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REPORTS OF CASES

IN THE

SUPREME COURT

OF

NEBRASKA.

SEPTEMBER TERM, 1895—JANUARY TERM, 1896.

VOLUME XLVI.

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.

1895–6.

CHIEF JUSTICES,

T. L. NORVAL,
A. M. POST.*

JUDGES,

T. O. C. HARRISON,
T. L. NORVAL.†

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.

---

* Became Chief Justice January 9, 1896.

† Re-elected November 5, 1895, and took his seat January 9, 1896.

DISTRICT COURTS OF NEBRASKA.

JUDGES.

First District—

C. B. LETTON.....Fairbury.
J. S. STULL.....Auburn.

Second District—

B. S. RAMSEY.....Plattsmouth.

Third District—

A. J. CORNISH.....Lincoln.
CHARLES L. HALL.....Lincoln.
E. P. HOLMES.....Lincoln.

Fourth District—

B. S. BAKER.....Omaha.
CHARLES T. DICKENSON.....Tekamah.
JACOB FAWCETT.....Omaha.
W. W. KEYSOR.....Omaha.
CLINTON N. POWELL.....Omaha.
C. R. SCOTT.....Omaha.
W. W. SLABAUGH.....Omaha.

Fifth District—

EDWARD BATES.....York.
S. H. SEDGWICK.....York.

Sixth District—

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

Seventh District—

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

Eighth District—

R. E. EVANS.....Dakota City.

Ninth District—

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

Tenth District—

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

Eleventh District—

A. A. KENDALL.....St. Paul.
J. R. THOMPSON.....Grand Island

Twelfth District—
W. L. GREENE.....Kearney.

Thirteenth District—
H. M. GRIMES.....North Platte.

Fourteenth District—
G. W. NORRIS.....Beaver City.

Fifteenth District—
M. P. KINKAID.....O'Neill.
W. H. WESTOVER.....Rushville.

PRACTICING ATTORNEYS.

ADMITTED SINCE THE PUBLICATION OF VOLUME XLV.

ACHESON, M. C.
BERGEN, PAUL.
BRADLEY, J. A.
CARE, EUGENE E.
DETWEILER, J. O.
HAGUE, L. W.
LONG, JOHN W.
MACK, JUDAH L.
OLDHAM, WILLIS D.
PATRICK, W. R.
PRATT, EPHRAIM D., JR.
ROGERS, HERBERT M.
SPANOGLE, MARK.
TAYLOR, T. D.
WALKUP, A. E.

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.

AMENDED RULES OF COURT.

6. [NOTICE OF MOTIONS.]—Every application for an order in any case shall be in writing, and, except as to motions for rehearing, shall be granted only upon the filing thereof at least two days before the hearing and due proof of service of notice on the adverse party, or his attorneys, at least three days before the hearing, which, in all cases, must be fixed for one of the session days provided for by rule 1. The notice herein provided for shall conform to the provisions of section 574 of the Code of Civil Procedure, and may be served by a bailiff of this court, or by any sheriff or constable in this state, or by any disinterested person; in the latter case, however, the return must be under oath. Fees for service of said notice shall be allowed and taxed as for the service of summons in proper cases.

25. [ADMISSION OF ATTORNEYS.]—The applicant shall also, with his application, deposit with the clerk the sum of five dollars. The clerk shall enter all sums so received in a book or account kept for that purpose, showing date and name of applicant, and shall pay the same out on order of the chief justice, in payment of the expenses of such examination, and for no other purpose; that is to say, the cost of necessary printing and stationery; to the clerk for each oath and certificate of admission issued to an applicant, one dollar and fifty cents; to each member of the commission conducting the examination, his necessary traveling expenses, and for personal expenses while actually engaged in the performance of his duties, not exceeding five dollars per day.

INSTRUCTIONS FOR PREPARING TRANSCRIPTS FOR THE SUPREME COURT.

1. The caption of the transcript should be as follows:

Pleas before the District Court of the.....Judicial District of Nebraska, in and for the County of .....at a term thereof begun and holden in the City of.....in said County and State, on the..... day of.....One Thousand Eight Hundred and Ninety.....

Present, Honorable.....Judge.

(Here insert name of Judge before whom case was tried.)

.....*Clerk.*

(*McDonald v. Penniston*, 1 Neb., 324.)

2. The copy of the petition should be preceded by the following recital:

Be it remembered, that heretofore, to-wit, on the..... day of.....18....., a petition was filed in the office of the Clerk of said Court in the words and figures following, to-wit:

3. Where an amended petition has been filed and there is no objection on that ground, copy only the *amended* petition. Where there is an appearance and no point is made on the summons, it should not be copied into the record. Other papers which are not to be considered in the supreme court should be omitted from the transcript. (Maxwell, Pleading & Practice [4th ed.], p. 777.)

4. Each subsequent filing or order included in the transcript should be preceded by a minute giving the date of the filing or order, as follows:

And afterwards, on the.....day of..... 18....., there was filed or entered of record in the office of said Clerk a certain.....in words and figures following, to-wit:

5. The complete title, showing the names of all the parties, should be set out in the final order or decree.

6. In cases where a supersedeas bond or undertaking is filed in the district court a copy of such bond or undertaking should appear in the transcript after the copy of the judgment.

7. Immediately preceding the certificate authenticating the transcript insert the date when the court adjourned *sine die* for the term during which the judgment was rendered.

8. The amount of fees of the clerk of the district court for making the transcript should in every case be noted on his certificate.

9. By referring to sections 586 and 675, Code of Civil Procedure, it will be observed that it is a *transcript* of the proceedings that is to be filed in the supreme court. The original papers will not take the place of a properly certified copy. The transcript, when filed, is a part of the records of the supreme court, and, aside from the inconvenience of handling original pleadings, there is no provision of law under which they may be returned to the district court. (*Moore v. Waterman*, 40 Neb., 498.)

10. The different parts of a record should be arranged as follows: The petition in error should appear first. The transcript should follow the petition in error, and the bill of exceptions should follow the transcript. Sometimes exhibits and other papers that belong to the bill of exceptions are mixed with those in the transcript. This should be avoided. The transcript and bill of exceptions should be separately prepared and separately authenticated. The bill of exceptions must sometimes be detached in the supreme court and returned to the district court, while the transcript

remains permanently on file in the office of the clerk of the supreme court. (*Vaughn v. Crites*, 44 Neb., 814.)

11. The transcript must be filed with the petition in error, prior to the issuing of the summons in error. (*Garneau v. Omaha Printing Co.*, 42 Neb., 847.)

12. Bonds that are to be filed in the supreme court should not be attached to other papers.

13. In an error case where summons is waived attach the waiver to the petition in error.

RULES FOR CITATIONS.

1. Abbreviate as follows:
   Atlantic Reporter—Atl. Rep.
   Chapter—Ch.
   Company—Co.
   Edition—ed.
   Federal Reporter—Fed. Rep.
   Insurance—Ins.
   Manufacturing—Mfg.
   National Bank—Nat. Bank.
   Northeastern Reporter—N. E. Rep.
   Northwestern Reporter—N. W. Rep.
   Pacific Reporter—Pac. Rep.
   Page—p.
   Railroad—R.
   Railway—R.
   Section—sec.
   Southeastern Reporter—S. E. Rep.
   Southern Reporter—So. Rep.
   Southwestern Reporter—S. W. Rep.
   Supreme Court Reporter—Sup. Ct. Rep.
2. Soule's Manual is the standard for abbreviations of Reports and Reporters.
3. "County" should never be abbreviated in a citation.
4. The name of an insurance company should be given in full, with the exception as to abbreviating the words "insurance" and "company," thus: *German-American Ins. Co.*
5. The first word of the name of a railroad company should be given in full and the words following should be abbreviated, thus: *Chicago, B. & Q. R. Co.*

6. The standard abbreviations for the names of states should be used.
7. The names of corporations should be given in full where the foregoing rules do not apply.
8. Do not abbreviate titles of text-books.
9. Do not abbreviate names of authors of text-books.
10. In citing text-books the number of the volume, where there is more than one, should precede the author's name.
11. In citing text-books the number or name of the edition, where there is more than one, should be inclosed in [ ] just preceding the page or section, thus: 2 Wharton, Evidence [2d ed.], sec. 490.
12. The title of a case should only contain the name of one plaintiff and one defendant, thus: *Smith v. Jones*, 1 Neb., 4; *Peoria Mfg. Co. v. German-American Ins. Co.*, 61 N. W. Rep. [Ia.], 467; *Chicago, B. & Q. R. Co. v. Douglas County*, 4 L. R. A. [Neb.], 27.
13. "*Et al.*" should be omitted from all citations.
14. Do not insert "administrator," "executor," "trustee," or other designation after names in titles.
15. "*Id.*" should never be used in citations.
16. The state or country in which the decision was rendered should be indicated in all citations from courts of last resort, thus: *Smith v. Jones* 4 Met. [Mass.], 823; *Johnson v. Woods*, 2 Beav. [Eng.], 409.
17. In citing the Federal Reporter do not indicate the state from which the case was appealed.
18. The names of the parties should be printed in italics.
19. The names of the parties should never be omitted from a citation.

See page lvii for table of Nebraska cases overruled.

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

A table of statutes and constitutional provisions cited and construed, numerically arranged, will be found on page lxiii.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NEBRASKA.

SEPTEMBER 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.

MICHAEL D. MURPHY v. WILLIAM D. ERNST.

FILED OCTOBER 1, 1895. No. 6420.

Malicious Prosecution: TIME ACTION ACCRUES. As a general rule, an action for malicious prosecution will not lie until the proceeding complained of has been legally terminated in favor of the defendant therein.

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

Francis Martin and *J. Hall Hitchcock*, for plaintiff in error, cited: *Welch v. Boston & P. R. Corp.*, 14 R. I., 609;

Phillips v. Village of Kalamazoo, 53 Mich., 33; *Labar v. Crane*, 49 Mich., 561; *Olson v. Neal*, 63 Ia., 214; *Johnstone v. Sutton*, 1 T. R. [Eng.], 544; *Ash v. Marlow*, 20 O., 119.

S. P. Davidson, contra, cited: Cooley, Torts [2d ed.], 214; *Griffis v. Sellars*, 31 Am. Dec. [N. Car.], 422; *Womack v. Circle*, 32 Gratt. [Va.], 324; *Payson v. Caswell*, 22 Me., 212; *Severance v. Judkins*, 73 Me., 376; *Turner v. O'Brien*, 5 Neb., 543; *Wertheim v. Altschuler*, 12 Neb., 594; *Palmer v. Keith*, 16 Neb., 93; *Painter v. Ives*, 4 Neb., 126; *Bodwell v. Osgood*, 3 Pick. [Mass.], 379; *Marshall v. Betner*, 17 Ala., 832; *Sweet v. Negus*, 30 Mich., 406.

POST, J.

This was an action for malicious prosecution in the district court for Johnson county. For his cause of action therein the plaintiff below, who is also plaintiff in error, alleged that the defendant, maliciously and without probable cause, made a complaint before one Fugate, a justice of the peace for Nemaha county, charging him, plaintiff, with trespassing upon the land of the said complainant and cutting and removing grass growing thereon. The proceedings before the justice of the peace are shown by the following record introduced in evidence by the plaintiff:

"STATE OF NEBRASKA
v. } ss. September 7, 1891.
MIKE MURPHY.

"In Justice Court, before R. M. Fugate, Justice of the Peace.

"Now comes William Ernst, through his agent, G. L. Ernst, and makes oath and says that one Mike Murphy did, on the 6th and 7th days of September, 1891, trespass on land known as the Sears land, now in the possession of said plaintiff, after being duly warned off the premises, feloniously cut and take away hay. Plaintiff asks for war-

rant. I therefore issue warrant for the arrest of said defendant and place same in the hands of J. M. Stone, constable, returnable on the 7th day of September, 1891, at 1 o'clock P. M.

"September 7, 1891, — o'clock, court called prisoner in court, who pleaded not guilty and introduced letters pertaining to contract for the possession of the land now in controversy. Plaintiff also introduced letters pertaining to contract with B. Sears.

"Return of warrant September 7, 1891. I took the body of Mike Murphy, within named and have him before the within named justice of the peace. J. M. Stone, Constable.

"Plaintiff's witnesses, G. L. Ernst, George Errick, Sr.

"The court, by consent of the prisoner, continued the case until September 8, 1891, in the afternoon, at 7 o'clock P. M.

"September 8, 1891, at 7 o'clock P. M., court called, parties all present. Examination of witnesses for plaintiff. William Ernst first. The court, after hearing all the testimony and deliberations, finds the defendant guilty as charged. It is the judgment of this court that the defendant pay a fine of $25 and costs of suit, which was paid by defendant, costs taxed at $6.75."

Upon the conclusion of the plaintiff's case the defendant requested the court to direct a verdict in his favor, whereupon leave was given to amend the petition by the addition of an allegation charging that the judgment of conviction shown by the foregoing record was unwarranted by the evidence and procured by fraud and in pursuance of a conspiracy between the defendant and the said justice. The motion for a peremptory instruction was thereupon renewed and sustained, which is the error assigned as the basis of this proceeding.

An action for malicious prosecution cannot as a rule be successfully maintained until the proceeding complained of

has been legally terminated in favor of the defendant therein. (*Casebeer v. Drahoble*, 13 Neb., 465; Addison, Torts, 874.) True, an exception to that rule is recognized in cases where a conviction is procured by means of the fraud or perjury of the complainant (*Olson v. Neal*, 63 Ia., 214; 14 Am. & Eng. Ency. of Law, 290), but a careful examination of the record fails to disclose any foundation in the evidence for the application of the exception above noted. In the absence of proof tending to impeach the good faith of the justice of the peace or the complainant, the direction complained of was proper and the judgment must accordingly be

AFFIRMED.

JOSEPH ORGALL, ADMINISTRATOR, v. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY.

FILED OCTOBER 1, 1895. No. 6322.

1. **Death by Wrongful Act:** PECUNIARY INJURY: PLEADING. A petition under chapter 21, Compiled Statutes, for the death of the plaintiff's intestate by the wrongful act of the defendant is fatally defective, which fails to show that the person or persons for whose benefit the action is brought have sustained pecuniary injury by the death of the deceased.
2. ——: ——: ——. Nor will the petition in the absence of such allegation support a judgment for nominal damages. (*Hurst v. Detroit City R. Co.*, 84 Mich., 539.)
3. ——: ——: ——. *Anderson v. Chicago, B. & Q. R. Co.*, 35 Neb., 95, distinguished.
4. **Review.** The court will not review a judgment of the district court upon allegations of error where the successful party is clearly entitled to judgment on the pleadings.

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

Webster, Rose & Fisherdick and *E. W. Metcalf*, for plaintiff in error.

T. M. Marquett, J. A. Kilroy, and *J. W. Deweese, contra.*

POST, J.

This is a petition in error and presents for review a judgment of the district court for Fillmore county. The action below was to recover damages on account of the killing of the plaintiff's intestate, Maria Tatro, by an engine operated by the defendant company on the 26th day of June, 1891. At the trial below, before Hastings, J., and a jury, there was a verdict for the defendant at the conclusion of the plaintiff's evidence by direction of the court, and which ruling is the basis of this proceeding.

The facts which the plaintiff's evidence tends to establish are as follows: On the day of the accident the deceased purchased a ticket from the defendant's station agent at Grafton, good to Denver, Colorado, intending to take passage on the regular west-bound passenger train. On being advised by the agent that the train was two hours and twenty minutes late she decided not to wait at the station, and accordingly returned to the village south of the railroad track, going to the house of a friend, Mrs. Haney, and from thence to the store kept by a Mr. Haney. About an hour and a half or an hour and three quarters after the deceased had returned to the village, an extra or wild train approached the station running at a high rate of speed, estimated by some witnesses at thirty-five miles per hour. Regular warning was given of the wild train, and the witnesses agree that the engine whistle was sounded continuously from the time the train reached the first cross street of the village until it had passed the station, and also that the bell was ringing. At the first sound of the whistle the deceased and Mrs. Haney ran hurriedly toward the station, nearly a quarter of a mile distant. As they ap-

proached the side track, which is forty-five feet south of the main track, the deceased, who was in advance of Mrs. Haney, took the latter by the hand as if to assist her forward. At that point a Mr. Warren stepped in front of the women and raised his hands as if warning them to stop, although no witness was near enough to hear what, if anything, was said by him. They apparently took no notice of the warnings thus given, but ran toward the station platform on the north side of and adjoining the main track. As they approached the main track Mrs. Haney passed the deceased, and when in the act of crossing the track fell and was struck and killed by the engine. The deceased, who had in the meantime stepped from the sidewalk to the west or left-hand side, stooped forward as if attempting to rescue her companion, when she was struck on the head by the steam chest of the engine and also instantly killed. In addition to the rate of speed of the train in question it is alleged and proved that an elevator situated on the east and opposite side of the street from the sidewalk leading to the station partially obstructed the view from the street of trains approaching from the east, and that the view of the track was on that occasion further obstructed by a freight car by the defendant negligently permitted to stand on said track just west of the elevator above mentioned and partly in the street; also, that the sidewalk across the defendant's right of way, and adjacent to the main track, was so negligently constructed as to leave dangerous holes and spaces therein which were liable to cause passers-by to stumble and fall. It is further charged that the deceased's companion, Mrs. Haney, "was entangled by said dangerous sidewalk and thrown in front of the approaching train, and the deceased, in stooping to assist the former in her emergency, was struck," etc. The answer admits the killing of the deceased at the time alleged, but is in effect a denial of all of the other allegations of the petition.

It is strenuously insisted that there was sufficient evidence for the submission of the cause to the jury, and that the court accordingly erred in directing a verdict for the defendant. We are, however, unable to disturb the judgment of the district court, for the reason that, in our opinion, the petition fails to state a cause of action, and the ruling complained of is at most error without prejudice, since a second trial would necessarily result in a judgment adverse to the plaintiff.

The only allegation of the petition as to the next of kin of the deceased is the following: "The plaintiff is the father and next of kin of Maria Tatro, a single woman, who died without issue at the county of Fillmore, Nebraska, on the 26th day of June, 1891, intestate, and on the 29th day of September, 1892, letters of administration were duly issued to the plaintiff by the county court of Fillmore county, and plaintiff has duly qualified as such administrator and entered upon the duties of his office, and as such administrator brings this suit." It is by chapter 21, Compiled Statutes, provided:

"Section 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 distrib-

uted 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 has been frequently held that a petition which does not disclose the existence of some person who has suffered pecuniary injury by the death of the deceased or to whom he would have contributed in a pecuniary way, fails to state a cause of action under the foregoing provisions. (*Topping v. Town of St. Lawrence*, 86 Wis., 526; *Coops v. Lake S. & M. S. R. Co.*, 66 Mich., 448; *Hurst v. Detroit City R. Co.*, 84 Mich., 539; *Charlebois v. Gogebic & M. R. Co.*, 91 Mich., 59; *Anderson v. Chicago, B. & Q. R. Co.*, 35 Neb., 95, and cases cited.) We have not overlooked the following expression of the present chief justice in the last mentioned case: "Under the proof they [the jury] were warranted in inferring that the next of kin were not pecuniarily injured by the death of the intestate, hence the plaintiff was only entitled to recover nominal damages." But that language was used with reference to the case then before the court, by which it was sought by the plaintiff below to reverse a judgment for nominal damages, and in nowise conflicts with the rule here approved, while in *Hurst v. Detroit City R. Co.*, *supra*, it is expressly decided, on the authority of *Franklin v. South E. R. Co.*, 3 Hurl. & N. [Eng.], 213, and *Duckworth v. Johnson*, 4 Hurl. & N. [Eng.], 653, that nominal damages are not recoverable in like cases in the absence of an allegation and proof of pecuniary injury to the next of kin or others beneficially interested in the life of the deceased. Nor was the plaintiff more fortunate

in his proof, from which it appears that the deceased, who was at the time of her death forty-three years of age, had resided in this state and Kansas for twenty years or more, during all of which period the plaintiff was a resident of the state of Wisconsin, and there is in the record nothing to indicate that she had ever contributed to his support, or that he was in any manner dependent upon her. True, the plaintiff was permitted, over the defendant's objection, to prove that the deceased was capable of earning from $3 to $5 per week as a nurse, but that fact alone will not, as we have seen, satisfy the requirements of the statute. Our only embarrassment in thus disposing of the cause is the fact that the arguments of counsel are devoted to the question of negligence alone, from which it may be inferred either that the sufficiency of the petition was not challenged in the district court, or that the question of pleading has been waived by the defendant in order to insure a determination of the cause on its merits in this court; but whatever motives may have led counsel to ignore that question, it cannot be overlooked by us, since it would be an idle and profitless proceeding to remand a cause for trial *de novo* which must inevitably result in a judgment adverse to the plaintiff in error. An actionable wrong is essential to every valid judgment, for, as has been said, "An unsupported judgment is as a foundationless structure." (Elliott, Appellate Procedure, sec. 471.) The direction complained of was right, and the judgment of the district court must be

AFFIRMED.

FRED O'CHANDER V. STATE OF NEBRASKA.

FILED OCTOBER 1, 1895. NO. 7469.

