Toomey v. Sanborn*, 146 Mass., 28; *City of Indianapolis v. Emmel-*

man, 108 Ind., 530; *Khron v. Brock*, 144 Mass., 516; *Gulf, C. & S. F. R. Co. v. Styron*, 66 Tex., 421; *Powers v. Harlow*, 53 Mich., 507; *Beck v. Carter*, 68 N. Y., 283; *Barnes v. Ward*, 9 M., G. & S. [Eng.], 392; *Hadley v. Taylor*, L. R., 1 C. P. [Eng.], 53; *Sioux City & P. R. Co. v. Stout*, 17 Wall. [U. S.], 657; *Westerfield v. Levis*, 9 So. Rep. [La.], 52; *Lynch v. Smith*, 104 Mass., 52; *City of Chicago v. Hesing*, 83 Ill., 204; *Hydraulic Works Co. v. Orr*, 83 Pa. St., 332; *Birge v. Gardiner*, 19 Conn., 507; *Keffe v. Milwaukee & St. P. R. Co.*, 21 Minn., 207; *Nagel v. Missouri P. R. Co.*, 75 Mo., 653; *Schmidt v. Kansas City Distilling Co.*, 2 S. W. Rep. [Mo.], 417; *City of Chicago v. Keefe*, 114 Ill., 222; *Village of Carterville v. Cook*, 129 Ill., 152; *Brennan v. City of St. Louis*, 92 Mo., 482.

Connell & Ives, contra, cited: *Klix v. Nieman*, 32 N. W. Rep. [Wis.], 223; *Overholt v. Vieths*, 6 S. W. Rep. [Mo.], 74; *Ratte v. Dawson*, 52 N. W. Rep. [Minn.], 965; *Gillespie v. McGowan*, 100 Pa. St., 144; *McEachern v. Boston & M. R. Co.*, 23 N. E. Rep. [Mass.], 231; *Clark v. Manchester*, 62 N. H., 578; *Pierce v. Whitcomb*, 48 Vt., 127; *Hargreaves v. Deacon*, 25 Mich., 1; *Sweeny v. Old Colony & N. R. Co.*, 10 Allen [Mass.], 368; *Schmidt v. Bauer*, 22 Pac. Rep. [Cal.], 256; *Benson v. Baltimore Traction Co.*, 26 Atl. Rep. [Md.], 975; *Murphy v. City of Brooklyn*, 23 N. E. Rep. [N. Y.], 888; *Nolan v. New York & N. H. R. Co.*, 4 Atl. Rep. [Conn.], 110; *Frost v. Eastern R. Co.* 9 Atl. Rep. [N. H.], 791; *Faris v. Hoberg*, 33 N. E. Rep. [Ind.], 1028; *Thiele v. McManus*, 28 N. E. Rep. [Ind.], 327.

POST, J.

This was an action in the district court of Douglas county by Fannie E. Richards, as administratrix of the estate of George Bertram Weston, deceased, against the city of Omaha, William J. Connell, and William E. Clark. It

was held by the district court, on demurrer interposed by Connell and Clark, that the petition failed to state a cause of action as against them, which is the only ruling assigned as ground for the reversal of the judgment of dismissal as to the defendants named.

The allegations of the petition, so far as they refer to the defendants in error, are, in substance, as follows: On the 29th day of June, 1891, and for a long time prior thereto, said Clark was the owner of lots Nos. 40 and 41, in Hickory Place, an addition to the city of Omaha, and said Connell was during said time the owner of the adjoining premises, described as lot No. 59, in Redick's second addition to said city; that the defendants had for a long time prior to the day named negligently permitted the surface water to accumulate on said lots, thereby creating a deep and dangerous pond, and that they had failed and neglected to fence said lots or to erect barriers of any kind to prevent children, lawfully in the vicinity thereof, from falling into said pond; that said lots are situated in the vicinity of one of the public schools of said city, and the pond aforesaid is not only dangerous to persons passing along South Twenty-fifth street adjacent thereto, but is in a public and much frequented place and attractive to children of tender age, many of whom are accustomed to play about and upon said water; that on said June 29, 1891, the plaintiff's intestate, a boy ten years of age, yielding to the natural impulse of childhood, went on said pond upon a section of wooden sidewalk floating thereon, from which he fell into said pond and was drowned. The language of the petition is somewhat ambiguous, but there is in the brief of plaintiff's counsel no claim that the deceased at the time of the accident was passing along the street or that the fatal result thereof is directly or indirectly chargeable to a proper use of the sidewalk. On the other hand, the construction, in which both parties appear to concur, is that the deceased had constructed a raft of the floating sidewalk,

from which he fell while thus engaged at play on the pond. The petition, we think, fails to state a cause of action against the defendants, and that the demurrers were rightly sustained. The single question presented by the record is whether the owner of a vacant lot upon which is situated a pond of water or a dangerous excavation is required to fence it or otherwise insure the safety of strangers, old or young, who may go upon said premises not by his invitation, express or implied, but for the purpose of amusement or from motives of curiosity. The authorities we find to be in substantial accord, and sustain the proposition that independent of statute no such liability exists.

In *Hargreaves v. Deacon*, 25 Mich., 1, which was an action for the death of the plaintiff's son, a child of tender years, by drowning in a cistern left unguarded, it is said: "Cases are quite numerous in which the same questions have arisen which arise in this case, and we have found none which hold that an accident from negligence, on private premises, can be made the ground of damages, unless the party injured has been induced to come by personal invitation, or by employment which brings him there, or by resorting there as to a place of business or of general resort held out as open to customers or others whose lawful occasions may lead them to visit there. We have found no support for any rule which would protect those who go where they are not invited, but merely with express or tacit permission, from curiosity or motives of private convenience, in no way connected with business or other relations with the occupant."

In *Klix v. Nieman*, 68 Wis., 271, a case quite similar to that before us, it is said, after an exhaustive review of the authorities: "Upon the facts we do not think the law imposed the duty upon the defendant of building a fence or guard to prevent children from reaching the pond; therefore he is not liable for the death of the child."

In *Ratte v. Dawson*, 52 N. W. Rep. [Minn.], 965, an

infant three years of age was by an elder sister taken for recreation to a vacant lot, and accidentally killed by the caving in of an embankment, caused by excavation for sand, which had been left unfenced. In the opinion of the court it is said: "The parties were clearly trespassers. They were not on the premises by plaintiff's invitation or for any lawful purpose. He owed then no duty to fence or guard his premises to prevent them from entering and exposing themselves to danger."

In *Clark v. Manchester*, 62 N. H., 578, it is said: "The plaintiff's intestate was not upon the land of the defendants, where he was drowned, by express or implied invitation, for any purpose. The fact that the ground was uninclosed, and that the deceased and people at their pleasure went there without objection, was not an invitation; and from that fact alone no license can be inferred. The fact that the person who suffered injury and death was an infant child does not change the question nor create a liability against the defendants where none would have existed in case of an injury to an adult person under similar circumstances." And to the same effect see *Overholt v. Vieths*, 6 S. W. Rep. [Mo.], 74; *Gillespie v. McGowan*, 100 Pa. St., 144; *Pierce v. Whitcomb*, 48 Vt., 127; *McEachern v. Boston & M. R. Co.*, 150 Mass., 515; *Gay v. Essex Electric Street R. Co.*, 159 Mass., 238; *Beck v. Carter*, 68 N. Y., 283; Cooley, Torts, 606; Shearman & Redfield, Negligence, sec. 505.

This class of cases rests upon an entirely different principle from those cases in which the injury resulted from a lawful and proper use of the street or sidewalk adjacent to a dangerous excavation. In the latter cases the law imposes upon the owner or occupant the duty to protect the traveling public, and he will be liable for the consequences of a failure to discharge that duty, while in the former he owes no duty to the general public in that respect. We are referred to a number of cases which counsel argue sustain the plaintiff's right to recover on the facts alleged, and which may be classified as follows:

1. Cases in which the owner of land has made or permitted a dangerous excavation, embankment, or the like, so near a public highway as to injure one in the rightful use thereof. The principle which underlies this class of cases is, as we have seen, that the owner of land is required to so use it as not to imperil the life or property of another, and are, therefore, not authority in case at bar.