1. **Contempt: NATURE OF PROCEEDINGS.** Proceedings in contempt are criminal in their nature, and the rules of strict construction applicable to criminal preceedings are to govern therein.
2. ———: **APPEAL BOND: INJUNCTION.** An appeal bond in an action for injunction which omits a material condition prescribed by law is insufficient and will not operate to supersede a decree of the district court dissolving an order of injunction and continue the order in force during the pendency of the appeal to this court.
3. ———: **SUFFICIENCY OF COMPLAINT.** The complaint or information in this case examined, and *held* insufficient to sustain the conviction and sentence of plaintiff in error.

ERROR to the district court for Dakota county. Tried below before NORRIS, J.

Barnes & Tyler and *Taylor, Shüll & Farnsworth*, for plaintiff in error, cited: *Smith v. Sahler*, 1 Neb., 310; *Scofield v. State National Bank of Lincoln*, 8 Neb., 16; *School District v. Brown*, 10 Neb., 440; *Steele v. Haynes*, 20 Neb., 319; *Troupe v. Eade*, 42 Ia., 552; *Brevoort v. City of Detroit*, 24 Mich., 322; *Hovey v. McDonald*, 109 U. S., 161; *Slaughter House Cases*, 10 Wall. [U. S.], 273; *Knox County v. Harshman*, 132 U. S., 14; *Hart v. Mayor of Albany*, 3 Paige Ch. [N. Y.], 380; *Eureka Consolidated Mining Co. v. Richmond Mining Co.*, 5 Sawyer [U. S.], 121.

A. S. Churchill, Attorney General, John T. Spencer, and *R. E. Evans*, for the state.

HARRISON, J.

It appears from the record in this case that an action of injunction was commenced against the plaintiff in error in

the district court of Dakota county, and the district judge being absent from the county, the county judge issued a temporary order. That due service of this and a summons in the action was had upon plaintiff in error, who filed an answer to the petition, to which there was a reply and a trial of the issues joined and a submission to the court, as a result of which, in the language of the record, "The said district court did, upon the 9th day of November, 1893, decide that said injunction ought not to have been granted and did make a decree accordingly," or, as stated in another portion of the record, "the plaintiff in error recovered a decree dissolving the injunction." We are thus particular in quoting the statements of the record in reference to the event of the trial for the purpose of showing that while it is disclosed that there was a trial of the matters in controversy, it does not very clearly appear whether a final disposition was made of the case or not, or the adjudication was confined to the dissolution of the injunction. The court, at the request of the plaintiff in the injunction suit, fixed the amount of a supersedeas bond, which was afterwards executed and filed, and a transcript and other necessary papers were filed in this court for the purpose of perfecting an appeal hereto from the decision of the trial court. At a later date it appears that there was an affidavit in the nature of an information filed in the district court, in which it was stated that plaintiff in error had been guilty of violations of the injunction, also setting forth portions of the prior proceedings in respect to the injunction, including the decision, the filing of the bond, and the appeal of the case to this court, the purpose being to procure his punishment for a contempt. Plaintiff in error was brought before the court to answer to the charges made in the complaint. There was filed for him a demurrer to the complaint which, so far as we care to notice it, was general, or questioned the sufficiency of the statements contained in the pleading, which, after argument and submission, was overruled,

there being no other or further pleas, either oral or written, made or filed so far as shown by the record. Upon the facts as they appeared in the information the court adjudged plaintiff in error guilty of contempt and to pay a fine of $50 and the costs, and to do and perform certain acts set forth in the judgment, and in default of compliance with such requirements to be committed.

Errors alleged to have been committed by the trial court during the hearing on the charge of contempt are presented for our examination and determination. The petition for injunction, decree, and some other papers, including the bond which was given as an appeal bond, were attached to and made a part of the affidavit or complaint in the contempt proceedings. "Proceedings in contempt are in their nature criminal, and the strict rules of construction applicable to criminal proceedings are to govern therein." (*Boyd v. State*, 19 Neb., 128; *Johnson v. Bouton*, 35 Neb., 903.) It is very evident that the charge of contempt depended upon the force and efficiency of the bond given to operate as a supersedeas and continue the injunction. The requirements of the law in relation to the bond and its conditions are contained in section 677 of the Code of Civil Procedure, and are as follows: "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 ef-

fect until it is finally decided whether or not the injunction ought to have been granted." The condition in the bond in the case at bar was as follows: "Now, therefore, if the said Charles Holsworth, overseer of said road district No. six (6), of Dakota county, Nebraska, shall pay the amount of the decree, interest, damages, and costs against him in case the said decree shall be affirmed in whole or in part in said supreme court, then the above obligation to be void, otherwise to remain in full force and virtue." By comparison of the condition stated in the bond as given, with the requirements of the law applicable to such a bond as quoted it will at once be noticed that the bond in this case was not conditioned as the law prescribes, but a material portion was omitted. This rendered it insufficient as a supersedeas bond or to continue the injunction in force. (*State v. Thiele*, 19 Neb., 220.) This being true, it follows that the information in the contempt proceedings, based upon the continuance of the injunction by the effect of this bond as one of the necessary elements of the charge, and disclosing upon its face that the bond was so defective as not to fill the purpose for which it was intended, was insufficient to sustain the conviction and judgment predicated upon it, and that the demurrer to it should have been sustained. The judgment of the district court is

REVERSED AND PLAINTIFF IN ERROR DISCHARGED.

DAVID ZIMMERMAN V. STATE OF NEBRASKA.

FILED OCTOBER 1, 1895. No. 7079.

1. **Contempt: NATURE OF PROCEEDINGS.** A proceeding against a party for contempt in this state is in the nature of a criminal prosecution and governed by the rules of construction and practice applicable thereto.

2. ———: REVIEW OF PROCEEDINGS. A judgment for contempt may be reviewed on error in the supreme court in the same manner as criminal cases.

3. ———: ———. In order to secure a review of errors committed during a trial in proceedings for contempt such errors must first be submitted to the court wherein such proceedings were had by a motion for new trial.

4. ———: DEFECTS IN INFORMATION: PRACTICE. Formal defects in an information and warrant or order of arrest must be taken advantage of by objections made in the proper manner before going to trial, otherwise they will be deemed waived.

5. ———: DISOBEDIENCE OF ORDER OF INJUNCTION. The proceedings in this case examined, and *held* fully within the jurisdiction of the trial court as conferred upon it by section 260, Code of Civil Procedure.

ERROR to the district court of Furnas county. Tried below before WELTY, J.

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

A. S. Churchill, Attorney General, T. H. Matters, and *C. J. Dilworth*, for the state.

HARRISON, J.

An action for an injunction was commenced in the district court of Furnas county by one Enos Clark against the Cambridge & Arapahoe Irrigation and Improvement Company to restrain it, or any person acting by, through, or under it, from diverting the waters of the Republican river from the natural channel, and upon the presentation of the petition on the 18th of June, 1894, to the judge of the district court for the allowance of a temporary injunction during the pendency of the suit, the matter of such allowance was set for hearing at 1 o'clock P. M. of the following day, and an order allowed restraining the company, or any person or persons acting by, through, or under it, from committing the acts complained of in the petition for injunction. On the 19th day of June, 1894, an affidavit

was filed in which it was charged that the plaintiff in error had been guilty of a contempt, consisting of a violation of the restraining order made in the injunction suit. He was arrested and brought before the court or judge, and as the result of a trial upon the charge in the affidavit was convicted and sentenced, and to secure a reversal of the judgment these error proceedings have been prosecuted to this court.

The petition in error contains some assignments which refer to errors alleged to have occurred during the trial. It has been said by this court that a proceeding against a party for contempt is in the nature of a criminal prosecution. (*Gandy v. State*, 13 Neb., 445; *Boyd v. State*, 19 Neb., 128; *Johnson v. Bouton*, 35 Neb., 903; *O'Chander v. State*, 46 Neb., 10.) It was also determined in the case of *Gandy v. State, supra*, that "A judgment for contempt may be reviewed on error in the supreme court in the same manner as criminal cases." It would seem to follow that the rules of practice governing error proceedings should be adopted and made applicable to contempt cases where the issues are tried, and among them the one by which a party who desires a review of errors occurring during the trial of a case must file a motion for new trial pointing out such error. (*Davis v. State*, 31 Neb., 243.) There was no motion for new trial filed in this case, hence we cannot review any of the errors assigned which are alleged to have been committed during the trial. This includes the assignment of error regarding the insufficiency of evidence to support the finding and judgment.

There are some assignments which are directed toward what are alleged to be defects in the information and warrant, or order of arrest, in matters of form. These are questions which should have been raised by objections made in the proper manner before going to trial. This was not done, and, if they existed, they were waived. (*Davis v. State*, 31 Neb., 252.)

There are some assignments of error in which it is alleged the judge was without authority of law to fine and imprison plaintiff in error, and was without jurisdiction to try and sentence him, and that the judgment was unlawful and void. The authority to entertain such a proceeding, to try the issues and render judgment, is conferred upon courts and judges thereof. (See Code of Civil Procedure, sec. 260.) The court had jurisdiction of the injunction suit and the judge had authority to make the restraining order, and its obedience was imperative so long as it remained in force, and upon complaint filed of its violation and the party being brought before the judge to answer the charge, upon the evidence adduced during the trial was determined guilty and a sentence imposed such as is contemplated or prescribed by law.

In such portion of the proceedings of the trial court or judge as are properly presented here for review nothing has been assigned or indicated in either the petition in error or argument for plaintiff in error which was erroneous, and the judgment must be

AFFIRMED.

GEORGE B. CHAPMAN v. W. S. GARBER.

FILED OCTOBER 1, 1895. No. 6144.

1. **Contribution: PRINCIPAL AND SURETY: PAYMENT BY RENEWAL OF NOTE.** If a note signed by a principal and two or more sureties is discharged by the execution and delivery of a new note executed by the principal and one of the sureties, and the surety is forced to pay the last note, this does not entitle him to, and he cannot, compel his co-surety or co-sureties on the first note to contribute. The execution and delivery of the second note was not a payment of the first note by the surety alone. It but effected a change in the form of contract.

2. ———: ———: ———. A promissory note to be executed for the

purpose of discharging a prior note signed by a principal and two sureties was presented by the principal maker to one of the sureties for his signature, it then bearing the signatures of the principal and other surety on the prior note. *Held*, In the absence of any agreement or understanding with his co-surety on the prior note in regard to his signing the second note as surety, he had the right to refuse to sign the second note, or he could sign it in such manner as to limit or modify his liability and make it other than that of a surety, and, if he did so sign it, the surety, being compelled to pay it, could not exact contribution from him.

3. **Negotiable Instruments:** PRINCIPAL AND SURETY. The opinion in the case of *Stump v. Richardson County Bank*, 24 Neb., 522, examined and distinguished.

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

Davis & Hibner, for plaintiff in error.

Reese & Gilkeson, contra.

HARRISON, J.

The plaintiff in this action stated in his petition, in substance, that Al. E. Ewan, as principal, and the plaintiff and defendant, as sureties, of date July 13, 1889, signed and delivered to the Capital National Bank a promissory note in the sum of $300, payable ninety days after date; that the note was not paid at its maturity, but was renewed, and the time of payment extended three several times, the last of which renewals was of date November 17, 1890, and before maturity of the last of the renewal notes the principal, Al. E. Ewan, became insolvent and absconded from or left the state, and on the 26th day of November the plaintiff paid the amount of indebtedness. The relief prayed for was judgment for $150, or one-half the amount paid, with interest, or for contribution as co-surety. The defendant in his answer admitted signing as surety the note declared upon in plaintiff's petition; denied that there were

any renewals of it, and further pleaded that it was paid in full by the principal maker, and that the other notes which were signed by plaintiff and defendant as sureties for Ewan were by him paid; that on August 16, 1890, Ewan, as principal, and plaintiff, as surety, signed a note in favor of the Capital National Bank for the sum of $300, payable ninety days after date, which the defendant also signed as follows: "W. S. Garber, guarantying note good and collectible," and not as surety; that this note was paid November 26, 1890, by the plaintiff and he has sued the defendant in this action for one-half of the amount then paid. The reply of plaintiff is as follows:

"Comes now the plaintiff, and for reply to the defendant's answer herein filed—

"1. Admits that the defendant signed said note as surety and co-surety with the plaintiff, but denies that said note was paid by Al. E. Ewan, and alleges that said note was never paid, but was renewed from time to time until the same was paid by this plaintiff as alleged in his petition, and denies each and every allegation of new matter in said answer set forth."

The result of a trial in the district court, a jury being waived, was a judgment for defendant, to reverse which is the object of this error proceeding on behalf of plaintiff.

It appears from the evidence that the four notes were executed and delivered to the bank and that the second was a renewal or payment of the first, the third of the second, and the fourth of the third. That the first, second, and third were signed by plaintiff and defendant as sureties for Al. E. Ewan, the principal maker; that the fourth was signed by the principal and presented to the plaintiff, who signed and gave it to the principal, who presented it to defendant to sign; that defendant refused to attach his signature to it in the relation of surety, but did sign it in the manner we have hereinbefore indicated, after which the note was delivered to the bank and the third of the series

canceled and surrendered to the parties. It does not appear that there was any understanding or agreement between plaintiff and defendant in regard to signing the notes and their relative rights and positions created or to be established thereon. It is urged by counsel for plaintiff that if the indebtedness evidenced by the third note was extinguished or paid by the execution and delivery to the bank of the fourth, that, inasmuch as plaintiff signed the last note as surety and it paid the third, on which the defendant was his co-surety, the liability of the defendant to contribute to the payment was established by such satisfaction of the third note. This argument in behalf of plaintiff is not sound and the position assumed is untenable. If the fourth note, or the one by which the third was paid, had been the individual note of the plaintiff it would have been a payment by him and would have entitled him to contribution from defendant, but the fourth note being the obligation of the principal debtor and the plaintiff, and also signed by defendant, was not a payment of the debt by plaintiff and did not create the right in him to call upon the defendant for contribution. (*Bell v. Boyd*, 13 S. W. Rep. [Tex.], 232; the doctrine which is referred to with approval in *Smith v. Mason*, 44 Neb., 610.) It is further contended by counsel for plaintiff that inasmuch as plaintiff and defendant had signed the first note as co-sureties, and created the liabilities each to the other by such act of signing, it was not competent or within the power of defendant to alter or modify the existing liability as between him and his co-surety. Here we will again call attention to the facts attending the execution of the fourth note, or last of the series which figured in the transactions out of which arose the present controversy. There was no agreement or understanding between plaintiff and defendant in regard to signing any of the notes. When the last one was executed the principal and plaintiff attached their signatures to it and it was then entrusted to the principal to

obtain that of the defendant, who refused to again sign as surety, but signed it in the manner herein shown, and not so as to be liable to plaintiff as a co-surety, and the note was then delivered to the bank and the third of the notes given was canceled and surrendered and this one took its place. The defendant had the right to refuse to sign the last note, or to sign it in the manner or with such restrictions as to liability as he chose or desired to make, and the plaintiff cannot recover against him in this action as a co-surety.

We are cited by counsel for plaintiff to the case of *Stump v. Richardson County Bank*, 24 Neb., 522, and it is insisted that the rule therein announced is applicable to the facts and circumstances developed in the case at bar and decisive of the questions involved. A careful reading of the case referred to convinces us that it does not conflict with the rule announced herein. It must be borne in mind that in all cases of this nature the actual intention of the parties to an instrument, or the actual relationship which exists, may be shown, regardless of the form which the transaction may have assumed or which may have been attempted to place upon it, and in the case of *Stump v. Richardson County Bank, supra*, this doctrine was applied: That there were no facts proved tending to establish a change in the relationship between the parties litigant at the making and indorsing of the first note prior to or at any renewal of it, the change made being merely in a matter of form. In the case at bar the facts show both an intention to change the relationship and an expression of the intention in the form of signature, and to make a change which it was entirely competent and within the power of defendant to make if he so desired. The judgment of the district court is

AFFIRMED.

FRED GROSSMAN V. STATE OF NEBRASKA.

FILED OCTOBER 1, 1895. NO. 7713.

1. **Criminal Law:** STATEMENTS OF COUNSEL: EVIDENCE: REVIEW. Mere statements made by a counsel in the course of an argument, even though contained in a bill of exceptions, cannot be considered as evidence of the facts so stated.
2. **Conflicting Evidence:** REVIEW. Facts determined upon consideration by the district court of contradictory affidavits will be presumed by the supreme court to have been fully established by the proofs.

ERROR to the district court for Lancaster county. Tried below before HOLMES, J.

R. D. Stearns, for plaintiff in error.

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

RYAN, C.

The plaintiff in error was convicted in the Lancaster county district court of unlawfully and feloniously receiving stolen property of the value of $63.

The first error argued is that the court erred in ordering five talesmen to be called to fill the panel. The grounds of objection alleged to this procedure are that in the first instance the court, upon request, had directed a special panel to be drawn, and before this panel was exhausted had required the sheriff to call talesmen for the trial of this cause. In the bill of exceptions we find a *venire facias* requiring the sheriff to summon twenty persons named to serve as petit jurors. This was served upon eighteen of the persons named and required their attendance forthwith. This venire was issued and served February 19, 1895, and on the same day the jury in this case was impaneled. The record of the proceedings of the court in this trial recited

that "the impaneling of the jury herein was entered upon, and the regular panel of petit jurors being exhausted and the jury in the case not being complete, it is by the court ordered that the sheriff of Lancaster county be, and he is hereby, ordered to call talesmen qualified to serve as jurors in this case, to which the defendant duly excepts," etc. There was no affidavit filed as to what proceedings were in fact had in court. The bill of exceptions recites what was said by the counsel for the plaintiff in error, to the effect that while twenty persons had been summoned but three were present; that the court had excused jurors from the panel without counsel for the accused being present or having knowledge of that fact. These statements of the counsel, while they may have been in fact true, were not evidence. This being the case, we have before us no proof of the existence of the facts showing the alleged abuse of discretion by the district court.

There are matters complained of, for instance, the permitting of outbursts of applause, the separation of one juror from the others contrary to the direction of the court in that regard, and the fact that there was an earnest conversation between the county attorney and a juror before the trial was concluded and after its commencement. It is a sufficient answer to this class of objections to say that these matters were matters of fact considered and determined by the district court upon conflicting evidence and that there is perceived no reason for interfering with the conclusions reached.

The evidence adduced by the state was amply sufficient to justify the conviction complained of if the jury believed it in preference to that offered by the plaintiff in error in contradiction.

We find no errors in regard to the instructions as given or as refused. Indeed, if in any single one there was error we would be powerless to review it, for all the instructions were grouped in two classes in the assignment of er-

rors in the motion for a new trial,—the one pertaining to instructions given; the other, to those refused.

The record has been carefully examined and re-examined in the light of the brief presented by the plaintiff in error, but without any substantial ground of complaint being found. The judgment of the district court is

AFFIRMED.

WILLIAM BOWEN V. STATE OF NEBRASKA ET AL.

FILED OCTOBER 1, 1895. No. 7370.

1. **Review**: STIPULATION FILED BELOW AFTER JUDGMENT. A stipulation of the facts filed in the district court after its judgment has been rendered cannot be considered upon proceedings for the review of such judgment in the supreme court.

2. ———: RECORD. Where the questions presented in error proceedings are dependent upon the existence of certain facts there can be no review of such questions in the absence of a showing that any evidence was introduced upon the trial in the district court.

ERROR to the district court for Holt county. Tried below before KINKAID and BARTOW, JJ.

H. M. Uttley, for plaintiff in error.

H. E. Murphy, contra.

RYAN, C.

The district court of Holt county fixed the penal sum of the bond of Barrett Scott at $70,000 in a prosecution therein pending. Upon an application for a writ of *habeas corpus* this court held the penal sum named not excessive. (*In re Scott*, 38 Neb., 502.) The petition in the case now under consideration was filed December 4, 1893, in said

district court by the defendants in error and an injunction allowed December 6 to prevent the release of Barrett Scott by plaintiff in error, the county judge of said county, upon a recognizance proposed to be by him approved. From the answer found in the record it appears that the county judge of Holt county, at the time the petition was filed, was taking steps toward admitting Barrett Scott to bail in the sum above named. It does not appear, however, when this answer was in fact filed nor that it ever was filed. The reply was filed December 11, 1893. A stipulation was filed December 12, 1893, in which it was admitted that the district court of Holt county was in session November 27, 1893, and was transacting business, and on that day took a recess until the 5th day of December, 1893, and that at the time of the taking of the bond of Barrett Scott both judges of said district court were absent from Holt county and were holding court in the counties of Sheridan and Dawes in said district, and that at the time of the filing of the stipulation the September term of the district court of Holt county had not yet adjourned. While the stipulation was filed December 12, 1893, the trial was had and decree entered on the day previous. A motion in the nature of a motion for a new trial was overruled on December 12, 1893, from which we are led to infer that the stipulation above referred to was perhaps filed after the said motion was passed upon. However this in fact may be, it is clear it was not filed early enough to have received consideration upon the trial. The record purports to contain a bill of exceptions, but we can find nothing of the nature of evidence except the stipulation to which reference has already been made. We cannot, therefore, determine this error proceeding upon the facts, and these being eliminated, no question remains for our consideration. The judgment of the district court is, therefore,

AFFIRMED.