2. Cases in which the defendant has negligently left exposed dangerous machinery likely to attract children and resulting in their injury. Illustrative of this class which constitute a recognized exception to the rule are the so-called turn-table cases.

3. Cases where the plaintiff was injured while upon the defendant's premises by invitation of the latter, and where the negligence consists in a failure to keep such premises in a reasonably safe condition.

But in no case cited has a recovery been allowed on a state of facts substantially like those alleged in the petition under consideration. It follows that the judgment of the district court is right and must be

AFFIRMED.

THOMAS A. STRATTON V. FLORENCE E. DOLE.

FILED JUNE 19. 1895. No. 6100.

1. **Continuance.** An application for continuance is addressed to the discretion of the trial court, and the ruling thereon will not be disturbed in the absence of a clear abuse of discretion.

2. ———: DEPOSITIONS IN OTHER STATE. Provisions for the taking of testimony in one state for use in the courts of another, and the enforced attendance of witnesses for that purpose, are founded upon comity, and are, in the absence of express statutory provision to the contrary, extrajudicial as to the courts of the state where such evidence is sought.

3. ——: ——. A continuance will not be granted to enable a party by proceedings for contempt in the courts of Wisconsin to compel a contumacious witness to testify by deposition, there being no presumption that by refusing to answer he is guilty of contempt of any court of that state.

4. **Breach of Promise to Marry:** DAMAGES: EVIDENCE OF DEFENDANT'S WEALTH. In actions for breach of promise to marry, evidence of the defendant's reputation for wealth is admissible, not for the purpose of proving his ability to pay damages, but as tending to show the condition in life which the plaintiff would have secured by a consummation of the marriage contract, although it is not permissible for the plaintiff to particularize the defendant's property.

5. ——: ——: ——. The defendant's mother, at his request, procured the plaintiff to receive him as a suitor, and was otherwise actively engaged in promoting the marriage agreement. *Held*, That communications by the former to the plaintiff, while thus engaged, touching the defendant's property, made as an inducement to the marriage contract, are admissible in evidence in an action against the latter for the breach thereof.

6. **Review:** HARMLESS ERROR. Error not probably conducing to a wrong final decision is no ground for the reversal of a judgment.

7. **Damages for Breach of Promise to Marry:** EVIDENCE OF PLAINTIFF'S CHARACTER. *Held*, Permissible for the defendant to prove specific acts of incontinence on the part of the plaintiff. If guilty of fornication, that fact would be a defense to her action, since personal purity is one of the implied conditions of her agreement. If her actions have been wantonly indelicate and inconsistent with the conduct of a pure-minded woman, that fact is admissible at least in mitigation of damage.

8. **Review:** HARMLESS ERROR IN INSTRUCTION. A judgment will not be reversed for the giving of an erroneous instruction where the verdict is clearly right and the only one which could have been rendered upon the particular issues involved.

9. **Witnesses:** IMPEACHMENT. Evidence set out in the opinion, *held*, admissible for the purpose of impeachment, the necessary foundation therefor having been laid.

10. **Trial:** READING DECISIONS TO JURY. Although the practice of reading to the jury from reported decisions should not be encouraged, the subject is one within the discretion of the trial court and presents no grounds for interference by this court in the absence of an abuse of discretion.

11. **Arguments of Counsel.** Arguments of counsel based upon facts not in evidence will not justify the reversal of a judgment when the objectionable remarks were evidently made in reply to the argument of the complaining party who was guilty of the first offense in that regard.

12. **Breach of Promise to Marry: JUDGMENT FOR PLAINTIFF: SUFFICIENCY OF EVIDENCE.** Evidence examined, and *held* sufficient to sustain the verdict and judgment of the district court.