JOHN B. WALKER V. STATE OF NEBRASKA.

FILED OCTOBER 1, 1895. No. 6887.

1. **Homicide:** DEFENSE OF INSANITY: TRIAL. Where insanity or lunacy has not originated since the offense charged is alleged to have been committed, there is no requirement that the existence of such lunacy or insanity should be determined by a jury impaneled to determine whether or not the accused is of sound mind.
2. **Murder:** PENALTY. The offense charged having been committed before chapter 44, Session Laws, 1893, went into effect, it was not necessary that the jury in the verdict of guilty should fix the penalty which should be inflicted.

ERROR to the district court for Dawson county. Tried below before HOLCOMB, J.

C. W. McNamar, for plaintiff in error.

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

RYAN, C.

Plaintiff in error was, in the district court of Dawson county, convicted of murder in the first degree. There was no controversy as to the fact of the homicide. The principal questions raised were as to the insanity of the accused when the act was committed and when the trial took place. When the arraignment was about to be had there was a showing of the probable unsoundness of the mind of the prisoner, to such an extent that he could not assist in the conduct of his defense, wherefore it was insisted that he should not be required to plead or enter upon his defense until a jury should be impaneled and a trial be had as to his insanity. Upon the showing made, including an examination by the court of the accused, the court found and entered of record his finding that "the defendant un-

derstands the nature of the charge made against him, and that he is competent to make his defense in the action and competent to plead to the information filed against him." The court further found that the question of the sanity of the accused was properly triable upon a plea to the information. This was on the 12th day of September, 1893, and on the 23d of November thereafter, immediately following, the court further found "that no other or different causes or reasons exist therefor [that is, as to prisoner's sanity] than heretofore presented to the court, that the alleged insanity, if existing, began and was existing prior to said homicide, and did not occur since the commission of the alleged homicide, and is a matter properly triable upon the main issue in the case." As facts, these findings were fully sustained by the evidence submitted. Counsel for the plaintiff in error cites but two sections of the statute in his argument upon the right to have tried by a jury the question of insanity before being compelled to plead to the information or make a defense against its charges. Of these sections the first cited (Criminal Code, sec. 553) applies solely to the sanity of the person under sentence of death. The other (Criminal Code, sec. 454) is limited to persons who become lunatic or insane after the commission of the offense. In each of these classes a jury trial must already have been had before insanity supervened so that otherwise than by the methods provided in the above sections no trial to a jury of the fact of his insanity or lunacy could be had by the person under conviction. Where, however, the alleged insanity or lunacy is claimed to have been in existence before trial upon information is begun, the legislature probably assumed that no provision for an independent trial of the question of sanity was necessary, therefore no such provision was made for such an independent trial. In the absence of such a provision of the statute we can perceive no reason which would justify the district court in submitting twice to a jury the question of

the insanity or lunacy of the person accused of a criminal offense. The evidence was not so clearly wanting to sustain the verdict of the jury, sanctioned as it was by the refusal of the district court to grant a new trial, that this court should interfere and by a reversal set aside the judgment of the district court, even though as an original proposition we might believe the plaintiff in error at the time of the homicide was of unsound mind.

All the instructions given were by the motion for a new trial, as well as by the petition in error, criticised in a single group. In a case of ordinary importance it would be sufficient to note this fact as affording a sufficient reason for disregarding this assignment if there was found in the group a single instruction not open to criticism. Treating this assignment, however, as a challenge of the correctness of the instructions as a whole, we are unable to agree with the counsel for the plaintiff in error in his somewhat technical criticisms. We have, however, gone a step further and have examined each instruction separately, and have been able to find no substantial ground of complaint in either of them.

It is insisted that the jury should have fixed the penalty in the verdict in accordance with the provisions of chapter 44, Laws, 1893. The provisions of that act in terms are restricted to any person who shall after its passage commit one of the crimes therein described. The act in question had no emergency clause and was approved April 8, 1893, so that at the time the homicide was committed (May 11, 1893) chapter 44 aforesaid was not yet in effect. There was, therefore, no requirement that the jury in this case should fix the penalty which should be inflicted upon the plaintiff in error. The judgment of the district court is

AFFIRMED.

January 10, 1896, fixed for the execution of the sentence imposed by the district court.

JOHN P. HEALD ET AL. V. POLK COUNTY.

FILED OCTOBER 1, 1895. NO. 5704.

1. **Office and Officers:** COMPENSATION. When the law prescribes the duties of a public officer and fixes the compensation of such officer he must perform all the duties required of him by the law for such compensation. *State v. Silver*, 9 Neb., 85, and *Bayha v. Webster County*, 18 Neb., 131, reaffirmed.

2. **County Clerks:** COMPENSATION FOR MAKING TAX LISTS. By the statute in force in 1883 county clerks of counties having less than 25,000 inhabitants were required as a part of the duties of their office to make out the tax lists of such counties for said year, and for this service such clerks were not entitled to any extra compensation.

3. ———: ———: FEES: COUNTY BOARDS: ALLOWANCE OF CLAIMS. The county clerk of such a county in the year 1883 duly made report to the county board of all fees received by him as such clerk for said year. Such report was by the county board approved, and the clerk retained of the fees collected $1,500, that sum being his compensation as fixed by the law. Said clerk duly filed a claim of $200.24 against said county for making out the tax list of the county for said year, which claim was duly audited by the county board and paid to said county clerk. In a suit by the county against the clerk and the sureties on his official bond to recover this sum, *held*, (1) that the county board, in examining the reports made to it by said clerk of fees received by him as such officer, and in adjusting the account between the county and said clerk, exercised ministerial functions only (*Kemerer v. State*, 7 Neb., 130, and *State v. Roderick*, 25 Neb., 629, limited and reaffirmed); (2) that the action of the county board in examining and adjusting the reports made to it by the clerk of fees received by him for the year 1883, and its action in allowing the clerk the claim filed against the county for making the tax list, were independent transactions; (3) that the county board, in passing upon the claim filed against the county by the clerk for making up the tax list, exercised judicial functions, and its decision in the premises not having been appealed from was final; (4) that the fact the claim presented by the clerk for making up the tax list was without merit, and was one for which the county was not legally liable, did not oust the county board of jurisdiction in the premises.

4. Counties: COUNTY BOARDS: CLAIMS: ALLOWANCE: RES ADJUDICATA. The counties of this state are bodies corporate and politic. Their powers as such bodies are exercised by their county boards. Such boards are invested with exclusive, original jurisdiction to hear and determine, to allow or disallow, all claims filed against their counties. In passing upon such claims they act judicially and their decisions in the premises are conclusive unless appealed from.

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

Holmes, Cornish & Lamb, for plaintiff in error, cited: *Dixon County v. Barnes*, 13 Neb., 294; *Brown v. Otoe County*, 6 Neb., 111; *Bowers v. Rice*, 19 Neb., 578; *Lamb v. Briggs*, 22 Neb., 144.

Harry M. Marquis, County Attorney, contra, cited: *State v. Silver*, 9 Neb., 85; *State v. Ream*, 16 Neb., 681; *Palo Alto County v. Burlingame*, 32 N. W. Rep. [Ia.], 259; *Board of County Commissioners v. Sheehan*, 43 N. W. Rep. [Minn.], 690; *Chicago, B. & Q. R. Co. v. Bernard*, 32 Neb., 306; *Thompson v. Pioneer Press Co.*, 33 N. W. Rep. [Minn.], 861; *Bowers v. Rice*, 19 Neb., 578; *McNamara v. Cabon*, 21 Neb., 590; *Black v. Cabon*, 24 Neb., 248; *Marsh v. Snyder*, 14 Neb., 8; *Lewis v. Watrus*, 7 Neb., 477; *Crowell v. Johnson*, 2 Neb., 156; *Wausau Boom Co. v. Plumer*, 5 N. W. Rep. [Wis.], 54.

RAGAN, C.

John P. Heald was the duly elected, qualified, and acting county clerk of Polk county during the year 1893. This suit was brought by Polk county against Heald and the sureties on his official bond as such clerk to recover $200.24 fees which it is alleged Heald collected and retained as county clerk for said year in excess of the compensation allowed him by law for services rendered as such clerk for such year. Polk county had a verdict and judg-

ment and Heald has prosecuted to this court a petition in error.

The undisputed evidence in the case is that Polk county in the year 1883 had a population of less than 25,000 inhabitants; that Heald made out the tax list of said county for said year, and made out and filed with the board of commissioners of said county his claim against it for $200.24 for making out such tax list; that such claim was duly audited, a warrant drawn on the treasurer in favor of Heald for said amount and the same duly paid; that Heald made a report to the county authorities of all the fees received by him for the year 1883 as such county clerk, except this item for making up the tax list; that the county board examined his reports, approved the same, and allowed him to retain fees, besides the tax list item, to the amount of $1,500 for said year. The law in force at that time fixed the compensation or salary of county clerks of counties having less than 25,000 inhabitants at $1,500 per year. There was no law in force in that year which allowed county clerks in counties having less than 25,000 inhabitants any extra compensation for making tax lists. The law then in force fixing the compensation of such county clerks was section 1 of an act passed and approved February 15, 1877, and which took effect January 1, 1878. This law limited the compensation of such county clerks to $1,500 per year, and required them to account and pay over to the county all fees received by them in excess of said sum of $1,500. When the law prescribes the duties of a public officer and fixes the compensation or salary of such officer by the year, then such officer must perform all duties required of him by law for the compensation fixed. (*State v. Silver*, 9 Neb., 85; *Bayha v. Webster County*, 18 Neb., 131.) At the time Heald qualified for the office of county clerk, and before that time, the law made it the duty of county clerks of counties having less than 25,000 inhabitants to make out the tax lists of their counties for

each year. This was not extra work. It was as much a part of his duty to make out the tax lists because he was county clerk as it was his duty to file chattel mortgages brought to his office for that purpose. By section 44, chapter 28, Compiled Statutes, 1893, it is provided that the county clerk, and other officers, shall keep a book to be known as a fee-book, in which he shall enter each and every item of fees collected by him, the name of the party from whom he received the fee, the time of receiving the same, the amount received, and for what service the fee was charged. And by section 43 of said chapter it is made the duty of such county clerk, on the first Tuesday of January, April, July, and October of each year, to make a report under oath to the county board showing the different items of fees received by such officer for services performed by virtue of his office. And by section 45 of said chapter it is provided, that if the clerk shall omit to comply with said sections 43 and 44 he shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined; and if he shall make a false report under oath he shall be guilty of perjury and punished accordingly. By section 43, chapter 18, Compiled Statutes, 1893, it is provided that all persons chargeable with money belonging to any county shall render their accounts to and settle with the county board at the time required by law, and pay into the county treasury any balance which may be due the county and take receipts therefor.

In *Kemerer v. State*, 7 Neb., 130, it was held that a county board, in examining the reports made to it by county officers and in settling the account between such officers and the county, exercised ministerial functions only. This case was approved and followed in *State v. Roderick*, 25 Neb., 629. Following and relying upon these decisions, the argument of the county here is that the $200.24 allowed by the county authorities of Polk county to Heald for making the tax list constituted part

of the fees which he received in the year 1883 for services rendered by him as such county clerk, and which fees it was his duty to report to the county board and account for. We cannot adopt this argument. The law, it is true, required the county clerk to report to the county board all fees which he had received for services performed by him as such officer; but the fees which the clerk was required to account for was the compensation prescribed by law for the service rendered by him as such county clerk—the legal fees which he was authorized by law to charge and collect. As already stated, he was not entitled to any fee for making out the tax list for the year 1883. The money appropriated to Heald by the county board for making the tax list was in the nature of a gratuity, or donation. But whatever may be the character of this claim allowed to Heald by the county board, such claim was not a fee prescribed by law as a compensation to Heald for a service he had performed as such county clerk.

Another argument of the county is that the allowance by the county board of Heald's claim of $200.24 for making out the tax list for the year 1883, and the examination and approval of the reports made by him of the fees collected as county clerk for the year 1883, were parts of one and the same transaction, and that since the county board exercised only ministerial functions in examining Heald's reports and adjusting his accounts with the county, the board exceeded its authority in allowing Heald $200.24 for making out the tax list, as by that act the board increased the salary or compensation allowed Heald as clerk for the year 1883 by that amount; and that the board had no jurisdiction or authority to so increase the compensation of Heald and that its action in that respect was simply void. We think the cases last cited above from the 7th and 25th Nebraska, in so far as they hold that a county board exercises only ministerial functions in its examination of the reports of county officers and in settling and adjusting the accounts

between such officers and the county, are correct. It is provided by the statutes (see Compiled Statutes, 1893, secs. 43, 44, 45, art. 1, ch. 18) that persons chargeable with money belonging to any county shall render their accounts to and settle with the county board and pay any balance which may be found due into the county treasury; and if any person shall refuse to render true accounts or settle, the county board shall adjust the accounts of such delinquents according to the best information it can obtain, ascertain the balance due the county, and institute a proper action to recover such balance; and in such suit the delinquent shall not be entitled to any commission and shall forfeit and pay to the county a penalty of twenty per cent of the amount found due the county; and that it shall be the duty of the court in which any such action is brought to include such penalty in the judgment rendered. It is evident from this statute that the finding made by a county board in adjusting the accounts of an officer with his county is not conclusive upon either the officer or the county; but in a suit by a county against an officer to compel him to pay over fees collected the finding of the county board, made upon an examination and settlement of such officer's reports to it of the amount due from the officer to the county, is at most *prima facie* evidence of the correctness of the status of the account between the officer and the county. But the holding of said cases last cited should not be extended beyond the point stated and they are not applicable or controlling under the facts in this case. The action of the county board in examining the four reports made to it by Heald of fees received by him as county clerk for the year 1883, the approval of such reports and the adjusting of the accounts of Heald with the county, and its action in allowing the claim Heald filed against the county for making the tax list, were not parts of one and the same transaction. Heald had no valid claim against this county, and it may be conceded that the allowance made by the board

of his claim for making the tax list was a mere shift and device resorted to by the board for the purpose of increasing Heald's compensation as county clerk. The allowance of this claim was contrary to law and the money was appropriated for an unlawful and unauthorized purpose; and each member of the county board who voted for such appropriation may have thereby rendered himself and the sureties on his official bond liable to the county for the money so misappropriated. The members of county boards are trustees and agents of the public charged with the performance of certain duties and invested with certain powers, and among these is that of conserving the public funds and paying them out only for lawful purposes; and when a county board appropriates the money of the public for any purpose, its members must know at their peril that such purpose is one authorized by law. But by section 20, article 1, chapter 18, Compiled Statutes, 1893, each county in this state is declared to be a body politic and corporate; and by section 21 of said chapter it is declared that the powers of a county as a body corporate or politic shall be exercised by a county board; and by subdivision 3 of section 22 of said article and chapter it is declared that the county board shall have power to make all contracts and to do all other acts in relation to the property and concerns of the county necessary to the exercise of its corporate powers; and by subdivision 5 of section 23 of said article and chapter the county boards are given power to examine and settle all accounts against the county and all accounts concerning the receipts and expenditures of the county. By section 37 of said article and chapter it is provided that before any claim against a county is audited and allowed such claim shall be verified by the oath of the claimant or his agent and filed with the county clerk, and that if the claim be disallowed in whole or in part, the claimant may appeal from the decision of the board to the district court; and by section 38 of said article and chap-

ter it is provided that any taxpayer of the county may appeal from the allowance of any claim against the county. This court has many times construed these statutes, and it has been uniformly held that a county board is invested with exclusive original jurisdiction to hear and determine, to allow or disallow, all claims filed against the county; that a county board, in passing upon a claim filed against the county, acts judicially, and that its decision in the premises, if unappealed from, is final. (*Brown v. Otoe County*, 6 Neb., 111; *State v. Buffalo County*, 6 Neb., 454; *Dixon County v. Barnes*, 13 Neb., 294; *Ragoss v. Cuming County*, 36 Neb., 375; *State v. Churchill*, 37 Neb., 702; *Sioux County v. Jameson*, 43 Neb., 265.)

In this action the county seeks to recover from Heald money paid to him on a claim filed by the latter against the county. This claim was duly verified by Heald, filed with the county clerk, examined by the county board and allowed, and as no appeal was taken from this action of the county board, this suit cannot be maintained. The claim ought not to have been presented to the county, as it did not owe Heald anything, and the board was quite as well aware of this as was Heald himself; but the fact that the claim presented was without merit, or was one for which the county was not legally liable, did not oust the county board of jurisdiction in the premises. Jurisdiction is authority to hear and decide. There were two parties to this proceeding, Heald and the county. There was an issue made by the filing of the claim, namely, whether the county was liable for the claim, and there was a judgment that the county was liable and that Heald should recover. Here then was not only jurisdiction, but on the part of the board judicial action and the exercise of judicial discretion. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

F. W. RAGOSS ET AL. V. CUMING COUNTY.

FILED OCTOBER 1, 1895. No. 5778.

County Clerks: FEES: ALLOWANCE OF CLAIMS BY COUNTY BOARDS. The facts and the questions of law involved in this case are in all respects similar to those involved in *Heald v. Polk County*, 46 Neb., 28, decided herewith, and on the authority of that case the judgment of the district court rendered herein is reversed.

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

J. C. Crawford, M. McLaughlin, and *T. M. Franse,* for plaintiffs in error.

H. C. Brome and *P. M. Moodie, contra.*

RAGAN, C.

The county of Cuming brought this suit in the district court of that county against F. W. Ragoss, as principal, and the sureties on his official bond as county clerk, to recover the amount of certain fees which the county alleged Ragoss, during his term of office, had collected for services performed by him as such clerk and had retained in excess of the amount which he was allowed by law to retain for the services performed by him as such clerk. The county had a verdict and judgment, and Ragoss and the sureties have prosecuted to this court petitions in error.

It appears that during the time Ragoss was in office he made up the tax lists for the county, made out the road supervisor's books, canvassed election returns, and performed other services which, under the law as it then existed, it became his duty to perform without any extra compensation over and above the salary or compensation attaching to the office of county clerk. For these extra services per-

formed by Ragoss he filed his claims with the county clerk of said county. These claims were audited and approved by the county board of said county, warrants drawn therefor in favor of Ragoss on the treasurer and by him paid. The suit is in effect one by the county to recover back this money unlawfully paid by it to Ragoss for such extra services performed by him. The facts and the questions of law involved are in all respects similar to those involved in the case of *Heald v. Polk County*, 46 Neb., 28, and following that case the judgment here must be reversed and the cause remanded.

REVERSED AND REMANDED.

EDWARD J. COLLINS V. STATE OF NEBRASKA.

FILED OCTOBER 1, 1895. NO. 7572.

1. **Criminal Law:** WITNESSES: RE-EXAMINATION. As a general rule the re-examination of a witness should be limited to the points arising out of the cross-examination; but whether this rule shall be strictly enforced or not seems to rest entirely in the discretion of the trial judge. (*Schlencker v. State*, 9 Neb., 241.)

2. ———: ———: ———. It is competent for a witness on his redirect examination to make clear or complete matters left obscure or incomplete by his answers on cross-examination.

3. ———: RULINGS ON EVIDENCE: OBJECTIONS: REVIEW. In reviewing the rulings of the trial court in receiving and rejecting evidence this court will confine its examination to the objections made at the trial. (*Hill v. State*, 42 Neb., 503.)

4. ———: EVIDENCE: DYING DECLARATIONS. Dying declarations, to be admissible, must be made under a sense of impending death; but it is unnecessary that the deceased should have stated at the time of making the same that he was about to die. It is sufficient if this state of mind appears from other testimony. (*Fitzgerald v. State*, 11 Neb., 577.)

5. ———: ———: RES GESTÆ. The term "*res gestæ*" means things done in and about, and as a part of, the transaction out of which the litigation in hand grew and on which transaction said litigation is based.

6. ———: ———: ———. The declaration of an injured person, who subsequently dies from such injury, as to the cause of his injury, though made out of the presence of the party accused of inflicting such injury, and made under such circumstances as not to be admissible as the dying declaration of the deceased, is, nevertheless, competent evidence as part of the *res gestæ*, provided the declaration was made so near the time of the infliction of the injury and under such circumstances as to raise the presumption that it is an unpremeditated explanation thereof.

7. ———: ———: ———. Whether the declaration of a person, since deceased, is competent evidence, as being part of the *res gestæ* of some transaction occurring in the life of said deceased, in any case, must be determined from the facts and circumstances surrounding the case on trial.

8. **Homicide**: DYING DECLARATIONS: RES GESTÆ. One McPherson about midnight was wounded by a pistol shot, of which wound he died a few days afterwards. At the time of the shooting he and one Dale were stealing coal from a railroad yard. McPherson was found insensible, where shot, shortly afterwards, but soon thereafter regained consciousness. He was then removed to a hotel near by and his wound dressed. About two hours and a half after the shooting he stated to those in attendance upon him at the hotel that "Dale had shot him accidentally." It did not appear from any statements of McPherson, or other evidence, that when he made said declaration he was possessed of the conviction that he was mortally wounded and about to die. No inquiries were made of McPherson by those who found him in the railroad yard, while there, as to how he came to be shot. McPherson made no statements while in the railroad yard as to who shot him. It was not made to appear that McPherson was unable to speak while in the yard after regaining consciousness and before being removed; nor was it made to appear that he lost consciousness or became unable to speak at any time after reaching the hotel and before the making of such declaration. On the trial of one Collins for the murder of McPherson the prisoner offered in evidence McPherson's declaration above quoted. *Held*, (1) that the declaration was not competent evidence as the dying declaration of McPherson; (2) that the declaration was not made so soon after the shooting and under such circumstances,—all the facts and cir-

cumstances of the case considered,—as to raise the presumption that the declaration was the unpremeditated explanation of the shooting, and that, therefore, it was incompetent evidence as part of the *res gestæ*.

ERROR to the district court for Douglas county. Tried below before SCOTT, J.

Joseph R. Clarkson, for plaintiff in error.

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

RAGAN, C.

For the shooting and killing of one Louis McPherson Edward J. Collins was convicted in the district court of Douglas county of the crime of murder in the second degree and sentenced to the state penitentiary for life. Collins brings the judgment pronounced against him here for review, and seeks its reversal for alleged errors committed by the trial court.

1. On the trial the state called as a witness one Bennett, the sheriff, who amongst other things testified that after a conversation with one Dale he arrested the prisoner. Bennett, on his cross-examination by counsel for Collins, testified as follows:

Q. After you heard Dale's story and after you had arrested Collins you felt suspicious, didn't you?

A. I did, for two reasons.

Q. You did feel suspicious of him?

A. Yes, sir.

Bennett, on his redirect examination by the state, was then asked: "What were your reasons?" [for being suspicious.] This question counsel for Collins objected to. The objection was overruled and the witness answered. The first reason was, Mr. Dale seemed to be very open in his remarks and he didn't care how he talked. The other rea-

son was, Mr. Collins was very close-mouthed and very careful what he said. The ruling of the court in permitting this question to be answered is the first error assigned here by Collins. In *Schlencker v. State*, 9 Neb., 241, it was held: "As a general rule the re-examination of a witness should be limited to the points arising out of the cross-examination; but whether this rule shall be strictly enforced or not seems to rest entirely in the discretion of the presiding judge." Whether the evidence elicited from Bennett on his cross-examination was competent and would have been permitted, had objection thereto been made by the state, we do not decide; but it is clear that the redirect examination of Bennett was limited and directed solely to the facts of Bennett's suspicions at the time he made the arrest of Collins as brought out on his cross-examination. It is competent for a witness on his redirect examination to make clear or complete matters left obscure or incomplete by his answers on cross-examination. The court did not abuse its discretion in permitting the question to be answered, and it was proper and competent evidence tending to explain and make complete facts elicited from Bennett on his cross-examination which were left incomplete and obscure. The assignment is, therefore, overruled.

2. On his direct examination a witness for the state was asked: "What, if anything, did you hear defendant Ed. Collins state previous to the shooting in this case about there being too much stealing done in and about Valley and he was going to put a stop to it?" The prisoner's counsel objected to this question as leading, and thereupon the trial court said: "You may repeat his language if you know. State what he said." The prisoner excepted and the witness answered. The ruling of the court in permitting this question to be answered is the second assignment of error urged here. It is to be observed that the only objection made to the question was that it was leading. The trial judge, in effect, sustained this objection and himself put to

the witness the question: "You may repeat his language if you know. State what he said." No objection was interposed to the question as actually put by the court and answered by the witness. "In reviewing the rulings of the trial court in receiving and rejecting evidence this court will confine its examination to the objections made at the trial." (*Hill v. State*, 42 Neb., 503.) For the reason that no objection was made in the court below to the question actually put to and answered by the witness, the assignment of error is overruled.

3. It appears from the record that the deceased was shot in a railroad yard in the town of Valley, somewhere near midnight of the 18th of November, 1893. Shortly afterwards he was found lying on the ground, where shot, in an unconscious state of mind, with a bullet hole in his head. About thirty minutes after he was found, and while he was still in the railroad yard, he regained consciousness and was soon afterwards removed to a hotel where he was washed and put to bed,—a man named Ball being in attendance upon him in the hotel. Ball was called as a witness for the prisoner and testified that McPherson, while in the railroad yard, made no statements as to how he happened to be shot. Counsel then asked Ball this question: "Did he [McPherson], while you were present at the hotel, after he had recovered so as to be able to talk, state the manner of his shooting?" This question the state objected to. The court sustained the objection and the prisoner excepted. The witness then testified that at no time while he was present with McPherson was anything said by him about the likelihood of his dying, or which indicated that he thought he was dying or fatally wounded.

4. The prisoner then made the following offer of proof under the question asked Ball and which the court refused to permit him to answer: "Defendant offers to prove by this witness that McPherson, the deceased, at the Reid Hotel, in the presence of the witness and others, stated, when

questioned regarding the manner in which he was shot, and the person by whom, that his partner had shot him and that he thought it was accidental and that he laid no blame on him." This offer was objected to by the state and the court said: "If you will show on the part of the defendant that the deceased was laboring under the belief or conviction that he was going to die, you may introduce that testimony." The prisoner made no such showing and the court sustained the objection to the testimony offered, to which the prisoner excepted. This ruling of the court is the third assignment of error alleged here. In *Fitzgerald v. State*, 11 Neb., 577, it is held: "Dying declarations, to be admissible in evidence, must be made under a sense of impending death; but it is unnecessary that the deceased should have stated at the time of making the same that he was about to die. It is sufficient if this state of mind appears from other testimony." To the same effect see *Rakes v. People*, 2 Neb., 157. The record before us does not disclose by the statements of McPherson or other evidence that the declaration offered in evidence was made by him while possessed of the conviction that he was mortally wounded and about to die. It is clear then that the evidence was not competent as being the dying declaration of the deceased. But it is strenuously and ably insisted by the prisoner's counsel that this evidence was a part of the *res gesta*, and as such competent. This term *res gesta* means something done in and about, and as a part of, the transaction out of which the litigation in hand grew and on which transaction said litigation is based. In this case the *res gesta* was the shooting of McPherson. Was the declaration made by him at the hotel as to who shot him so connected with the shooting, and such an element thereof, as to come within the legal definition of a part of that transaction?

The authorities are all agreed that the declaration of an injured person, who subsequently dies from such injury, as to the cause of his injury, though made out of the presence

of the party accused of inflicting such injury, and made under such circumstances as not to be admissible as the dying declaration of the deceased, is, nevertheless, competent evidence as part of the *res gesta*, provided the declaration was made so near the time of the infliction of the injury and under such circumstances as to raise the presumption of its being the unpremeditated explanation thereof. (See the rule stated and the authorities cited in 21 Am. & Eng. Ency. of Law, 102–111.)

"*Res gestæ* may be therefore defined as those circumstances which are the automatic and undesigned incidents of a particular litigated act and which are admissible when illustrative of such act. These incidents may be separated from the act by a lapse of time more or less appreciable. * * * Their sole distinguishing feature is that they must be the automatic and necessary incidents of the litigated act, necessary in this sense, that they are part of the immediate preparations for, or emanations of, such act and are not produced by the calculated policy of the actors." (1 Wharton, Law of Evidence [3d. ed.], sec. 259.)

In *State v. Garrand*, 5 Ore., 216, it was held: "To make declarations a part of the *res gestæ* they must be contemporaneous with the main fact; but in order to be contemporaneous they are not required to be precisely concurrent in time. If the declarations spring out of the transaction, if they elucidate it, if they are voluntary and spontaneous, and if they are made at the time so near to it as reasonably to preclude the idea of deliberate design, they are then to be regarded as contemporaneous."

If declarations of a past occurrence are made under such circumstances as will raise the reasonable presumption that they are the spontaneous utterances of thought created or springing out of the transaction itself, and so soon thereafter as to exclude the presumption that they are the result of premeditation and design, they will be admissible as part of the *res gestæ*. (21 Am. & Eng. Ency. of Law, 102, and cases there cited.)

But how close in point of time to the infliction of an injury, and under what particular circumstances a declaration must be made by an injured person, as to the cause of the injury, to make such declaration a part of the *res gestæ*, the authorities are by no means harmonious.

In *Fulcher v. State*, 13 S. W. Rep. [Tex.], 750: "The deceased was shot in the neck and his articulation was affected by blood collecting in his throat. About fifteen minutes after he was shot, brandy and camphor were administered, and about fifteen minutes afterwards he was able to talk and made certain statements as to the circumstances of the shooting and who shot him, and it was held that the declaration was admissible as part of the *res gestæ*."

In *Lewis v. State*, 15 S. W. Rep. [Tex.], 642, a declaration made by the deceased about an hour and a half after the infliction of the wound from which she died, that defendant had come up behind her, pulled her backward, and cut her nearly in two, was held competent evidence as part of the *res gestæ*. It appeared that the woman was ignorant and had not spoken except in a scream after she was wounded, and it was therefore held that the declaration was apparently voluntary and spontaneous. To the same effect are *Castillo v. State*, 19 S. W. Rep. [Tex.], 892; *Moore v. State*, 20 S. W. Rep. [Tex.], 563; *Pool v. State*, 23 S. W. Rep. [Tex.], 891; *Pilcher v. State*, 25 S. W. Rep. [Tex.], 24.

In *Commonwealth v. Werntz*, 29 Atl. Rep. [Pa.], 272, it was held: "Declarations by the deceased to the police surgeon, who dressed his wounds after he had been carried across the street from where he was wounded and while his wounds were being dressed, as to who stabbed him are admissible as part of the *res gestæ*."

In *Travelers Ins. Co. v. Mosley*, 8 Wall. [U. S.], 397, the insurance company issued an accident policy to Mosley for $5,000, in favor of his wife. By the terms of the policy the company was not to be liable for any injury suffered

by Mosley which arose from a natural disease, and was not to be liable for his death from injury unless the injury produced his death within three months after the date of its occurrence. Mosley's wife sued the insurance company for the full amount of the policy, alleging that on the 21st of July, 1866, her husband accidentally fell down stairs and was thereby injured and died thereof within three months of that time. At the trial Mrs. Mosley testified that in the night (Wednesday) her husband got out of bed and went down-stairs. She did not know how long he was gone. When he came back he told her he had fallen down-stairs and almost killed himself; that he had hit the back of his head in falling; that he complained of his head and appeared faint and vomited. This conversation occurred on Wednesday night. She also testified that on Thursday morning her husband said he felt bad. The son of the deceased testified that about 12 o'clock on Wednesday night he saw his father lying with his head on the counter and asked him what was the matter and the father replied that he had fallen down-stairs and hurt himself. The son further testified that on Thursday his father said to him that he felt bad, and if he attempted to walk across the room his head became dizzy. These declarations of the widow and son of the deceased were objected to as incompetent. The objections were overruled. Mrs. Mosley had a verdict and judgment, and the insurance company assigned in the supreme court of the United States that the admission in evidence of these declarations was error, but that court held that the declarations were competent as part of the *res gestæ*.

Missouri P. R. Co. v. Baier, 37 Neb., 235, was an action by the administrator of Mrs. Baier against the railroad company for negligently causing her death. On the trial a witness testified that he was standing on the platform in front of the depot when the train pulled in; that the car was uncoupled and the train pulled out, and a few

minutes afterwards he heard a scream, and going to the place where he heard the outcry found Mrs. Baier lying on the platform with her legs cut off; that he picked her up and she then made certain statements to him as to the cause of the injury she had received. These declarations of the deceased were objected to at the trial as incompetent and the ruling of the trial court in admitting them was assigned as error in this court. The court decided the evidence was admissible as part of the *res gestæ*, holding that "A declaration to be a part of the *res gestæ* need not necessarily be coincident in point of time with the main fact proved. It is enough that the two are so clearly connected that the declaration can, in the ordinary course of affairs, be said to be a spontaneous explanation of the real cause."

People v. Wong Ark, 30 Pac. Rep. [Cal.], 1115, was a murder case. At the trial a police officer was permitted to testify that after the shooting he ran to the place where the deceased was lying on the porch, a distance of about 140 yards, and in a conversation with her—for possibly a half minute—the deceased then stated to the witness that the defendant was the man who had shot her. The court held that the declaration was a mere narrative of a past event made after the event was closed, and it was not admissible as part of the *res gestæ*.

Armil v. Chicago, B. & Q. R. Co. 30 N. W. Rep. [Ia.], 42, was an action by an administratrix against the railroad company to recover damages for negligently killing her husband, and the court held that the declarations of the deceased as to the cause of the injury he had sustained, which declarations he had made after he had returned home and more than thirty minutes after the accident, were not admissible as part of the *res gestæ*.

In *State v. Pomeroy*, 25 Kan., 349, one W. alleged that P. assaulted him, while alone in his house, with a musket with intent to kill and rob him. On the trial of P. a witness testified that within five minutes after the assault W.

stated to him that P. had assaulted him, W., with a musket and demanded his money. It was held that this declaration of W.'s was inadmissible, being no part of the *res gestæ*.

In *Estell v. State*, 17 Atl. Rep. [N. J.], 118, it was held: "In a case of homicide the narration of the transaction given by the injured man, a few minutes after the affair, and after the defendant had left, is not admissible in evidence as a part of the *res gestæ*."

In *Crow v. State*, 21 S. W. Rep. [Tex.], 543, it was held: "On a trial for murder the exclusion was proper of defendant's statement of the difficulty to his mother, made half an hour after the homicide, and after driving home from the place of killing, such statement not constituting a part of the *res gestæ*."

In *King v. State*, 5 So. Rep. [Miss.], 97, it was said: "It was not error for the court not to allow appellant to prove the declaration made by him after he was arrested, and but a little more than a minute after the shooting, as to the reason why he shot the deceased. Such declaration was not a part of anything then being done, but a mere statement in regard to a past transaction, and was therefore incompetent."

These are by no means all the cases, nor any very considerable part of the cases, in which has been considered the question whether a declaration offered or given in evidence was made at such time and under such circumstances as to be part of the *res gestæ;* but they serve to illustrate the futility of any attempt to lay down a rule on the subject which will be a safe guide in all cases. Whether the declarations of a person, since deceased, are competent evidence, as being part of the *res gestæ* of some transaction occurring in the life of said deceased, in any case, must therefore be determined from the peculiar facts and circumstances surrounding the case on trial and the basis of which case is the past transaction.

Adhering to the rule quoted above from Wharton, and the rule announced in *Missouri P. R. Co. v. Baier*, *supra*, we proceed to inquire whether the declaration offered in evidence in the case at bar is so closely and clearly connected with the shooting of McPherson that such declaration can in the ordinary course of human affairs be said to be a spontaneous explanation of such shooting. It is to be remembered that McPherson was first discovered wounded in a railroad yard and was unconscious; but it must also be borne in mind that he regained his consciousness before being removed from the yard into the hotel. The record shows that during the time he was in the yard he made no statements as to how or by whom he was shot, nor does the record disclose that those who found him and were with him after he had regained consciousness in the yard made any inquiry of him as to how he came to be shot; and it is a significant fact, not to be lost sight of in this connection, that the prisoner in his trial neither proved, nor attempted to prove, that the deceased, while in the railroad yard and after he had recovered his consciousness, was unable to speak. He was removed from the yard to one hotel where he remained a short space of time, and thence to another where he was put to bed. The record does not inform us whether the deceased became unconscious after he was removed from the railroad yard and we must, therefore, presume that he retained his consciousness from the time he regained it up to the time he made the declaration which is offered in evidence, a period of some two hours and a half; nor does the record show that the deceased, at any time after he was removed from the railroad yard to the time that he made the declaration, ever was unable to speak. Nothing is more natural or more probable than that the parties who first found McPherson, on his regaining consciousness and being able to speak, would have inquired of him as to how he came to be shot; and it is entirely reasonable and probable that McPherson, after he

regained his consciousness in the yard, if he was able to speak, even without an inquiry, would have told those about him how he came to be shot. We are therefore constrained to hold that the declaration offered in evidence was not made under such circumstances and so soon after the shooting, the facts and circumstances all considered, as to exclude the presumption that the declaration was the result of premeditation; or, to paraphrase the language of RYAN, C., in *Missouri P. R. Co. v. Baier, supra*, we cannot say that the declaration and the shooting were so clearly and closely connected that the latter, in the ordinary course of human affairs, must be regarded as a spontaneous explanation of the former. In other words, we cannot indulge the presumption that the declaration was the unpremeditated explanation of the shooting. (*Hewitt v. Eisenbart*, 36 Neb., 794, and cases cited.) The assignment is therefore overruled.

4. The next assignment of error is that the court erred in giving instruction No. 11, which is in the following language: "By the term 'reasonable doubt,' as herein used, is not meant a mere caprice, conjecture, or groundless possibility. It is an actual, substantial doubt based on a reason arising either from the evidence or want of evidence in the case, and sufficient to cause an ordinary prudent man to hesitate and refuse to act in the most important affairs and concerns of life. The guilt of an accused person is proven beyond a reasonable doubt when, upon the entire comparison and consideration of all the evidence, the minds of the jurors are in that condition that they can say from the evidence they have an abiding conviction to a moral certainty of the truth of the charge; but mathematical certainty is not required." The criticism on this instruction is that the expression "but mathematical certainty is not required," was "calculated to impress the jury with the idea that anything short of mathematical certainty may properly be reasonable doubt." We think the instruction complained of would

have been better had the phrase quoted above been omitted therefrom, but we are unable to see that the jury was at all misled thereby, in view of the fact that in other instructions the degree of proof necessary to a conviction was specially and carefully commented on. The assignment is therefore overruled.

5. The fifth assignment of error is that the court erred in giving the twelfth instruction, which is in the following language: "The defendant contends that there is no evidence of any motive for the shooting of said deceased by said defendant; that they had never had any quarrel or ill-will one toward the other. But you are instructed that the question as to whether there was a motive for the defendant taking the life of the deceased, if he did take it, if that fact has been proven beyond reasonable doubt, is a question for you to determine under all the evidence in the case. If it has been proven beyond a reasonable doubt that defendant was accused of taking the life of said Louis McPherson, or of inflicting the wound that caused his death, if you find that fact has been proven beyond reasonable doubt, and that defendant stated that there had been too much stealing around there and he proposed to stop it, and any other facts that you find have been established beyond a reasonable doubt bearing upon that question, it would be for you to determine from all the evidence in the case whether the defendant had a motive for taking the life of said deceased, if he did take it, and whether that fact has been proved beyond a reasonable doubt, and you are further instructed that you should receive all evidence of verbal admissions of defendant with caution and closely scrutinize the same, as the repetition of verbal admissions or statements is more or less subject to imperfection and mistake; but if you find the defendant made an admission beyond a reasonable doubt under the evidence, and that such admission was deliberately made and precisely identified, the evidence it affords is to be considered by you the same as any other evidence

in the case, and you should give it such weight as you in your judgments think it fairly entitled to." The criticism on this instruction is thus stated by the prisoner's able counsel in his argument: "It most emphatically directs the jury to conversations had with Collins, and states that they supplied a motive, if otherwise evidence of motive was lacking." We think this criticism without merit.

6. Finally, it is insisted that the verdict is not sustained by sufficient evidence. We think it is. The testimony of the witness Dale was, that he and McPherson were engaged in stealing coal from some cars in a railroad yard on the night that McPherson was shot; that the prisoner came up near them, pointed a pistol in the face or at the head of McPherson and fired; that McPherson fell to the ground and he, Dale, ran away. Dale also identified the prisoner as the man who shot McPherson. He further stated that he had seen him prior to the shooting, had been in his company, was somewhat acquainted with him, and he recognized him after the shooting and pointed him out to the sheriff. It is on this evidence that the verdict assailed is predicated. Dale's credibility as a witness was for the jury, and if his story was true, the verdict does not lack evidence to support it. The judgment of the district court is

AFFIRMED.

JOHN JOHNSON, APPELLEE, V. MARCUS L. PARROTTE ET AL., APPELLANTS.

FILED OCTOBER 1, 1895. No. 7439.

1. **Supreme Court: JURISDICTION.** The supreme court is one of limited jurisdiction, both original and appellate. Its original jurisdiction is prescribed and limited by the constitution, and its appellate jurisdiction is prescribed and limited by statute.

2. **Final Order:** SETTING ASIDE VERDICT: REVIEW. An order of the district court setting aside the verdict of a jury and granting a new trial during the term at which the verdict is returned, and before judgment, is not a final order, and therefore not reviewable by a proceeding in error. (*Artman v. West Point Mfg. Co.*, 16 Neb., 572.)

3. **Creditors' Bill:** VALIDITY OF JUDGMENT: PLEADING. The foundation of every creditors' bill is an unimpeachable judgment, and the plaintiff who exhibits such bill as a condition precedent to his right to relief is required to plead and prove his ownership of a valid and unsatisfied judgment.