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

E. E. Brown and *G. M. Lambertson*, for plaintiff in error.

W. R. Starr, *J. B. Strode*, and *R. D. Stearns*, *contra*.

POST, J.

This was an action by the defendant in error, in the district court for Lancaster county, for the breach by the plaintiff in error (defendant below) of an alleged promise of marriage. It is also alleged as a part of the cause of action in the court below that the defendant therein, under promise of marriage, seduced and debauched the plaintiff, to her damage, etc. The answer, while denying the alleged seduction, admits a promise of marriage conditioned that the plaintiff should prove upon inquiry to be a woman of good character and reputation. It is further alleged that the defendant, subsequent to said promise, ascertained that the plaintiff was not a woman of good character and reputation, but that she was, on the contrary, immoral and unchaste, by reason of which he declined to consummate the agreement above mentioned. There was a trial in the district court, resulting in a verdict and judgment for the plaintiff therein, from which the defendant prosecutes proceedings by petition in error to this court.

The first of the errors assigned is the denial of a continuance on the motion of the defendant in order to enable him

to secure the testimony of one Rowley, an alleged material witness. By reference to the defendant's affidavits we observe that he claims to have learned from the plaintiff's own confession on the 31st day of December, 1890, while the agreement was still in force, that she had been criminally intimate with certain persons, including the witness named, and which is the ground upon which he relies for a justification of his refusal. The action, as shown by the record, was commenced in the district court April 27, 1891, and a trial had therein in the month of April, 1892, resulting in a verdict, which was, on the defendant's motion, set aside and a new trial ordered. The motion for continuance above mentioned was made at the September, 1892, term, to-wit, September 20, and the order overruling it bears date of December 9, being the sixty-eighth day of the said term. On the 23d day of August of that year the deposition of said Rowley was taken before a notary public in the city of Racine, in the state of Wisconsin. During said examination the witness was asked whether there had at any time existed criminal relations between himself and the plaintiff, which question he refused to answer, assigning therefor that his relations with the plaintiff were his "own personal business." It was urged in the district court, and which contention is here renewed, that if sufficient time had been allowed for that purpose the defendant could, by means of proceedings for contempt in the courts of Wisconsin, have compelled the witness to answer and that his answers would have established the defense alleged. That an application for continuance is addressed to the discretion of the trial court, and that the ruling thereon will not be disturbed unless such discretion is shown to have been abused, are propositions so firmly established by the decisions of this court as to render a reference to them wholly unnecessary. Rowley, it should be noted, resided in this state continuously from the date of the alleged confession of the plaintiff in December, 1890, until the month

of September, 1891, yet no attempt was made to secure his testimony until the month of August, 1892; nor had any steps been taken at the time of the overruling of the motion to compel him to answer the questions propounded. The district court evidently regarded the showing of diligence as insufficient to entitle the defendant to a further continuance, and such conclusion cannot be regarded as an abuse of discretion calling for interference by this court. But the district court was apparently influenced by another consideration, and which is of itself a sufficient justification of the ruling assigned, viz., the improbability of securing the evidence sought by resort to proceedings for contempt in the courts of Wisconsin. The law which authorizes the taking of testimony in one state for use in the courts of another state, and which requires the attendance of witnesses for that purpose, is founded upon comity, and is, as remarked by Lyon, J., in *State v. Lonsdale*, 48 Wis., 365, extrajudicial as to the courts of the state where such evidence is sought. It follows that the witness named, by refusing to answer in this cause, is, in the absence of a special statute of Wisconsin, guilty of no contempt of any court of that state. This conclusion is in harmony with the recognized rule as well as the decisions of this court. (See *Johnson v. Bouton*, 35 Neb., 898, and cases cited.)