4. **Judgments:** COLLATERAL ATTACK: APPEAL: SUPREME COURT: ESTOPPEL. Johnson sued Parrotte for damages in a district court. The jury returned a verdict in favor of Johnson, and Parrotte filed a motion for a new trial. Pending the ruling of the district court on this motion the parties entered into a stipulation, as follows: "That if the court shall grant a new trial herein, that the said plaintiff may review said order granting a new trial by petition in error to the supreme court; and that if said supreme court shall confirm said order granting a new trial, that judgment absolute shall be rendered against the plaintiff, dismissing said action with costs; but if said supreme court reverse said order, then judgment absolute shall be rendered against the defendant for amount of verdict and costs herein." The district court sustained Parrotte's motion for a new trial. Johnson then prosecuted a petition in error to the supreme court, which reversed the order of the district court and, in pursuance of said stipulation, rendered a personal judgment in favor of Johnson and against Parrotte for the amount found by the jury. This judgment Johnson subsequently made the basis of a creditors' bill in the district court and obtained a decree canceling, as fraudulent, the conveyance of certain real estate made by Parrotte and subjecting such real estate to the payment of said judgment. On appeal of Parrotte from this decree, *held*, (1) that it was not enough that this court rendered the judgment after reversing the order made by the district court; that such order of the district court must have been a final order to invest this court with jurisdiction to review it; (2) that the order of the district court sustaining Parrotte's motion for a new trial was not a final order within the meaning of section 581, Code of Civil Procedure; (3) that the supreme court had no original jurisdiction and acquired no appellate jurisdiction of the suit of Johnson v. Parrotte, and therefore its judgment was void; (4) that Parrotte, neither by reason of having been

a party to the stipulation aforesaid, nor by reason of having had in the district court and in the supreme court a suit in equity for a new trial of the original action had estopped himself from assailing this judgment as void; (5) that a void judgment is in reality no judgment at all. It is a mere nullity. It is supported by no presumptions and may be impeached in any action direct or collateral. (1 Black, Judgments, sec. 170.)

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

F. G. Hamer, for appellants.

Dryden & Main, contra.

RAGAN, C.

The facts necessary to an understanding of this case are briefly as follows: Some years ago, in the district court of Buffalo county, John Johnson sued Marcus L. Parrotte at law for damages for the latter's alleged misrepresentation of some sheep sold by him to Johnson, who had a verdict, and Parrotte filed a motion for a new trial. Pending the ruling of the district court upon Parrotte's motion for a new trial the parties entered into a stipulation as follows: "That if the court [district court] shall grant a new trial herein, that the said plaintiff may review said order granting a new trial by petition in error to the supreme court; and that if said supreme court shall confirm said order granting a new trial, that judgment absolute shall be rendered against the plaintiff dismissing said action with costs; but if said supreme court reverse said order, then judgment absolute shall be rendered against the defendant for amount of verdict and costs herein." This stipulation was incorporated in the record of the case on trial in the district court and that court thereupon sustained Parrotte's motion for a new trial, but rendered no judgment dismissing Johnson's action. Johnson then prosecuted a petition in

error to the supreme court to reverse the order of the district court granting Parrotte a new trial, and the supreme court reversed that order and, in pursuance of the stipulation above, rendered a money judgment in favor of Johnson and against Parrotte for $981.50. (See *Johnson v. Parrotte*, 23 Neb., 232.) The judgment of this court in the case was by mandate certified to the district court of Buffalo county. Subsequently, Johnson caused an execution to be issued out of the office of the clerk of the district court of Buffalo county. This execution was based on the mandate sent down by this court in the case above mentioned, and levied upon certain real estate alleged to have been the property of Parrotte at the time of the rendition of the judgment in the case by the supreme court. The execution not having been returned satisfied, Johnson brought this suit in equity, a creditors' bill, against Parrotte and others in the district court of Buffalo county to have declared fraudulent and void and have set aside certain conveyances made of certain real estate by Parrotte subsequent to the date of the rendition of the verdict above mentioned in the district court of Buffalo county in the law action of Johnson against Parrotte. Johnson had a decree as prayed for in his petition in equity, and Parrotte has brought the same here for review. It will thus be seen that the creditors' bill of Johnson and the decree of the district court under review have for their foundation the judgment of this court pronounced in Johnson v. Parrotte in pursuance of the stipulation quoted above. Did the supreme court have any jurisdiction to render that judgment?

Section 2, article 6, of the constitution provides: "It [supreme court] shall have original jurisdiction in cases relating to the revenue, civil cases in which the state shall be a party, *mandamus*, *quo warranto*, *habeas corpus*, and such appellate jurisdiction as may be provided by law."

Section 582 of the Code of Civil Procedure provides: "A judgment rendered or final order made by the district

court may be reversed, vacated, or modified by the supreme court, for errors appearing on the record."

Section 581 of the Code of Civil Procedure provides: "An order affecting a substantial right in an action, when such order, in effect, determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment, is a final order which may be vacated, modified, or reversed, as provided in this title."

Section 594 of the Code of Civil Procedure provides: "When a judgment or final order shall be reversed either in whole or in part, in the supreme court, the court reversing the same shall proceed to render such judgment as the court below should have rendered, or remand the cause to the court below for such judgment."

It will be seen that the supreme court is one of limited jurisdiction, both original and appellate. Its original jurisdiction is prescribed and limited by the constitution and its appellate jurisdiction prescribed and limited by statute It is scarcely necessary to remark that the original damage suit of Johnson v. Parrotte brought to the district court of Buffalo county was not a case which related to the revenue, nor a civil case to which the state was a party, nor a *mandamus*, *quo warranto*, or *habeas corpus* proceeding, and that, therefore, the supreme court would have been and was without any original jurisdiction whatever to hear and determine that case; and had Johnson brought his damage suit against Parrotte to the supreme court in the first instance, that tribunal would have had no jurisdiction over the subject-matter of the action, and any judgment pronounced therein would have been a nullity.

Did the supreme court acquire jurisdiction of the case by the error proceeding prosecuted by Johnson from the order of the district court sustaining Parrotte's motion for a new trial? The answer to this question depends upon whether the order of the district court granting Parrotte's

new trial was a final order within the meaning of sections 581, 582, and 594 of the Code of Civil Procedure above quoted. These sections have been repeatedly construed by this court, and it has been uniformly held that an order, to be final, must dispose of the whole merits of the case on trial and leave nothing for the further determination of the lower court. (*Smith v. Sahler*, 1 Neb., 310.) In *Brown v. Edgerton*, 14 Neb., 453, it was held: "An order of a district court vacating its own judgment during the term at which it was rendered is not a final order, and therefore is not reviewable by proceedings in error." In *Artman v. West Point Mfg. Co.*, 16 Neb., 572, it was held: "An order of the district court setting aside the verdict of a jury and granting a new trial during the term at which the verdict is returned, and before judgment, is not a final order, and therefore not reviewable by proceedings in error." (See, also, *Gapen v. Bretternitz*, 31 Neb., 302.) And finally, in the very case in which the supreme court assumed to render the judgment made the basis of the case under review, the court said: "The decision of the district court in sustaining a motion for a new trial after the cause has been tried to a jury and verdict returned is not a subject for review until after a final judgment is rendered in a cause." (*Johnson v. Parrotte*, 23 Neb., 232.) We conclude, therefore, that the supreme court was without appellate jurisdiction to render the judgment made the basis of the present action, and that its judgment was not voidable, but absolutely void. It is not enough that the judgment rendered by this court was rendered by it after reversing the order under review made by the district court. Such order must have been a final order to invest this court with jurisdiction to review it; and since the order of the district court granting Parrotte a new trial was not a final order within the meaning of the statute, we conclude that the supreme court never acquired even appellate jurisdiction of that case and that the judgment pronounced by it therein was and is a nullity.

It is insisted by the appellee that the judgment is not open to collateral attack; that the appellant, by reason of being a party to the stipulation aforesaid, or by reason of certain equity proceedings brought in and had by him in the district court of Buffalo county and in this court for a new trial of the original action after the supreme court had rendered the judgment, is now estopped from assailing the judgment on which this action is based as being void. "Now a void judgment is in reality no judgment at all. It is a mere nullity. It is attended by none of the consequences of a valid adjudication, nor is it entitled to the respect accorded to one. It can neither affect, impair, nor create rights. As to the person against whom it professes to be rendered, it binds him in no degree whatever, it has no effect as a lien upon his property, it does not raise an estoppel against him. As to the person in whose favor it professes to be, it places him in no better position than he occupied before; it gives him no new right, but an attempt to enforce it will place him in peril. As to third persons, it can neither be a source of title nor an impediment in the way of enforcing their claims. It is not necessary to take any steps to have it reversed, vacated, or set aside. But whenever it is brought up against the party he may assail its pretentions and show its worthlessness. It is supported by no presumptions, and may be impeached in any action, direct or collateral." (1 Black, Judgments, sec. 170.) But for Parrotte to assert that this judgment is void is not to attack it collaterally, as the basis of every creditors' bill is an unimpeachable judgment; and Johnson in this case, as a condition precedent to his right to the relief for which he prayed in his petition, was required to plead and prove his ownership of a valid and unsatisfied judgment. He has done neither. The petition itself does not state a cause of action. It alleges the bringing of the damage suit of Johnson v. Parrotte in the district court of Buffalo county, the return of a verdict in that action in favor of Johnson,

the stipulation of the parties, the sustaining by the district court of Parrotte's motion for a new trial, the prosecution by Johnson of proceedings in error to this court to reverse the district court's ruling, and the rendition by this court of the judgment which he owns and is unsatisfied, and which, he alleges, should be paid by a sale of certain real estate fraudulently conveyed by Parrotte. But the petition does not allege that the district court, in the damage suit, rendered a judgment dismissing Johnson's action. The lack of jurisdiction in this court to render the judgment appears then on the face of the petition. The decree of the district court is reversed and the action dismissed.

REVERSED AND DISMISSED.

SAMUEL WOOD v. STATE OF NEBRASKA.

FILED OCTOBER 1, 1895. No. 7699.

1. **Rape:** EVIDENCE. While in a prosecution for rape, or an assault with intent to commit rape, the state may only inquire of the prosecutrix whether she made complaint of the injury, and when and to whom, but not as to the particular facts which she stated, still the defense, in cross-examination, may inquire as to such particular facts.
2. ———: ———: REVIEW: UNFOUNDED ASSIGNMENTS OF ERROR. In a prosecution for an assault upon a girl under the statutory age of consent, with intent to commit a rape, whether the girl consented or resisted is immaterial, and to constitute the offense it is, therefore, unnecessary to prove that the defendant intended to use force if necessary, to overcome her resistance.

ERROR to the district court for Lancaster county. Tried below before TIBBETS, J.

Alex. Altschuler and *J. C. McNerny*, for plaintiff in error.

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

IRVINE, C.

The plaintiff in error was convicted in the district court of Lancaster county on an information charging him with making an assault upon one Louisa Schrader, a female child nine years of age, with intent to commit a rape upon her person. The prosecutrix had testified that immediately after the alleged assault she had made complaint thereof to her mother. On cross-examination she was asked, "What did you tell your mother when you went out there?" This question was objected to, as incompetent and immaterial, and the objection was sustained. An offer was then made by the defendant to prove that prosecutrix had made statements to her mother differing from the testimony she had given upon the stand, and the objection being repeated, was again sustained. In excluding this evidence on cross-examination we think the learned district judge erred. Whether in the examination in chief the particulars of the complaint may be elicited, or whether the state is restricted to a general inquiry as to the fact that a complaint was made, is a question upon which the authorities are not harmonious. In *Regina v. Walker*, 2 Moody & R. [Eng.], 212, Baron Parke said: "The sense of the thing certainly is, that the jury should, in the first instance, know the nature of the complaint made by the prosecutrix, and all that she then said. But, for reasons which I never could understand, the usage has obtained that the prosecutrix's counsel should only inquire, generally, whether a complaint was made by the prosecutrix of the prisoner's conduct towards her, leaving the counsel of the latter [evidently meaning the prisoner's] to bring before the jury the particulars of that complaint by cross-examination." This view has been taken by some courts whose decisions are entitled to the highest respect, and among authors it has received the approval of the late Justice Stephen. These authorities place the admissibility of such testimony

on the ground that it constitutes a part of the *res gestæ*. The prevailing doctrine, however, is that stated by Professor Greenleaf (3 Greenleaf, Evidence, sec. 213), as follows: "Though the prosecutrix may be asked whether she made complaint of the injury, and when and to whom, and the person to whom she complained is usually called to prove that fact, yet the particular facts which she stated are not admissible in evidence, except when elicited in cross-examination, or by way of confirming her testimony after it has been impeached. On the direct examination, the practice has been merely to ask whether she made complaint that such an outrage had been perpetrated upon her, and to receive only a simple yes or no. Indeed, the complaint constitutes no part of the *res gestæ*; it is only a fact corroborative of the testimony of the complainant; and, where she is not a witness in the case, it is wholly inadmissible." This is the view which has been taken in this state. (*Oleson v. State*, 11 Neb., 276.) But it will be observed that Professor Greenleaf, in stating the more restricted doctrine, unmistakably implies that the particulars of the complaint may be brought out on cross-examination, and this seems to be the view taken wherever the restricted doctrine prevails, although in the reported cases the rule in regard to cross-examination is for the most part stated under circumstances which render it, strictly speaking, *obiter*. (*Scott v. State*, 48 Ala., 420; *Barnett v. State*, 83 Ala., 40; *State v. Richards*, 33 Ia., 420; *State v. Jones*, 61 Mo., 232; *Regina v. Walker*, *supra*; *State v. Langford*, 45 La. Ann., 1177.) In the absence of direct authority, and even if the general rule were not always stated with a qualification as to cross-examination, we think that the admission of the particulars of the complaint on cross-examination is in harmony with the general principles of evidence.

The plaintiff in error requested the following instruction, which was refused: "You are further instructed that you

must further find from the evidence beyond a reasonable doubt, before you can convict the defendant, that the defendant must have intended to use whatever force was necessary to overcome her resistance and compel her to submit to his passions, to make out the crime of an assault with intent to commit rape." The refusal of this instruction is assigned as error, and *Skinner v. State*, 28 Neb., 814, is cited in support of the assignment; but *Skinner v. State* was the case of a charge of rape upon a woman of mature years, where the element of force would have been an essential ingredient of the consummated offense. By our statute (before the amendment of 1895), the carnal knowledge, with her consent, of any female child under the age of fifteen years constituted a rape when the offender was of the age of eighteen or upwards, and an assault by such a person upon a female child under fifteen, with an intent to carnally know her, was an assault with intent to commit a rape, regardless of her consent. (*Davis v. State*, 31 Neb., 247; *Head v. State*, 43 Neb., 30.) Under the charge contained in this information, it was, therefore, unnecessary to establish an intent to use force if necessary to overcome the will of the child, and the instruction was properly refused.

The other assignments of error relate to matters which may be deemed accidental to the former trial, and not inherent in the case itself, and will not, therefore, be considered, except in one respect. It is assigned that the verdict is not sustained by the evidence, and in support of this assignment it is, among other things, suggested that the state failed to prove the venue. The evidence shows, without contradiction, that the offense, if any were committed, occurred in the home of the prosecutrix's parents. The mother of the prosecutrix was asked: "Mrs. Schrader, where do you live?" A. "Eleven miles east; ten miles east and one mile north." Q. "Is your place in Lancaster county, Nebraska?" A. "Yes, sir." The first question

asked the father was as follows: "Mr. Schrader, where do you live?" To which he answered: "Lancaster county, Nebraska." There is no contrary evidence, and the venue was, therefore, fully proved. We refer to this assignment merely for the purpose of saying that it is one which should not be made. Unfounded assignments of this character presumably cost counsel some effort. They certainly occupy the time of the court, and they avail nothing.

REVERSED AND REMANDED.

S. S. VAN HORN ET AL. V. STATE OF NEBRASKA, EX REL. JOHN W. C. ABBOTT.

FILED OCTOBER 1, 1895. No. 7998.

1. **Townships:** COUNTY BOARDS. The distinguishing feature of township organization lies in the application of the principle of local self-government. It is the regulation of purely local affairs by the townships and local officers thereof, and not the constitution of the county board, which distinguishes the township system.

2. ———: SUPERVISORS. Where supervisors are local officers, their number and the manner of their election are subjects connected with township organization, and not solely related to county government.

3. **Statutes:** SUBJECT OF BILL: TITLE OF ACT: CONSTITUTIONAL LAW. The object of section 11, article 3, of the constitution, providing that "no bill shall contain more than one subject, and the same shall be clearly expressed in its title," is to prevent surreptitious legislation. If a bill has but one general object, no matter how broad that object may be, and contains no matter not germane thereto, and the title fairly expresses the subject of the bill, it does not violate this provision of the constitution.

4. ———: ———: ———: ———. Whether or not a bill contains more than one subject is to be determined by examining the substance of the bill. Apparent duplicity in the title alone does not invalidate the act.

5. **Township Organization:** VALIDITY OF STATUTE. Chapter 28, Session Laws, 1895, providing for township organization, etc., has but one subject, which is clearly expressed in its title.

6. ———: ———. Where different parts of the same statute are in irreconcilable conflict, the last words stand, and those in conflict therewith are disregarded. (*Albertson v. State*, 9 Neb., 429.) Session Laws, 1895, chapter 28, construed, and *held* to provide for seven supervisors in all counties under township organization.

7. **Statutes:** AMENDMENT OF LAWS: REPEAL: CONSTITUTIONAL LAW. That portion of section 11, article 3, of the constitution, providing that "No law shall be amended unless the new act contain the section or sections so amended, and the section or sections so amended shall be repealed," has no application to acts complete in themselves, and not in their effect simply amendatory. Such complete acts are valid, although they may modify or destroy the effect of previous legislation.

8. **Township Organization:** CONSTITUTIONAL LAW. Section 5 of article 10 of the constitution confers upon the people by vote the power of adopting and discontinuing township organization, but it leaves to the legislature the power of providing the details of such organization.

9. ———: AMENDMENT OF LAW. The legislature may, therefore, amend or change the law in regard to township organization, without referring such change to a vote of the people.

10. **County and Township Officers.** Section 4, article 10, of the constitution, enacting that the legislature shall provide by law for the election of such county and township officers as may be necessary, does not prevent the legislature when it reduces the number of officers from providing that those already elected shall cast lots to determine whose terms of office shall be discontinued; nor does it prevent the legislature from providing for the filling of vacancies provisionally by appointment.

11. **Statutes:** UNIFORMITY OF OPERATION. If a law is general and uniform throughout the state, acting alike upon all persons and localities of a class, or who are brought within the relations and circumstances provided for, it is not objectionable as wanting uniformity of operation. (*State v. Berka*, 20 Neb., 375.)

12. **Mandamus:** MINISTERIAL OFFICERS: CONSTITUTIONAL LAW. Ministerial officers, upon whom the legislature has sought to impose a duty by statute, may assert the unconstitutionality of that statute as a defense to an application for a *mandamus* to require them to perform the supposed duty.

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

The case is stated by the commissioner.

Samuel Maxwell and *C. Hollenbeck*, for plaintiffs in error:

The act under consideration is void because the title contains more than one subject. (Sutherland, Statutory Construction, secs. 86–97; *State v. Lancaster County*, 6 Neb., 474; *Trumble v. Trumble*, 37 Neb., 340; *Curch v. City of Detroit*, 31 N. W. Rep. [Mich.], 447; *Davies v. Board of Supervisors*, 50 N. W. Rep. [Mich.], 862; *Ives v. Norris*, 13 Neb., 252; *Holmburg v. Hauck*, 16 Neb., 337; *Touzalin v. City of Omaha*, 25 Neb., 817; *Weigel v. City of Hastings*, 29 Neb., 379; *Northwestern Mfg. Co. v. Chambers*, 58 Mich., 381; *People v. Congdon*, 43 N. W. Rep. [Mich.], 386.)

The act is void, for the reason that it contains several subjects independent of each other which are not embraced within the title.

The constitutionality of the act is challenged upon the ground that it is ambiguous and indefinite to such an extent that it is incapable of enforcement.

The legislation is special, because the act provides five supervisors for some counties and seven for others.

The law repeals a large number of other laws without any reference to them in the title of the act and is therefore invalid.

The act is inoperative and void as to counties now under township organization, because it imposes upon such counties the system of local government provided for by the act without a vote of the people of the county, as provided in section 5, article 10, of the constitution.

The act under consideration practically, and in effect, amends the act of 1879 (Compiled Statutes, 1895, sec. 62, ch. 18), without any reference to it, and should therefore be

declared invalid. (*Trumble v. Trumble*, 37 Neb., 340; *State v. Lancaster County*, 6 Neb., 474.)

The act is objectionable, because it provides for new county officers and provides for their selection by casting lots, thereby amending the laws in relation to appointment.

The board of county supervisors may resist an application for *mandamus* on the ground that the act of the legislature, requiring the performance of the duty sought to be enforced, is unconstitutional. (*State v. Lancaster County*, 6 Neb., 474.)

George L. Loomis, also for plaintiffs in error.

John W. C. Abbott and *J. E. Frick, contra:*

The law does not violate section 11, article 3, of the constitution, providing that "No bill shall contain more than one subject, and the same shall be clearly expressed in its title." (23 Am. & Eng. Ency. Law, 232; *State v. Atlantic City*, 28 Atl. Rep. [N. J.], 427; *Van Husen v. Heames*, 56 N. W. Rep. [Mich.], 22; *Henderson v. State*, 36 N. E. Rep. [Ind.], 257; *Bissell v. Heath*, 57 N. W. Rep. [Mich.], 585; *State v. Mines*, 18 S. E. Rep. [W. Va.], 470; *People v. Taylor*, 56 N. W. Rep. [Mich.], 27; *Gaines v. Williams*, 34 N. E. Rep. [Ill.], 934; *People v. Brooks*, 59 N. W. Rep. [Mich.], 444, 816; *Board of Trustees v. Daniels*, 25 S. W. Rep. [Ky.], 746; *Lynch v. Murphy*, 24 S. W. Rep. [Mo.], 774; *Curtin v. Barton*, 34 N. E. Rep. [N. Y.], 1093; *In re Board of Commissioners of Johnson County*, 32 Pac. Rep. [Wyo.], 850; *Barnhill v. Teague*, 11 So. Rep. [Ala.], 444; *Mills v. Charleton*, 9 Am. Rep. [Wis.], 578; *Commonwealth v. Depuy*, 23 Atl. Rep. [Pa.], 896; *State v. Tucker*, 46 Ind., 355; Black, Constitutional Law, 286; *People v. Mahaney*, 13 Mich., 496; *White v. City of Lincoln*, 5 Neb., 505; *Hamlin v. Meadville*, 6 Neb., 227; *Kansas City & O. R. Co. v. Frey*,

30 Neb., 790; *State v. Ream*, 16 Neb., 681; *State v. Page*, 12 Neb., 386; *Dogge v. State*, 17 Neb., 143; *State v. Babcock*, 23 Neb., 128; *Gatling v. Lane*, 17 Neb., 80; *Poffenbarger v. Smith*, 27 Neb., 788; *Bonorden v. Kriz*, 13 Neb., 121.)

The contention of plaintiffs in error that the act repeals the law of 1879 without reference to the government of counties is not tenable. (*Jones v. Davis*, 6 Neb., 33; *State v. Page*, 12 Neb., 386; *Brome v. Cuming County*, 31 Neb., 362; *Warren v. Crosby*, 34 Pac. Rep. [Ore.], 661; *People v. Mahaney*, 13 Mich., 496; Cooley, Constitutional Limitations [5th ed.], 181.)

The following authorities are cited in reply to the contention that the act repeals a large number of different statutes without any reference to them: *Brome v. Cuming County*, 31 Neb., 362; Sutherland, Statutory Construction, secs. 154–156.

As to uniformity of laws, reference is made to the following cases: *State v. Berka*, 20 Neb., 375; *Lancaster County v. Trimble*, 33 Neb., 121.

In reply to the contention that the act is invalid because it effects a change in township organization without submitting the question to the legal voters, under section 5, article 10, of the constitution, the following authorities are cited: *Board of Supervisors v. Heenan*, 2 Minn., 330; *Bank of the Republic v. Hamilton*, 21 Ill., 53; *People v. Brislin*, 80 Ill., 423.

The law is not invalid because it provided for the casting, or drawing, of lots to determine which one of the several supervisors should temporarily represent any given district that might be established from two or more townships until the following general election. (*State v. Douglass*, 7 Am. Rep. [Wis.], 87; *Prince v. Skillin*, 36 Am. Rep. [Me.], 325; 19 Am. & Eng. Ency. Law, 562.)

The act is not void for indefiniteness. (*In re Frey*, 18 Atl. Rep. [Pa.], 478; *Board of Supervisors v. Heenan*, 2 Minn., 339.)

The plaintiffs in error have no such rights involved as entitle them to question the validity of the act. (*People v. Salomon*, 54 Ill., 39; Merrill, Mandamus, sec. 65.)

IRVINE, C.

Chapter 28 of the Session Laws of 1895, among other radical changes with regard to counties under township organization, fixes the number of supervisors in such counties at seven, and in counties now having township organization requires the county clerk to call a special meeting of the supervisors for the purpose of dividing the county into suitable supervisor districts, and choosing supervisors for such districts. After making such division the supervisors are required, if there be more than one supervisor in any district so formed, to cast lots among themselves and so select one to remain supervisor for such district; and if there are any vacancies, the board appoints supervisors to fill them. The county clerk of Dodge county called a meeting of the board in pursuance of the act, and the board when assembled refused to perform the duties imposed upon it, on the ground that the act was in violation of the constitution and void. The board at the same time instructed the county attorney to take the proper steps to have the constitutionality of the act determined, and the county attorney therefore applied to the district court for a writ of *mandamus* to compel the board of supervisors to meet and divide the county into seven supervisor districts, as required by the act in question. The supervisors demurred to the petition for the writ. The district court overruled the demurrer and allowed the writ. From this judgment the respondents prosecute error.

The record presents only one general question—the constitutionality of the act of 1895. In order to an understanding of the case, a brief review of the legislation on the subject is necessary. Section 5 of article 10 of the constitution requires that "The legislature shall provide

by general law for township organization, under which any county may organize whenever a majority of the legal voters of such county voting at any general election shall so determine; and in any county that shall have adopted a township organization the question of continuing the same may be submitted to a vote of the electors of such county at a general election in the manner that shall be provided by law." Attempting to perform the duty imposed upon the legislature by this provision, there was passed in 1877 "An act to provide for township organization." This act, outside of its professed object, contained many provisions in regard to county government in general, and in regard to taxation and revenue, and was declared unconstitutional in *State v. Lancaster County*, 6 Neb., 474, for the reason that the act embraced subjects not indicated by the title, and that its various provisions were so interdependent that the portion indicated by the title could not be given separate effect. In 1879 there was passed "An act concerning counties and county officers." This act presented a complete scheme of county government, and contained special provisions for the government, not of townships, but of counties under township organization, although there was at that time, by reason of the failure of the act of 1877, no means of accomplishing township organization. The validity of the act of 1879 was presented to the court in the case of *State v. Page*, 12 Neb., 386, and the court held that the act embraced but one general object which was fairly expressed by the title, and that the act was, therefore, not in conflict with that portion of section 11, article 3, of the constitution, providing that "No bill shall contain more than one subject, and the same shall be clearly expressed in its title." So the law rested until 1883, providing for county government in counties under township organization, but being ineffective as to that portion of the law for want of a law authorizing and providing for township organization. By chapter 36, Session Laws,

1883, a scheme of township organization and government was finally enacted under the title of "An act to provide for township organization, to divide counties under township organization into supervisor districts, to define the rights, powers, and liabilities of towns, the duties, and compensation of the officers thereof." This act, with some amendments, has remained in force until the present year. The act here in question (Session Laws, 1895, ch. 28) has for its manifest object to supersede the act of 1883, by providing a new and complete plan of township organization and government, and by expressly repealing the act of 1883. Further statements in regard to the nature of these various acts can more conveniently be made in connection with the several arguments advanced.

It is urged that the title to the act of 1895 is double; that it contains more than one subject; that the bill relates to both township and county government, two entirely separate and distinct subjects, and that both the title and the act indicate this duplicity. The title of the act is as follows: "An act to provide for township organization, to divide counties under township organization into supervisor districts, to define the rights, powers, and liabilities of towns, the duties and compensation of the officers thereof, and to provide for the election of town officers, and for the election of supervisors, and the term of office of supervisors to be elected and chosen in the several supervisor districts into which the county is to be divided when governed by township organization, and to repeal sections one (1) to sixty-two (62), both inclusive, of article four (4), chapter eighteen (18), Compiled Statutes of Nebraska, 1893." An analysis of the act discloses that it embraces the whole subject of township organization and government, but that it does not affect in any manner the government of the county as such, except by changing the law in regard to the constitution of the board of supervisors. County government and the duties of the board of

supervisors in county affairs remain as they were provided by the act of 1879. In connection with and incidental to the main provisions of the act we do, however, find certain provisions which it may be said affect the county as a whole. Under the law of 1883 each township selected a supervisor, with certain provisions relating specially to cities. Under the present law, laying out of view for the moment a complication to be hereafter noticed, the county is to be divided into seven supervisor districts, each one choosing a supervisor. In addition to this the act contains a special provision (sec. 65) with regard to the duties of supervisors. This section relates not to their duties as members of the county board, but to their duties as local officers, giving to each special charge of the expenditure of money appropriated for roads, bridges, and culverts within his supervisor district, and requiring each supervisor to account to the board for all money so received and disbursed. It may, by the way, be here remarked that by virtue of this provision the supervisors remain local officers charged with local duties, and that, therefore, the contention of the respondents that this act deprives them of all such powers and duties, and makes them merely county commissioners, is unfounded. The act also provides for the method of accomplishing a change from the commissioner system to township organization, and also contains provisions, being those directly brought into controversy in this action, for the purpose of conforming counties already working under township organization to the provisions of the new law. In considering the act it is necessary to have constantly in mind what is really meant by township organization. We have in this state two systems of government within the county. By one of these systems, designated for convenience "the commissioner system," the government of the county at large and of its subdivisions is entrusted to a board of county commissioners, who, together with certain governmental agents subordinate

to them, conduct all the affairs of the county, local and general. Under the other system, called "the township system," the county is subdivided into townships, or towns. Each of these towns constitutes a body corporate. The purely local affairs are entrusted to the town meetings of the several towns, or to township officers selected by the towns, while the general affairs of the county are conducted by a board constituted of the various township supervisors. The essential feature of township government lies in the application of the principle of local self-government. It is not the constitution of the county board, but the local government of the townships which marks the distinction between the two forms of government. The constitution of the supervisors into a county board is accidental to the system, but by no means essential thereto. Township government, within the meaning of the constitution, might well be provided for as in the act of 1883, or in the act of 1895, but without the supervisors or other township officers having any functions in the government of the county at large. Indeed, the writer recalls that in the state of Pennsylvania just such a system of township government prevails, the townships having their local officers, but the county being governed at large by a board of commissioners, constituted very much as the boards existing in our counties in which the commissioner system prevails. Bearing in mind this distinction, we think it will be apparent at once that the act of 1895 has but one main and general subject, to-wit, the organization of townships and the government thereof. The other provisions of the act have direct reference to this main subject, are cognate therewith and incidental thereto. The government of the county at large is not affected. The board of supervisors has the same powers and the same duties as the county board had before the passage of the act. Only the number of supervisors and the manner of their election are changed. As we have said, the organization of the super-

visors into a county board is purely fortuitous, for convenience merely. These local officers constitute the county board, but they are still local officers, and their number and the manner of their election are properly connected with the subject of the local government. For the purposes of this discussion it may be assumed that the title of the act may state several subjects; but this is not the question. The constitutional inhibition is against the bill's containing more than one subject. The title must clearly express the subject, but provided the bill itself contains but one subject, and this subject is clearly expressed in the title, it matters not although the title, read independently of the bill, may seem double. We, therefore, look to the bill itself to ascertain whether or not it contains more than one subject, and having ascertained that it contains but one, then we look to the title to see if that subject is clearly expressed therein. If so, the constitutional provision we are here dissussing is not violated. Tested by this rule, we have no hesitation in saying that the subject-matter of this act is single, and that while a more comprehensive and shorter title might have been sufficient to indicate the contents of the bill, still the title which the legislature adopted does clearly indicate every essential feature of the act.

In view of the numerous cases in which this court has been called upon to apply the constitutional provision referred to, we might dismiss this branch of the case here; but, in view of the large number of counties affected by the decision, and in view of the elaborate argument based upon authority which has been advanced on behalf of the respondents by counsel of long forensic and judicial experience, we think it proper to refer in this connection to the cases in this state which have been cited. The desirability of not unreasonably extending an opinion, which must necessarily be somewhat long, forbids our referring to the decisions of other courts, especially as almost every conceivable phase of the question has received an adjudication in this court.

In most of the cases where acts of the legislature have been declared to be in conflict with this provision of the constitution, while in some of them general language may be found suggesting duplicity of subject, it will be found that the decision was based not upon that duplicity, but upon the fact that the legislature had adopted a title which was too restrictive and did not clearly express the subject of the act. Such cases are the following: *Smails v. White*, 4 Neb., 353; *White v. City of Lincoln*, 5 Neb., 516; *State v. Lancaster County*, 6 Neb., 474; *Burlington & M. R. R. Co. v. Saunders County*, 9 Neb., 507; *Ives v. Norris*, 13 Neb., 252; *Holmberg v. Hauck*, 16 Neb., 337; *Touzalin v. City of Omaha*, 25 Neb., 817; *Weigel v. City of Hastings*, 29 Neb., 379. In some of the foregoing cases it was, however, unmistakably intimated that the act was not bad for duplicity and would have been valid under a broader title. In *State v. Lancaster County*, 17 Neb., 85, while the syllabus refers only to the title, it is clear from the opinion that the court deemed the act itself bad for duplicity; but the act there under consideration provided for the registry, sale, leasing, and general management of school lands, and also sought to incorporate therein a repeal of an act providing for the repayment of taxes levied on lands the legal title of which was in the state. Here were two subjects clearly. The repeal of the law in relation to repaying taxes was not incidental to the main purpose of the act. It was not cognate therewith, nor did it in any manner relate thereto. It was wholly separate and distinct from the main purpose. In *Trumble v. Trumble*, 37 Neb., 340, an act of 1889 relating to various matters connected with decedents' estates was held void, among other reasons, for duplicity of subject; but that act had for its ostensible purpose the amendment of only two sections of the law in regard to decedents, and, therefore, the professed subject of the act extended only to such matters as were germane to those two sections. Every subject not so germane was, therefore, a separate

subject. We conceive the rule to be that the constitutional provision does not restrict the legislature in the scope of legislation. It does not prohibit comprehensive acts, and no matter how wide the field of legislation the subject is single so long as the act has but a single main purpose and object. Thus, we would have no doubt of the power of the legislature by a single act to provide a new and complete Code of Civil Procedure, but if the legislature should undertake in an act whose main purpose should be, for instance, to provide for supersedeas bonds, to also provide for the issuing of original summonses, or the effect of a demurrer, we would have no hesitation in saying that such an act contained more than one subject. The act under consideration in *Trumble v. Trumble* was of the latter character, and if this idea was not clearly expressed in the opinion, the writer, who was also the author of that opinion, owes an apology to the profession, and can only say that the general language there used should be read as applied to the questions presented in that case. In none of the cases already cited, and in none decided by this court, has it ever been held that the constitution required any subdivision of legislation into distinct acts, each having reference to only so much as might practicably form a single act. On the contrary, it has always been said that the legislature might choose for itself its manner of legislation, and that an act, no matter how comprehensive, would be valid provided a single main purpose was held in view, and nothing embraced in the act except what was naturally connected with and incidental to that purpose. Thus, in *State v. Page*, 12 Neb., 386, the act of 1879, already referred to, entitled "An act concerning counties and county officers," was held to contain but one subject because it had "but one general object," fairly expressed in the title, although this act contained a complete scheme of county government, and so operated as to materially change the law on other subjects related thereto. In *Bonorden v. Kriz*, 13 Neb., 121, the

court considered an act entitled "An act to exempt homesteads from judicial sale," and held that a provision in that act that a conveyance or incumbrance by the owner would be of no validity unless the husband and wife concurred in and signed the same joint instrument was valid and within the general subject of the act. It might be remarked that this act, in connection with its main features, provided for the change of homesteads and for their descent. The court evidently regarded these features within the same general purpose as the exemption of homesteads from judicial sale. In *White v. City of Lincoln*, 5 Neb., 505, it was said by MAXWELL, J.: "The object of this constitutional provision is to prevent surreptitious legislation by incorporating into bills obnoxious provisions, which have no connection with the general object of the bill and of which the title gives no indication. It will be sufficient, however, if the law have but one general object which is fairly expressed in the title of the bill." In *Poffenbarger v. Smith*, 27 Neb., 788, it was held that those provisions of what is known as the "Slocumb Law," subjecting a liquor seller to liability for damages sustained in consequence of the sale of intoxicating liquors, were "in harmony with the object of the act," and valid. In *Kansas City & O. R. Co. v. Frey*, 30 Neb., 790, there was involved the question of the constitutionality of an act giving laborers and material-men a lien upon a railway for material furnished and labor performed thereon. It was held that the various provisions of that act constituted a single subject of legislation, MAXWELL, J., saying, "The object of the framers of the constitution was not to embarrass legislation by making laws unnecessarily restrictive in their scope and operation, and thus greatly multiply their number, but it was intended that a proposed measure should stand upon its own merits, and that the several members of the legislature should be apprised of the purpose of the act when called upon to support or oppose it. In other words, members were pro-

hibited from joining two or more bills together in order that the friends of the several bills may combine and pass them. It was never designed to place the legislature in a strait-jacket and prevent it from passing laws having but one object under an appropriate title." In *Hopkins v. Scott*, 38 Neb., 661, it was held that chapter 50, Session Laws, 1891, providing for the deposit in banks of state and county funds, had but one subject, although relating to both state and county moneys, the general subject being the custody of public funds. We think these cases plainly indicate the test we have endeavored to express and that by that test this act is not bad for duplicity and the title expresses its subject.

2. It is urged in the second place that the act creates a new office of county supervisors, and defines the powers and duties of county boards, and that these subjects are not expressed in the title. These questions have been incidentally disposed of in considering the first objection.

3. Next, it is argued that the act is indefinite and incapable of execution, because, first, it provides for only five supervisors in counties having one city of over 1,000 inhabitants, and this provision is in conflict with other parts of the act, and, second, that there is no provision for counties having more than one city of over 1,000 inhabitants. Section 4 of the act is as follows: "On the second Tuesday after such election adopting township organization in any county the county commissioners of the county shall meet at the county seat of such county and shall forthwith, and within not more than three days from and after the first day of meeting, divide such county into seven districts to be known as supervisors districts; such districts to be divided as near as possible with regular boundary lines and in regular and compact form and shape, and each district shall as near as possible have the same number of inhabitants as any other district; but no township shall be divided by any such district; *Provided*, That in counties having

cities over one thousand inhabitants, and more inhabitants than the average outlying districts, the county commissioners shall add enough contiguous territory to such city so that the inhabitants in such city and contiguous territory shall equal the inhabitants of two of the other districts, and when so divided such district in which such city is located shall elect two supervisors to be elected at large within such district; *Provided further*, That if a county is divided with such a city district, then and in such event the balance of the territory shall only be divided into three districts, and such city district shall receive number as hereinafter provided; *Provided further*, That if any such city has more than the requisite inhabitants for two districts, then and in such event sufficient outlying territory may be added to such city to make three districts. The supervisors in such city districts shall be elected at large, and the balance of that territory outside of such city districts shall be divided so as to create seven districts including such city districts." (Compiled Statutes, 1895, sec. 4, art. 4, ch. 18.) There is certainly a conflict between the proviso of this section requiring in counties with city districts that the remainder of the territory shall be divided into three districts, and other portions of the act. It is suggested in argument that this state of affairs arose from the fact that the bill as originally drawn provided in all cases for only five supervisors; that during its progress in the legislature it was amended so as to provide for seven, but in this one case the proper amendment was not inserted. However this may be, we could not amend the act so as to make it conform with the unexpressed intent of the legislators. But in *Albertson v. State*, 9 Neb., 429, and *Ryan v. State*, 5 Neb., 276, it was held that where there is an irreconcilable conflict between different sections, or parts of the same statute, the last words stand, and those in conflict therewith are repealed. By the last sentence of section 4 it is provided that supervisors in such city districts

"shall be elected at large and the balance of that territory outside of such city districts shall be divided so as to create seven districts including such city districts." By section 5 it is made clear that where a city is entitled to more than one supervisor, it shall for the purpose of subdivision be deemed two districts, because that section provides: "When the county has been divided as in the preceding section provided, the county commissioners shall at once, upon such division, proceed to number such districts from one to seven, and they shall in case of a city district as contemplated in the preceding section, give such city district two or more numbers, one odd and one even number." Section 7 provides that county commissioners of a county having adopted township organization shall be assigned to the supervisor district in which each resides, "and the three shall forthwith appoint four supervisors to fill the vacancies in the other four supervisors districts." Section 8 provides that after the supervisors qualify "they shall at once organize by electing one of the seven supervisors as chairman." It is plain from these later provisions that the legislature contemplated that there should be in all cases seven supervisors, and these provisions being therefore in conflict with that provision of an earlier section, seeming to provide for five supervisors in certain cases, the rule in *Albertson v. State* requires us to reject the earlier provision, and thus give effect to the manifest final intent of the legislature. As to the objection that no provision is made for counties having more than one city of over 1,000 inhabitants, it is sufficient to say that the general provisions of section 4 in regard to equalizing the number of inhabitants in each district, especially the qualification making the special provision in regard to city districts applicable only where such city has more inhabitants than the average outlying districts, provide adequately for the case contemplated. Thus, assuming that a county has a population of 21,000, the average number of inhabitants for supervisor districts

would be 3,000, and no city would fall within the proviso of section 4 unless it had more than 3,000 inhabitants. Suppose there were in such a county two cities, one of 4,000 and one of 5,000 inhabitants. To the city having 4,000 inhabitants would be added sufficient contiguous territory to include 2,000 additional, and there would thus be formed a double district entitled to two supervisors. To the city having 5,000 inhabitants would be added sufficient contiguous territory to add another thousand, and this, too, would form a double district. There would thus be carved out of the county two double districts, each having 6,000 inhabitants. The remainder of the county would have 9,000 inhabitants, and would be divided into three districts. Such is the unmistakable construction of section 4, and it fully meets the objections urged against it.