The plaintiff was permitted, while a witness in her own behalf, to repeat an alleged statement of the defendant's mother relating to his, defendant's, financial standing, and which is assigned as error. In actions of this character evidence of the defendant's general reputation for wealth is admissible, not for the purpose of proving his ability to pay damages, but as tending to show the condition in life which the plaintiff would have secured by a consummation of the marriage contract. (*Kerfoot v. Marsden*, 2 Fos. & Fin. [Eng.], 160; *Kniffen v. McConnell*, 30 N. Y., 285; *Holloway v. Griffith*, 32 Ia., 409; *Bennett v. Beam*, 42 Mich., 346; *Olson v. Solveson*, 71 Wis., 667; *Johnson v.*

Travis, 33 Minn., 231; *Hunter v. Hatfield*, 68 Ind., 422.) But it is not as a rule permissible to particularize the defendant's property. As said in *Kerfoot v. Marsden*, *supra*: "You may ask in a general way as to the defendant's property, but you cannot go into particular items as to his property." (See, also, *Kniffen v. McConnell*, *supra*; *Chellis v. Chapman*, 125 N. Y., 214.) Our first impression was that the admissions of the declarations mentioned was error requiring a reversal of the judgment; but a second reading of the record has convinced us that this is not a case for the application of the general rule, in view of Mrs. Stratton's relation to her son, the defendant, and the conspicuous part taken by her in promoting the marriage contract. The evidence bearing upon this aspect of the case is free from conflict and may be summarized as follows: About the 14th day of October, 1890, the plaintiff then residing with her parents in Red Willow county and engaged in teaching school in an adjoining district, received a letter from Mrs. Stratton inquiring if she was married or engaged, and soliciting an answer, saying that she, plaintiff, might hear something to her advantage. This communication was followed by a second and third within the period of a month. In the second, the writer mentioned the fact that her son, the defendant, had recently broken an engagement with a young woman in Iowa to whom he had been engaged, and that she, Mrs. S., would like to have him call on the plaintiff during a visit he was then contemplating to that part of the state. The third letter was to advise plaintiff of the date set for the defendant's visit. In one of the letters mentioned the writer referred to her friendship for the plaintiff resulting from a previous acquaintance, saying that her son thought a great deal as she did, and would like a girl whom she admired. The plaintiff accordingly, on the 14th day of November following, received the defendant as a suitor at her home, and which was the beginning of their personal

acquaintance. During that visit of two days the engagement in question was made and the defendant at his request was received by plaintiff's parents as her affianced husband. After returning to his home in Lancaster county, near the city of Lincoln, he addressed the plaintiff a letter under date of November 18, in which he used this language. "Mother was surprised as well as glad when she heard of our engagement. She did not realize how much in earnest I was when I requested her to write to you." On the 29th day of December, following, the plaintiff, at the request of Mrs. Stratton, visited the latter at her home and remained until the evening of January 2. Further reference will be made to that visit in this opinion, but for the present it suffices that there was subsequently no personal communication between the plaintiff and the defendant or his mother. Returning to the examination of the plaintiff as a witness, we observe that after testifying to the engagement she was interrogated as follows:

Q. Did you learn anything of his financial condition prior to his coming to your house?

A. Yes, sir.

Q. Through whom?

A. Through his mother, his brother-in-law, and sister.

Q. What, if anything, did you learn through his mother as to his financial condition?

Objected to, as incompetent and hearsay. Overruled. Exception.

A. I learned that he had property in the city of Lincoln and that he also had 160 acres of land lying northeast of the city. She said they owned a half-section all together, that is, Mr. Stratton senior and Mr. T. A. Stratton, but that T. A. Stratton's property was worth more than the others, and she estimated the property at about $300,000, as near as I can remember.

The plaintiff had just been examined regarding the contents of Mrs. Stratton's letters, and the utmost that can be

claimed by defendant for the evidence quoted is that we are left in doubt whether it refers to the written correspondence or to information previously communicated to the witness, a doubt which is not removed by the other evidence in the record. Prior to December 29, 1890, the plaintiff had met Mrs. Stratton on one occasion only, viz., during a four weeks' visit at the home of a common relative in Hitchcock county. It is not shown that the amount of the defendant's property or that of his mother was referred to during that visit, nor are we at liberty to presume that Mrs. Stratton at that time confided to a comparative stranger, in whom she had no interest, the financial standing of herself or her son, rather than on the subsequent occasion when actively encouraging the suit of the latter for the plaintiff's hand. It is a rule of universal application that all presumptions are in favor of the judgments of courts of general jurisdiction and that one seeking a reversal on the ground of alleged error is required to exhibit the record showing affirmatively that the ruling complained of is not merely erroneous, but also probably prejudicial to his rights. The reasonable inference being that the communication touching the defendant's property was by means of the written correspondence conducted at his request and as an inducement to the marriage contract, it was admissible in evidence and the court did not err in receiving it.

Albert Dole, the plaintiff's father, who was a witness in her behalf, referring to a conversation with the defendant, in which the latter solicited the witness' consent to the proposed marriage, testified as follows:

Q. State what he said.

A. I think he told me at that time that they had a half section within two miles of the Lincoln post-office, and half of it was in his name and the other half in his father's or mother's name; that is the best of my recollection now. And I was wanting to know, curiously, what the property was worth so near the city, so I quizzed him something

about it and solicited the information from him that it was worth a good deal of money, but it was all in lots, or about all in lots.

Q. Did you make any estimate from his representations as to what property he had?

Objection to the witness giving any estimate he made overruled and defendant excepts.

A. As near as I can remember he estimated to me so that I figured out his land, what he had left, was worth about $500 per acre from the lots he had sold. He told me he had sold a few lots off the piece. I don't remember how many.

Q. Off what piece?

A. Off his quarter section, and in platting it it was worth about $500 per acre; something like that.

It is contended that the overruling of the foregoing objection was prejudicial error. Counsel do not attempt a defense of the above ruling in this court, and we assume that it cannot be successfully defended. But is the error prejudicial, calling for a reversal of the judgment? It will be observed that although the question embraces all of the defendant's property, the answer is confined to a particular tract of land; and while the first sentence thereof might warrant the inference that the value mentioned was merely the estimate of the witness, the answer as a whole, in connection with the succeeding one, points unmistakably to the defendant's own estimate rather than that of the witness. We are, after repeated examinations of this part of the record, unable to determine that the ruling under consideration was prejudicial to the defendant. It is not sufficient, as elsewhere stated, that an erroneous ruling may possibly be prejudicial, and that errors not probably conducing to a wrong final decision will be disregarded by the appellate court. (*Vide* Elliott, Appellate Procedure, 539, 632.) True, the jury might have construed the language quoted as referring to the estimate of the witness only, but

such a construction is neither the natural or probable one and will not therefore be presumed by this court.

It was sought by John Paul and other witnesses to impeach the plaintiff's character by proving that she was reputed to be unchaste in the neighborhood of her home, and the following question was excluded on her objection during the examination in chief of the witness named: "Is there anything you know of your own personal knowledge, other than what you have told, relative to her improper conduct?" It was certainly permissible for the defendant to show specific acts of incontinence on the part of plaintiff, whether committed before or subsequent to the marriage contract. If she had been guilty of fornication, that fact would have been a complete defense, since personal purity was one of the implied conditions of her agreement. If she had been guilty of acts wantonly indelicate and inconsistent with the conduct of a pure-minded woman, that fact was admissible at least in mitigation of damage. (*Willard v. Stone*, 7 Cow. [N. Y.], 21; *Palmer v. Andrews*, 7 Wend. [N. Y.], 142; *Williams v. Hollingsworth*, 6 Baxt. [Tenn.], 12; *Cole v. Holliday*, 4 Mo. App., 94.) But we cannot say that the ruling on that question, although erroneous, is prejudicial to the defendant, for the reason that no offer was made from which the court could determine that the evidence was material to the issues of the case. It has been frequently held that such an offer is necessary as a basis for review by petition in error. (*Masters v. Marsh*, 19 Neb., 458; *Hamilton v. Ross*, 23 Neb., 630.)