4. It is contended that the act lacks uniformity, and is therefore obnoxious to that provision of the constitution prohibiting special legislation in certain cases. This argument is based on the same grounds as the preceding, and what has already been said disposes of it.

5. The next contention is that the act repeals and amends a large number of statutes without any reference whatever to the statutes amended or repealed, and that it is, therefore, violative of that portion of section 11, article 3, of the constitution, providing that "No law shall be amended unless the new act contain the section or sections so amended, and the section or sections so amended shall be repealed." The answer to this argument is that the act is one complete in itself, covering the whole subject to which it relates, that it is competent for the legislature to pass a new act complete in itself, and the fact that such act modifies, changes, or destroys the effect of other statutes does not render it in conflict with the constitution. (*State v. Whittemore*, 12 Neb., 252; *State v. Ream*, 16 Neb., 681; *Stricklett v. State*, 31 Neb., 674; *Smails v. White*, 4 Neb., 353; *Sovereign v. State*, 7 Neb., 409.) While the manner

in which the rule was applied in the last case cited may be open to criticism, we think the test afforded by that rule, and as stated in all the cases, is a safe and proper one. As said by Judge Cooley in *People v. Mahaney*, 13 Mich., 481, to require whenever a new statute is passed that all prior statutes modified by it by implication should be re-enacted and published at length, would require a large portion of the whole code of laws to be republished at every session, and parts of it several times over, until from the mere immensity of material it would be impossible to tell what the law is, and would also render such a statute obnoxious to other provisions of the constitution relating to the subject of laws and their titles. "An act complete in itself is not within the mischief designed to be remedied by this provision and cannot be held to be prohibited by it without violating its plain intent." It is true, as held in *Smails v. White*, *supra*, that it matters not whether the new statute assumes to be amendatory or not. It is within the inhibition if it is in effect amendatory, but this rule applies only to acts either professedly or in effect simply amendatory and to acts incomplete in themselves. To complete acts our constitution has no reference and they must prevail as against earlier legislation in conflict therewith.

6. It is said that in so far as the act relates to counties already under township organization, it is void, because it changes the organization of the county without submitting the question to a vote of the electors as required by section 5 of article 10 of the constitution. This section we have already quoted. It requires the legislature to provide for township organization and then provides, in effect, that a majority of the legal voters of a county at a general election may adopt such organization, and, in a manner to be provided by law, may vote upon the question of continuing or discontinuing the same. In other words, the constitution gives to the voters of the county the right to determine whether or not township organization shall prevail;

but it leaves to the legislature the authority to provide the details of township government. The legislature, without submission to the people, may provide any system of township organization it sees fit, and consequently, having provided such a system, it may amend it, or it may repeal it altogether, provided it enacts a new system to take its place. The *referendum* provided by the constitution is merely upon the general question of adopting or continuing township organization. The details of township government are for the legislature, and if the legislature sees fit to so change the method of township government that the voters of a county having adopted township goverment do not desire to continue it under the new method, they still have the means through the *referendum* given by the constitution of discontinuing that organization. This is all that the constitution requires.

7. The next argument falls for the most part within what has already been said in regard to the amendatory character of this act, but suggests another question which requires separate treatment. It is that the act, in requiring supervisors who live in the same district to cast lots to ascertain who shall remain in office, creates new county officers, and provides for their selection by lot instead of election, as required by article 10, section 4, of the constition. The answer to this is, that no new officers are elected by casting lots. The officers required to do so have already been elected. The casting of lots only determines which one of those already elected shall cease to be an officer, and it is not contended that the legislature has no power to discontinue the office. So far as the act provides for appointments, in case there are no supervisors within the district, it is merely for the purpose of provisionally filling the office until an election can be had. Provisions for such temporary appointments exist in regard to many offices, and their validity is not now open to question.

8. Finally, it is suggested in argument that the act is

invalid because it provides that there shall be but one justice of the peace for each township. So far as this argument is based upon the ground that it operates as an amendment of the election law providing for two justices in each precinct, it has been met by what has already been said. But it is argued in addition to this that such a provision is void for want of uniformity, under section 19, article 6, of the constitution, providing that all laws relating to courts shall be general and of uniform operation. We might dispose of this latter branch of the case upon the ground that the provision referred to, if void, is not so interwoven with the rest of the act as to invalidate the whole act. But for the purpose of setting the whole question at rest we prefer to treat the argument upon its merits. The case is, in this aspect, directly in line with that of *State v. Berka*, 20 Neb., 375, holding that a statute limiting the number of justices in cities of the first class to three is not obnoxious to the constitutional provision referred to. It was there said that if a law is general and uniform throughout the state, operating alike upon all persons and localities of a class, or who are brought within the relations and circumstances provided for, it is not objectionable as wanting uniformity of operation. This law applies to all counties adopting township organization, and all counties may do so. It is, therefore, of uniform operation.

9. We have treated this case as properly involving the constitutionality of the act in question, although counsel for the relator contends with vigor that, irrespective of that question, the writ should issue, and earnestly asks the court to pass upon the question as to whether a ministerial officer, having no personal interest, can justify his refusal to act under a statute on the ground that the statute is in conflict with the constitution. We had thought it settled, at least since the decision of *Marbury v. Madison*, 1 Cranch [U. S.], 137, that the constitution is the supreme law, binding

upon the legislature, as well as upon every citizen, and that no act of the legislature repugnant to the constitution can become a law for any purpose. A different doctrine has of late been revived, and it would even seem has received acceptance in a modified form by some courts. There can, however, in our mind, be no escape from these propositions, that the constitution is the fundamental law, that an act of the legislature repugnant thereto is not merely voidable by the courts, but is absolutely void and of no effect whatever. It is no law, and binds no one to observe it. The officers of this state are sworn to support the constitution. Where a supposed act of the legislature and the constitution conflict, the constitution must be obeyed and the statute disregarded. Ministerial officers are, therefore, not bound to obey an unconstitutional statute, and the courts sworn to support the constitution will not by *mandamus* compel them to do so. It is, therefore, a complete answer to an application for such a writ that the statute seeking to impose the duty is violative of the constitution. But the courts themselves will enforce a statute unless it is clearly repugnant to the constitution, and in discharging the functions of their offices ministerial officers should, of course, exercise the greatest caution on such questions. A doubt as to the validity of a statute would not justify them in disregarding it. The peace of the community, the orderly conduct of government, require that only in clear cases of unconstitutionality should they refuse obedience to legislative acts. They always disregard them at their peril; but when they do disregard them, and the question is presented to the court as to whether or not obedience will be compelled, the question of the validity of the act is presented, and obedience will not be compelled if the act is unconstitutional, because in that case it is no law and imposes upon no one any duty. Of the cases cited in support of a contrary view two are found in our reports, but they are not authority for the contention of counsel. One is

State v. Douglas County, 18 Neb., 506. In that case the court refused to pass upon the constitutional question because the case was submitted on the eve of the election to which the case related and practically without argument. The other case is *State v. Stevenson*, 18 Neb., 417. The court there did pass on the constitutional question, and then added, what was clearly under the circumstances *obiter*, that an act of the legislature should be respected until declared invalid by the judiciary in a proper legal proceeding. This language must have been used without due reflection. If an act must be respected until its invalidity is declared by the judiciary in a proper proceeding, then the constitution is utterly ineffectual. Such a proceeding can never arise until some one refuses obedience to the act.

JUDGMENT AFFIRMED.

THOMAS J. COOPERRIDER ET AL. V. STATE OF NEBRASKA, EX REL. WILLIAM H. STEVENS ET AL.

FILED OCTOBER 1, 1895. No. 7999.

1. **Township Organization:** STATUTES: CONSTITUTIONAL LAW. *Van Horn v. State*, 46 Neb., 62, reaffirmed.
2. **Mandamus:** WRIT AGAINST BOARDS AND CORPORATIONS. In an action for a *mandamus* to compel the performance of a duty imposed upon the governing body of a corporation, such as a county board, it is proper to name as respondents and direct the writ against the individuals holding the offices in their official capacity.
3. ———: PARTIES. Members of the board may in such case be relators, and when they are such there is no defect of parties if all the members of the board who are not relators are made respondents.
4. ———: SUPERSEDEAS. Where a peremptory writ of *mandamus* has been awarded, the allowance of a supersedeas rests within the judicial discretion of the trial court.

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

Capps & Stevens, for plaintiffs in error.

W. P. McCreary, contra.

IRVINE, C.

The relators applied to the district court of Adams county for a writ of *mandamus* to compel the respondents, as members of the board of supervisors, to convene and divide the county into supervisor districts and select supervisors according to the provisions of Session Laws, 1895, chapter 28. The district court allowed the writ, and the respondents prosecute error.

The case on its merits presents the same questions as are decided in *Van Horn v. State*, 46 Neb., 62, and the same reasons control its decision. In this case there are, however, certain assignments of error relating to the form of the proceedings. These require separate notice. The relators in this case are themselves members of the board of supervisors. The respondents are the remaining members of the board. The prayer is for a writ compelling the respondents to convene with the relators and act. This is also the form of both alternative and peremptory writs. It is contended that in such a case the proper respondent is the corporation as such. In other words, that the writ should run not against individuals composing the board of supervisors, but against the board of supervisors by that name. In *State v. Home Street R. Co.*, 43 Neb., 830, it was said: "Where the act is a duty incumbent on a corporation, the writ may, according to circumstances, be directed to the corporation itself, to the select body of officers whose duty it is to perform the act, or to the corporation and that body jointly." An examination of the cases convinces us that according to the great weight of modern

authority the form of the writ as to the respondents is not very material. It has been held that a writ directed against a municipal corporation in its corporate name, or against the council without naming its members, is sufficient. (*Village of Glencoe v. People*, 78 Ill., 382; *City of Chicago v. Sansum*, 87 Ill., 182; *Fisher v. City of Charleston*, 17 W. Va., 595; *Wren v. City of Indianapolis*, 96 Ind., 206; *State v. City of Milwaukee*, 25 Wis., 122.) On the other hand, it has been held a proper and, indeed, a preferable practice, to direct the writ against the individuals holding the office. (*Hollister v. Judges of District Court*, 8 O. St., 201; *State Counsel v. Hickman*, 57 Ala., 338; *Commonwealth v. City of Pittsburg*, 34 Pa. St., 496; *St. Louis County Court v. Sparks*, 10 Mo., 117.) In *City of Louisville v. Kean*, 18 B. Mon. [Ky.], 9, a proceeding against the individuals was treated as one against the corporation and the corporation allowed to appeal. In *People v. Brinkerhoff*, 68 N. Y., 259, it was said that the writ should have been directed to the board of supervisors, but that it was not error to direct it to the chairman and clerk alone, they being particularly charged with the duty. It would seem, too, from some of the cases, that courts have regarded it essential to the enforcement of the writ by attachment that the peremptory writ should run against the individuals and be served upon them. But for this purpose they have issued the peremptory writ in that form, although the alternative writ was directed to the corporate body. (*People v. Champion*, 16 Johns. [N. Y.], 61; *Wren v. City of Indianapolis, supra; State v. City of Milwaukee, supra.*) Even the English courts of the last century were inclined to disregard technical defects in regard to the naming of respondents in the writ. (*Pees v. Major*, 1 Stra. [Eng.], 640.) It is the doctrine of the supreme court of the United States that a writ may be directed either to a city by its corporate name, or to the mayor and aldermen if it appear that these officers are the governing body. (*Mayor v. Lord*, 9 Wall. [U. S.], 409.) In such cases

the service of the writ seems to be more important than its form, but we think the better practice is to name as respondents and direct the writ against the individuals holding the office in their official capacity.

It is contended, also, that the relators, being members of the board, have no legal capacity to sue. The duty which it is sought to enforce is a public duty, and the question is one of public right. Therefore, any citizen may maintain the action. (*State v. Shropshire*, 4 Neb., 411; *State v. Stearns*, 11 Neb., 104; *State v. City of Kearney*, 25 Neb., 262.) No citizen can more appropriately bring the action than a member of the board, upon whom the duty is imposed, and whose efforts to perform it are thwarted by the recalcitrant majority of the board. It is suggested that there is a defect of parties defendant, because all the members of the board are not made defendants. It is the rule that in such cases all the officers upon whom the duty is imposed are necessary respondents. (*Lyon v. Rice*, 41 Conn., 245; *Knight v. Ferris*, 6 Houst. [Del.], 283; *State v. Jones*, 1 Ired. [N. Car.], 129.) In a case like the present it has been held proper for the relator, being a member of the board, to make himself also a respondent (*Cooper v. Nelson*, 38 Ia., 440), but we think that the correct view, especially under the reformed procedure, is that taken in *State v. Jones, supra*, holding that while the writ must be directed to all the members, still, where a portion of the members accept service and assent to the performance of the act, a writ directed against the remaining members is sufficient, as all have been thus brought before the court and are subject to penalty for contempt. Here all the members of the board are before the court. The relators asking for the writ here are as much bound by the record as the respondents. The writ requires the respondents to meet with the relators, and there can be no doubt that upon this record the writ may be enforced against every member of the board, whether relator or respondent.

The district court refused to allow a supersedeas, and its action in this respect is assigned as error. It is doubtful whether the question is properly presented in this manner, but be that as it may, there was no reversible error. The question was before this court in *State v. Judges*, 19 Neb., 149. It was there intimated that in a case not provided for by statute the district court might, where great hardship or wrong would be the result of enforcing the order before the appeal was decided, grant a supersedeas; but that for a supersedeas in such cases there was no statutory authority, and the district court could not be compelled to allow it. From this it would seem that the allowance of a supersedeas in a *mandamus* case rests within the discretion of the district court. This is the rule as to *quo warranto*. (*Gandy v. State*, 10 Neb., 243.) No abuse of discretion in this case appears.

JUDGMENT AFFIRMED.

STATE OF NEBRASKA, EX REL. O. HORNE, V. SILAS A. HOLCOMB, GOVERNOR.

FILED OCTOBER 3, 1895. No. 7769.

1. **Constitutional Law**: CONTEMPORANEOUS CONSTRUCTION. A contemporaneous construction of a constitutional provision, which has for many years been adhered to by the legislative and executive departments of the government, will not be disregarded by the courts, and in doubtful cases will generally be held conclusive.

2. **Trustees for Institution for the Blind**: ELECTION BY LEGISLATURE: CONSTITUTIONAL LAW. Session Laws, 1875, p. 150, sec. 2, providing for the election by the legislature of trustees for the institution for the blind, is repugnant to section 10, article 5, of the constitution, and was thereby repealed.

ORIGINAL application for *mandamus* to compel the governor to approve the bond of relator as treasurer of the board of trustees of the institution for the blind at Nebraska City. *Writ denied.*

John C. Watson and *S. G. Hutchinson*, for relator, cited: *State v. Bacon*, 6 Neb., 286; *Curtis v. Allen*, 43 Neb., 184; *State v. Plambeck*, 36 Neb., 401; *Beck v. Jackson*, 43 Mo., 117; Cooley, Constitutional Limitations, 184; *Pleuler v. State*, 11 Neb., 547; *State v. Smith*, 35 Neb., 24; *People v. Morgan*, 90 Ill., 558; *Wilcox v. People*, 90 Ill., 186.

Darnall & Kirkpatrick, contra, cited: *State v. Kennon*, 7 O. St., 566; *People v. Loewenthal*, 93 Ill., 196; *Jackson v. Board of Supervisors of Washington County*, 34 Neb., 680; *Coutant v. People*, 11 Wend. [N. Y.], 511; *State v. Bacon*, 6 Neb., 286; *Clark v. Stanley*, 66 N. Car., 59; *People v. McKee*, 68 N. Car., 429; *People v. McGowan*, 68 N. Car., 520; *Bunn v. People*, 45 Ill., 410; *State v. Hyde*, 22 N. E. Rep. [Ind.], 644; *State v. Peele*, 22 N. E. Rep. [Ind.], 654; *State v. Denny*, 21 N. E. Rep. [Ind.], 252; *State v. Board of Public Lands & Buildings*, 7 Neb., 42; *In re Board of Public Lands & Buildings*, 18 Neb., 340.

POST, J.

This is an application to this court in the exercise of its original jurisdiction for a writ of *mandamus*, requiring the respondent, as governor, to approve the relator's bond as treasurer of the board of trustees of the institution for the blind at Nebraska City. It appears from the pleadings upon which the cause is submitted that the legislature, on the 5th day of April, 1895, elected trustees for the institution above named as follows: Webster Eaton and F. E. McKeeby, to serve until March 4, 1897; and J. L. Fisk and D. W. Crane, to serve until March 4, 1899; and W. L. Wilson and the relator, O. Horne, to serve until March 4,

1901. The relator, having been named as treasurer for the board so chosen, presented for approval his official bond which is conceded to be in all respects sufficient, but the respondent refuses, for reasons hereafter appearing, to approve said bond, or to take any action whatever with respect thereto. The relator's claim is founded upon the provisions of sections 2 and 10 of the act of February 19, 1875, entitled "An act to erect and maintain an institution for the blind," as follows:

"Sec. 2. Such institution shall be under the supervision of a board of trustees, consisting of six persons, who shall be elected by the legislature of the state in joint convention as soon as practicable after the passage of this act. Two of said trustees shall be elected and serve until the fourth of March, A. D. 1877, and two shall be elected to serve until the fourth of March, A. D. 1879, and two shall be elected to serve until the fourth of March, A. D. 1881, and thereafter said trustees shall be elected by joint convention of the legislature and hold their office for six years."

"Sec. 10. The board of trustees shall elect one of their number president and another treasurer of the institution, and the treasurer shall enter into bonds with security in the sum of not less than ten thousand dollars, to be approved by the governor and auditor of state, conditioned for the faithful performance of his duties and the honest disbursement of, and accountal for, all moneys belonging to the institution which may come into his hands, which bond shall be filed with the secretary of state."

Section 23 of an act approved February 28, 1881, entitled "An act concerning official bonds and oaths," contains a provision expressly repealing section 10 above quoted, although that act is by both parties treated as void in so far as it relates to the subject of this proceeding, on the ground that the repealing clause thereof is not germane to the title. It is unnecessary in this connection to determine the

effect of the attempted repeal, since we prefer to rest our conclusions upon other and more satisfactory grounds.

A question distinctly presented by this record, and which must be regarded as decisive of the controversy, is whether section 2 of the act of 1875 was abrogated by the provisions of section 10, article 5, of the constitution of 1875, which took effect November 1 of that year, and which reads as follows:

"Sec. 10. The governor shall nominate and by and with the advice and consent of the senate (expressed by a majority of all the senators elected, voting by yeas and nays) appoint all officers whose offices are established by this constitution, or which may be created by law, and whose appointment or election is not otherwise by law or herein provided for; and no such officer shall be appointed or elected by the legislature."

These provisions of the constitution, it must be confessed, are wanting in the clearness and precision which characterizes that instrument as a whole. However, a careful analysis of the above section discloses that power is thereby conferred upon the governor to appoint two classes of officers, viz., (1) those whose offices are established by the constitution itself, and (2) those whose offices are created by law and whose appointment or election is not otherwise provided for. The phrase, "whose appointment or election is not otherwise * * * provided for," is an apparent limitation upon the preceding general language, and read by itself impliedly authorizes the legislature to prescribe the manner of selecting all officers of its own creation. The words "by law or herein" add nothing to the force or effect of the provision, since the only officers known to our system are those established by the constitution, and such as are created by law in harmony therewith; but the last clause of the section is in the nature of a proviso, in turn limiting the power of the legislature over the subject, and upon the scope and effect of that limitation must our con-

struction depend. The word "such" therein was not used inadvertently, and without doubt refers to one or both of the classes of officers contemplated by the first clause of the section. It cannot, it would seem, refer to the first class, since the governor is, as we have seen, expressly authorized to appoint all constitutional officers, and which authority is an obvious limitation upon the power of the legislature. It must, therefore, apply to offices created by law, and be construed as expressly prohibiting the appointment or election of officers by the legislature.

There are other considerations which should be mentioned, and which furnish the most satisfactory reasons for the conclusion above stated, some of which will be briefly noticed. It is a notorious fact, well authenticated by history and the public records of the state, that the practice of the legislature under the former constitution in appointing officers and members of boards charged with the government and control of public institutions had resulted in great abuse and public scandal, and that the constitutional restriction under consideration was designed as a remedy for that evil.