Exception was taken to the giving of one paragraph of the charge of the court as follows: "With respect to the absolute contract to marry, damages for its breach, and the aggravation thereof by the alleged seduction, you are instructed that the burden of proof is upon the plaintiff to maintain the same by a preponderance of evidence. And with respect to the alleged conditional promise to marry

upon ascertaining the good reputation and character of the plaintiff, the burden is upon the defendant to maintain the same by a like preponderance of evidence." It is said by counsel for defendant that "the burden was upon the plaintiff to establish an unconditional promise, or if there was a condition, that it had been complied with on her part. So plain and just a proposition needs no authority to maintain it." But the question of the soundness of the proposition stated in the instruction we regard as wholly immaterial, since the allegation of an unconditional promise is conclusively established by the proofs. Indeed, were that the only issue in the case, the court might with propriety have directed a verdict for the plaintiff. The evidence upon which this conclusion rests is the numerous letters of the defendant, beginning with that of November 18 above referred to. To set out that correspondence at length would be without profit to the parties hereto or the profession. It is sufficient to say that they abound in expressions of the tenderest regard for the plaintiff and solicitude for health which was somewhat impaired by recent illness. On November 29, referring to certain presents that day sent her, he wrote: "The photo and album are a birthday present, but the ring I hope you will accept as having more significance." And on December 13, referring to her acknowledgment of the letter above mentioned, he wrote, "How glad I was to hear that you had received the little presents all right, and a thousand thanks for accepting the ring in the way you did." Again, on December 18 he wrote in reply to an inquiry by the plaintiff, "In reference to the dress you expect to wear on the day I look forward to that will make me the happiest man on earth, I am satisfied to leave that to your own good judgment." It would be discrediting the defendant's intelligence to permit him to say, in the face of these and many like expressions, that, by the terms of his contract with the plaintiff, he then had under consideration the question of her chastity.

The foregoing observations lead naturally to a consideration of the visit of the plaintiff to defendant's home on the invitation of his mother. Her reception by the latter as well as by the defendant was of the most cordial kind and she appears to have been at once accorded the position of prospective wife and daughter, although the relations of the parties named at the termination of her visit, four days later, is a subject upon which the evidence is irreconcilably conflicting. A statement of the contentions of the parties with respect to this branch of the case is deemed sufficient without even a summary of the evidence. The defendant, as we have seen, contends that on New Year's the plaintiff confessed to him her past criminal relations with the witness Rowley and others, and which fact he confided next day to his mother, to whom, it is claimed, a like confession was made. The alleged confession is, as may be inferred, denied by the plaintiff, who testifies that the defendant, after she had retired on the night in question, entered her room when, as she claims, her seduction was accomplished. There is about the story of each that which suggests the propriety, if not the necessity, of corroboration. But the issue thus presented was by the jury determined in favor of the plaintiff, and the verdict, like other findings based upon conflicting evidence, is conclusive. We find, however, in the subsequent correspondence of the parties much which tends directly to corroborate the plaintiff and to contradict the defendant. For instance, on January 3, the day after her departure from Lincoln, the plaintiff addressing defendant from Indianola, wrote:

"DEAREST AL.: I arrived here safely and feel very well under the circumstances. * * * Darling, there is a place in my heart no one but you can fill, and I realize the fact more and more all the time. However, I am going to be brave and cheerful, and wait until the time comes when we shall not be separated. I cannot help but worry about your mother. I fear there is more the matter with her than

she is willing to admit. I don't imagine this letter will seem very cheerful to you, but I do feel so worried about her that I can't help expressing it. * * * Write immediately so that I may know. I have had so much attention from you for the past week that I miss it now. * * * Give my love to your mother."

The foregoing was followed by letters on the 11th and 19th of the same month, in each of which reference is made to their mutual affection and contemplated marriage. From the last we quote the following: "I have all the confidence in you imaginable, for I know you would not have confided in me as you did if you had not thought me worthy of your undivided love, and you may be sure no gentleman will be of much importance this winter. I do not intend to go with them any more than if we were married, for I think it just as wrong as it will be later." The defendant, replying to the letter of January 2, addressed the plaintiff "Dear Eva," and, after some suggestion of medical treatment for her, adds, "I am sure your father and mother will concur with me, and I assure you my motives are the best, for I would write this if I never expected you to become my wife." Again, on the 15th, after addressing her as "My Darling Girl," he wrote: "How I would enjoy that talk, for I am just as lonely without you as a man can be. * * * Why could we not write our love talks on separate slips of paper and write only sober business talk in our letters proper?" These communications afford unmistakable evidence of the relations of the parties on and prior to the date last above mentioned, and are, to say the least, radically inconsistent with the claim that the defendant had before that time learned from the plaintiff's confession of her illicit relations with other men, including his own sister's husband.

Mrs. Stratton, defendant's mother, who was a witness in his behalf, testified on her examination in chief that while driving from her home to Lincoln in company with the

plaintiff on the morning of January 2 the latter repeated the confession alleged to have been made to the defendant, which included criminal relations with the said Rowley and the witness' son-in-law, Harvey Gunder, only. On cross-examination she was, in substance, asked if she had not on a day named stated to Mr. Starr in front of Opelt's hotel in the city of Lincoln that the alleged confession was made at her home in the presence of her son, and if she did not in said conversation further state to Mr. Starr that the plaintiff during said confession admitted having led an immoral life ever since she was old enough, and that she had been criminally intimate with men generally, including a man then residing in Lincoln. The witness having answered in the negative the plaintiff was permitted to call Mr. Starr for the purpose of impeachment, and who, over the defendant's objection, testified that she had, in a conversation at the time and place named in the foundation question, used the language therein imputed to her. Although the ruling of the court in the admission of that evidence is vigorously assailed by counsel for the defendant, we are unable to say that it is error. It is true that a witness who has been cross-examined on matters collateral to the issues cannot, as to such examination, be afterwards contradicted by other witnesses. But the alleged confession was not a collateral issue of the case. If the witness had previously made statements concerning the admissions of the plaintiff so radically different from her version thereof at the trial, that fact was admissible as bearing upon the question of her credibility. To the trial court is committed some discretion in prescribing the limits at the cross-examination, whether for the purpose of impeachment or otherwise, and in the absence of a clear abuse of that discretion its rulings will not be reviewed by this court.

Finally, it is argued that the district court should have set aside the verdict on account of the misconduct of the plaintiff's attorney "in reading to the jury and commenting

upon a decision of the supreme court of Massachusetts." From the evidence in the bill of exceptions it appears that defendant's attorney in his argument to the jury stated, in substance, that the case on trial was the first of its kind ever brought in Lancaster county, that not a dozen cases of the kind had ever been tried in the state of Nebraska, and but one or two of such cases had ever reached the supreme court. The reason he said that so few cases of the kind were brought is that a woman of fine sensibilities would not sue for damages for the breach of a contract to marry, that such causes are not meritorious and should not be looked upon with approval. Afterward plaintiff's attorney during the closing argument was proceeding to read from notes when interrupted with the objection that the paper from which he was reading was "a copy of a legal decision," which objection was overruled and an exception taken by the defendant. The decision in question is *Wightman v. Coates*, 15 Mass., 1, and so much thereof as read to the jury is a defense of the action for breach of promise to marry, and appears to have been intended as an answer to the argument of defendant's attorney. The practice in this case is certainly not to be commended, but, like other matters pertaining to the trial, it is within the discretion of the court and will not be made the ground of reversal in the absence of probable prejudice to the complaining party. The objection, it will be observed, does not include the matter of the opinion, but goes no further than the question of practice, and therefore presents no question for review by this court. Another answer to this conclusion is that defendant's attorney was the first to offend and will not be heard to complain of remarks outside of the record in reply to his argument. (*Miner v. Lorman*, 66 Mich., 530.) The judgment of the district court will accordingly be

AFFIRMED.