Our conclusion is also strongly supported by contemporaneous constructions of the executive and legislative departments of the government. As illustrative of the foregoing proposition may be mentioned the fact that upon the adoption of the present constitution the executive officers of the state assumed control of the public institutions, including the institution for the blind, the trustees thereof, who held by appointment of the legislature, voluntarily retiring; and at no time thereafter, until the year 1895, has the legislature assumed the power to appoint or elect officers not essential to the business of its own department. In more than one instance has the legislature determined the question at issue adversely to the claim now urged in its behalf. For instance, during the session of 1893 a communication was by the governor addressed to the com-

mittee in charge of House Roll No. 81, being a bill for "An act for the issuing of state bonds for the purpose of providing supplies for citizens suffering from loss of crops," etc., calling attention to the fact that said measure was in conflict with the constitution by reason of a provision naming commissioners to distribute the proceeds of the bonds thereby authorized. Thereupon, on motion of the distinguished attorney for the relator, then a member of the house, the objectionable provision was stricken out and the bill so amended as to authorize the appointment by the governor of the proposed commission, and in which form it subsequently became a law. To pursue the subject in this connection would be without profit, since none will controvert the proposition that this section of the constitution was understood by its framers and the people by whom it was ratified as an express limitation upon the power of the legislature, and that the popular construction thereof was by all departments of the state government adhered to without question for more than nineteen years. Such a practical exposition, if not indeed conclusive, should at this late day be accorded the highest consideration by the courts in giving effect to its provision involved. It is said by Marcy, J., in *People v. Green*, 2 Wend. [N. Y.], 274: "Great deference is certainly due to a legislative exposition of a constitutional provision, and especially when it is made almost contemporaneously with such provision, and may be supposed to result from the same views of policy and modes of reasoning which prevailed among the framers of the instrument expounded." And in a recent work on the subject it is said: "A construction of a constitution, if nearly contemporaneous with its adoption, and followed and acquiesced in for a long period of years afterwards, is never to be lightly disregarded, and is often conclusive." (Sutherland, Constitutional & Statutory Construction, 307. See, also, Endlich, Interpretation of Statutes, 357, *et seq.;* Sedgwick, Construction of Statutory & Constitutional Law,

552; *Scanlan v. Childs*, 33 Wis., 663; *Cohens v. Virginia*, 6 Wheat. [U. S.], 265; *Packard v. Richardson*, 17 Mass., 143; *Opinion of Judges*, 126 Mass., 551; *Chesnut v. Shane*, 16 O., 599; *Jackson v. Washington County*, 34 Neb., 680; *State v. Smith*, 35 Neb., 13; *United States v. Union P. R. Co.*, 148 U. S., 562.) But we are fortunately not without adjudications in point. In *State v. Stanley*, 66 N. Car., 59, a statute authorizing the appointment of certain public officers by the speaker of the house of representatives and president of the senate was held to have been abrogated by the constitution of that state which provides: "The governor shall nominate and by and with the advice and consent of a majority of the senators elect, appoint, all officers whose offices are established by this constitution, or which shall be created by law, and whose appointments are not otherwise provided for; and no such officer shall be appointed or elected by the general assembly." (Constitution, N. Car., sec. 10, art. 3.) We are unable to perceive wherein the foregoing differs essentially from the provision of our constitution above quoted. Indeed, the only difference observable is the use in ours of the words "by law or herein," which, as we have seen, add nothing to the force of the section in which they are employed. The court in the case cited say, referring to the last clause of the section quoted, that the words thereof "are superadded as an express veto upon the power of the general assembly to appoint or to elect an officer, whether the office is established by the constitution or shall be created by an act of the general assembly." To the same effect see *People v. McKee*, 68 N. Car., 429, and *People v. McGowan*, 68 N. Car., 520. It follows that section 2 of the act of 1875, authorizing the election by the legislature of trustees for the institution for the blind, is repugnant to the present constitution and was thereby repealed. The writ is accordingly

DENIED.

NORVAL, C. J., concurs.

HARRISON, J., dissenting.

This is an original application to this court praying that a writ of *mandamus* issue, directing the Hon. Silas A. Holcomb, as governor of this state, to approve the bond of the relator, O. Horne, as treasurer of the institution for the blind at Nebraska City. The complaint or petition of the relator is as follows:

"Your relator complains and alleges for that the respondent herein, the Hon. Silas A. Holcomb, is now, and since the 3d day of January, 1895, has been, the duly elected, qualified, and acting governor of the state of Nebraska; that the relator herein is a citizen and resident of the county of Otoe and state of Nebraska.

"Your relator further alleges that on the 19th day of February, 1875, there was approved an act of the legislature of the state of Nebraska entitled 'An act to erect and maintain an institution for the blind,' the second section of which act is as follows:

"'Sec. 2. Such institution shall be under the supervision of a board of trustees consisting of six persons, who shall be elected by the legislature of the state in joint convention as soon as practicable after the passage of this act. Two of said trustees shall be elected to serve until the fourth of March, A. D. 1877, and two shall be elected to serve until the fourth of March, A. D. 1879, and two shall be elected to serve until the fourth of March, A. D. 1881, and thereafter said trustees shall be elected by joint convention of the legislature and hold their office for six years.'

"Your relator further alleges that the term of office of each member of the board of trustees of said institution for the blind, heretofore elected, having expired and there being a vacancy in each membership of said board of trustees, the legislature of the state of Nebraska, in pursuance of the provisions of said act approved as aforesaid, during a regular session thereof at the capitol in the city of

Lincoln, met in joint convention on the 5th day of April, A. D. 1895, and proceeded according to law to elect a board of trustees for said institution for the blind, consisting of six persons, who were elected to serve as follows: W. L. Wilson and O. Horne, of Otoe county, to serve until March 4, 1901; J. L. Fisk, of Gage, and D. W. Crane, of Keith, to serve until March 4, 1899; Webster Eaton, of Lancaster, and F. E. McKeeby, of Webster, to serve until March 4, 1897. A copy of the certificate of the election of the relator herein is hereto attached, and marked 'Exhibit A.'

"Your relator further alleges that each person so elected as one of the trustees for said institution for the blind as aforesaid took the oath of office and qualified according to law, and each entered upon the discharge of his duties; that the said above named W. L. Wilson, O. Horne, J. L. Fisk, D. W. Crane, Webster Eaton, and F. E. McKeeby, trustees of said institution for the blind, elected as such on the 5th day of April, A. D. 1895, by the legislature of the state of Nebraska in joint convention assembled, are the sole and only trustees that have been elected by said legislature; that no other person or persons have been named, appointed, or elected as trustees of said institution other than the persons named above, and that no other person or persons are claiming to act for or represent said institution or discharge the duties as trustees of said institution; that at a regular meeting of said board of trustees for the institution for the blind held at said institution in the city of Nebraska City, Nebraska, on the 15th day of April, 1895, said board of trustees elected W. L. Wilson, one of their number, as president, and thereupon elected O. Horne, also from among and one of their number, as treasurer of said institution for the blind, which said election was done and held in pursuance of said act above referred to, the tenth section of which is as follows:

"'Sec. 10. The board of trustees shall elect one of their

number president, and another treasurer of the institution, and the treasurer shall enter into bonds with security in the sum of not less than ten thousand dollars, to be approved by the governor and auditor of state, conditioned for the faithful performance of his duties and the honest disbursement of, and accountal for, all moneys belonging to the institution which may come into his hands, which bond shall be filed with the secretary of state.'

"Certificate attached, marked 'Exhibit C.'

"Your relator further alleges that in accordance with the requirements of said act approved as aforesaid he entered into bonds as the duly elected treasurer of said institution for the blind, with security in the sum of fifteen thousand dollars, conditioned for the faithful performance of his duties, and the honest disbursement of, and accountal for, all moneys belonging to said institution which may come into his hands, which bond he presented to his excellency Silas A. Holcomb, governor of the state of Nebraska, being the respondent herein, that he approve said bond as required by said act, but your relator here makes known to this honorable court that his excellency the said Silas A. Holcomb, governor as aforesaid, refused, and still refuses, to approve said bond; that his excellency the said Silas A. Holcomb, governor as aforesaid, informed the relator herein that he was satisfied with the amount of said bond and the sufficiency of the sureties thereon, but that the legislature of the state of Nebraska had not the power or authority under said act to elect said board of trustees for the institution for the blind aforesaid. A copy of said bond is hereto attached, marked 'Exhibit B.'"

To which the respondent filed the following answer:

"Now comes the respondent, and for answer to the petition of relator filed herein admits that he is the duly qualified and acting governor of the state, and that the relator is a citizen and resident therein. Respondent further answering admits the enacting and approval of an act entitled

'An act to erect and maintain an institution for the blind,' as mentioned in relator's petition, but respondent alleges that after the passage of the act aforesaid the new constitution of the state, known as the 'Constitution of 1875,' was adopted and ratified by the people of the state, and among other provisions of said constitution article 5 thereof contains the following section, viz.:

"'Sec. 10. The governor shall nominate and by and with the advice and consent of the senate (expressed by a majority of all the senators elected, voting by yeas and nays) appoint all officers whose offices are established by this constitution, or which may be created by law, and whose appointment or election is not otherwise by law or herein provided for; and no such officer shall be appointed or elected by the legislature.'

"Respondent further answering says that the portion of the act mentioned by relator which provided for the election of trustees by the legislature was by said section 10 of the constitution amended and repealed, and is not now, and was not at the date mentioned in relator's petition, of any force and effect, and all branches of the state government have so regarded and acted upon said statute. Respondent admits that the legislature elected trustees for said institution at the session when the act was passed, but alleges that the legislature has never made or attempted to make an election of trustees for said institution since, until the pretended election made in 1895, mentioned in relator's petition.

"Respondent further answering admits that the legislature done and performed the acts mentioned in relator's petition, but denies that said acts amounted to or constituted an election of relator and the other persons named to the office of trustees of said institution. Respondent alleges that said pretended election and all proceedings taken and had in and about the same by the legislature were contrary to the constitution and laws of the state and were null and void.

"Respondent further answering admits that relator and the other persons in his petition mentioned have pretended to qualify as trustees and have made a pretended election of relator as treasurer of said institution, as in relator's petition set out, but respondent alleges that all acts of said trustees are without color or authority of law and are null and void. Respondent further alleges that he as the chief executive of the state has full charge and control of said institution and has the sole right and authority to appoint the trustees and other officers for said institution.

"Respondent further answering alleges that among the provisions of the constitution of the state adopted in 1875 in article 2 thereof is a section in the following language, viz.:

"'Section 1. The powers of the government of this state are divided into three distinct departments, the legislative, executive, and judicial, and no person or collection of persons, being one of these departments, shall exercise any power properly belonging to either of the others except as hereinafter expressly directed or permitted.'

"Respondent alleges that the executive branch of the state government, either the board of public lands and buildings or the predecessors in office of respondent, have had the exclusive control and management of said institution for the blind ever since the adoption of said constitution, and respondent herein has sole right and authority to appoint trustees and other officers therefor.

"Further answering respondent admits that relator and the other persons mentioned in his petition claimed to act as trustees of said institution, but denies that they have possession and control of the same. Respondent further answering admits that relator has made and tendered to respondent a bond as mentioned in his petition, and that the same is in due form, and that the sureties thereon are good and sufficient, and that respondent has refused to approve the same. Wherefore respondent prays that relator's ap-

plication may be dismissed and that respondent may go hence and recover his costs."

There was no testimony adduced on behalf of either party, and the disposition of the controversy must be determined from a consideration of the issues and questions involved as raised and presented in the petition and answer. As stated in the pleadings filed by relator, there was passed, during a session of the legislature of 1875, an act establishing an institution for the blind and providing for the election of a board of trustees to manage the affairs of the institution. It was further provided in section 4 of the act referred to, as follows: "The trustees shall have the general supervision of the institution, adopt rules for the government thereof, provide teachers, servants, and necessaries for the institution, and perform all other acts necessary to render the institution efficient and to carry out the purposes of the establishment." It does not appear from the pleading when the first board of trustees was elected, but it is conceded by both parties in the argument in briefs filed, and is a fact, that the legislature which enacted the law, it being passed in such a manner as to take effect and be in force from and after its passage, and being approved February 19, 1875, elected a board, and this board assumed control of the institution and continued its management until the year 1877, when charge of its affairs was taken by what is known as the board of public lands and buildings. This board was created by section 19, article 5, of the "Constitution of 1875," which became the fundamental law of the state after the time of the passage of the act establishing the institution for the blind. The section referred to is as follows: "The commissioner of public lands and buildings, the secretary of state, treasurer, and attorney general shall form a board, which shall have general supervision and control of all the buildings, grounds, and lands of the state, the state prison, asylums, and all other institutions thereof, except those for

educational purposes; and shall perform such duties and be subject to such rules and regulations as may be prescribed by law." The powers and duties of this board were defined by an act of the legislature February 13, 1877. We will further state here that during the month of October, 1877, an opinion was rendered by this court in the case of the *State v. Bacon*, 6 Neb., 286, in which it was decided that the institution for the blind was not an educational institution and not within the exception of section 19, article 5, of the constitution, and was within the control of the board of public lands and buildings; but in an opinion filed January 2 of the current year it was determined by the court to be an educational institution within the meaning of the exception contained in section 19, article 5, of the constitution (*Curtis v. Allen*, 43 Neb., 184), and the legislature, on the 5th day of April of this year, elected a board of trustees for the institution for the blind as provided in the act of 1875, and on the 15th of the same month the persons so selected held a meeting at which the relator was chosen to fill the office of treasurer of the board of trustees and prepared and presented his bond as such officer to the respondent for approval, as admitted in the pleadings, with the result as therein stated.

It is insisted by the respondent that section 2 of the law of 1875, which created this board of trustees and provided the manner of its election, is in direct conflict with the constitution of 1875, which, as I have stated, became of force after the act in question was in effect, and that by the adoption of the constitution and its becoming the primary law of the state the portion of the act referred to was abrogated and repealed, and the office of member of the board of trustees was abolished, or the appointment to it vested in the governor. To support this contention counsel for the governor quote in their brief a number of sections of the constitution, some of which, it is claimed, have direct bearing upon the question at issue and others

are in point only as tending to disclose by their terms the general policy or sentiment which prompted their incorporation in the instrument and its adoption, and it is urged that they were of the same nature as the views and reasons underlying the theory advanced by counsel for respondent. The first of these sections of the constitution which I will notice is section 1, article 2, which is as follows: "The powers of the government of this state are divided into three distinct departments, the legislative, executive, and judicial, and no person or collection of persons, being one of these departments, shall exercise any power properly belonging to either of the others except as hereinafter expressly directed or permitted." This section merely states the departments or divisions of the state government. It does not define the powers and duties which shall pertain to any division. This is left as a task to be performed in other sections of the same instrument, and in laws enacted in pursuance of its provisions. It is, however, well settled that "The difference between the departments undoubtedly is that the legislature makes, the executive executes, and the judiciary construes the law." (Cooley, Constitutional Limitations, p. 108, and cases cited.) Counsel for respondent insist that appointment to office is distinctly within the purview of the executive division, or is an executive function, and that when the people of the state adopted the present constitution, they sought to establish this principle, or rule, and the court should give this due weight in construing what is said in the constitution in regard to offices and appointments thereto, and, so far as possible, give it full scope and effect. In the brief of respondent is the following quotation upon the subject of appointment to office being peculiarly within the powers of the executive: "Mr. Jefferson, in a letter to Samuel Kercheval, dated July 12th, 1816, said: 'Nomination to office is an executive function. To give it to the legislature, as we do [in Virginia], is a violation of the principle

of the separation of powers. It swerves the members from correctness by temptations to intrigue for offices themselves and to a corrupt barter of votes; and destroys responsibility by dividing it among a multitude.'" (Jefferson's Complete Works, vol. 7, p. 12.) And the view that nomination to office is an executive function, and intrinsically so, has been adopted by a number of the courts, while the contrary view has also been adopted by some, and in a dissenting opinion by Elliot, C. J., in the case of *State v. Hyde*, 22 N. E. Rep. [Ind.], on page 652, it is said: "Perhaps the principle has never been more clearly stated than by the great constitutional lawyer whose statements, as Emerson says, 'lay in daylight.' That lawyer said: 'The inferences which I think follow from those views of the subject are two: First, that the denomination of a department does not fix the limits of the power conferred on it, nor even their exact nature; and second (which, indeed, follows from the first), that in our American governments the chief executive magistrate does not necessarily, and by force of his general character of supreme executive, possess the appointing power. He may have it, or he may not, according to the particular provisions applicable to each case in the respective constitutions.' (Webster's speech on the presidental protest.)" From all of which it appears that there was not a unanimity of opinion upon the question among our ablest minds in the past, or the courts, or judges of the same courts. This court has said as to the division of power and the exercise of power properly belonging to one by the others: "The powers of the state government are divided into three distinct departments, the legislative, the executive, and judicial, and no person or collection of persons, being one of these departments, can exercise any power properly belonging to either of the others, except expressly so authorized by the constitution. Under this division of distinct departments of the government, the apportionment of power to one department will, of itself, imply an inhibi-

tion of its exercise by the others." (*Turner v. Althaus*, 6 Neb., 69.) If this court was also committed to the doctrine that appointment to office is essentially or exclusively considered in the abstract an executive function and our constitution stopped with the provision last quoted, the solution of the problem presented in this case would not be difficult. All power is inherent in the people. This statement is not new and contains nothing startling, but it is well that it be repeated and kept strongly in mind, and its exercise by those to whom it is delegated be directed toward furthering the best interests of the beneficiaries of the trust. In government this power is necessarily delegated by its primary possessors, portions of it to bodies of men, such as is the legislature in our own and sister states. Other portions more properly to one man, as our governor. This is usually done through the medium of what is known as a constitution, and history gives us many accounts of struggles by the people to repress, abridge, and circumscribe a dangerous extension of delegated power, at times by an executive and at others by the legislative body. Some of the United States at the inception of their existence adopted constitutions in which the power to elect or appoint officers was lodged in the legislative department, and in constitutions adopted at a later date in their state life changed this and either made the offices mainly elective or gave their nomination to the executive. It is stated that the reason for this after or later action was that it had been discovered that the exercise of the elective or appointive power to office, generally, by the legislature was corrupting, dangerous, and injurious to the best interests of the states where it prevailed. In our state, under the provisions of the constitution in force prior to and at the time of the adoption of the present one and the construction given to the portions of the old constitution in relation to offices and appointment or election thereto, the legislature had and exercised such power, an instance of the right to

exercise the power being the passage of the law under which the relator claims title to the office of trustee, and its placing the selection of trustees in the legislature, and of which, under the old constitution, no question would or could have successfully been raised. This shows beyond a doubt that up to the time of the adoption of the constitution of 1875 the doctrine that the power of appointment of officers was intrinsically an executive function or inherent in the executive department of our state government was not prevalent and did not obtain to any extent or in any degree. In the new constitution the draughtsman of the instrument, the convention which considered and arranged it for submission to the source of power, the people, from whose approval it must derive vitality and force, placed in it the section hereinbefore quoted by which the departments of the state government were clearly defined, and expressly prohibited the exercise of any proper power of any one of them by either of the others, and further, in section 10 of article 5, which is as follows: "The governor shall nominate and by and with the advice and consent of the senate (expressed by a majority of all the senators elected, voting by yeas and nays) appoint all officers whose offices are established by this constitution, or which may be created by law, and whose appointment or election is not otherwise by law or herein provided for; and no such officer shall be appointed or elected by the legislature,"—did not leave the duties of the chief executive officer in relation to appointment of officers to speculation or conjecture or to be determined by construction, but I think distinctly, and in unmistakable terms, defined the duties of the chief executive in respect to the appointment of officers and the offices to which they should apply and include, and here did not recognize the doctrine of the intrinsic right of the executive to control nominations to office, but excepted such as were otherwise provided for in the instrument, or might be otherwise provided for by law,

and this must be presumed to have been intentionally done, for the framers of the constitution and the body which arranged it for submission were no doubt painstaking and careful and examined and weighed the words, phrases, and sentences of the sections and articles and debated their effect before allowing them to become constituents of the instrument. Hence I conclude that the doctrine invoked by counsel for respondent, of the inherent right of the executive department to appoint officers, is not entitled to and should not be accorded any very great weight or further consideration in the determination of the questions herein involved. I am not at this time called upon to define or prescribe generally the boundaries or limitations of the exact powers or duties of either the executive or legislative department, this being a subject upon which a particular direction is made in the constitution itself.

If the section of the law under which relator claims title to the office of trustee and treasurer of the board of trustees is clearly in conflict with the terms of the constitution, or any section or sections of it, or inconsistent therewith, then it was annulled and must be declared void, but not unless unmistakably so. If there exists a doubt upon the subject it must be allowed to prevail in favor of the law. "The repugnancy which must cause the law to fall must be necessary and obvious; if by any fair course of reasoning the law and the constitution can be reconciled, the law must stand." (*Cass v. Dillon*, 2 O. St., 608.) It is provided in the constitution, which it is claimed abrogated this law, that all laws in force at the time of the adoption of this constitution not inconsistent therewith shall continue to be as valid as if this constitution had not been adopted. The task then to be performed in the present controversy is to construe section 10, above quoted, according to the established rules of construction in such cases, one of which is to discover, as nearly as may be, the intention of the body which framed and submitted and also of the people who adopted

it; and another is that "its terms must be taken in the ordinary and common acceptation, because they are supposed to have been so understood by the framers and by the people who adopted it. This is unquestionably the correct rule of interpretation. It, unlike the acts of our legislature, owes its whole force and authority to its ratification by the people, and they judged it by the meaning apparent on its face, according to the general use of the words employed, when they do not appear to have been used in a legal or technical sense." (Sedgwick, Construction of Statutory & Constitutional Law, p. 413.) "The object of construction as applied to a written constitution is to give effect to the intent of the people in adopting it. * * * Possible or even probable meanings, when one is plainly declared in the instrument itself, the courts are not at liberty to search for elsewhere. 'Whether we are considering an agreement between parties, a statute, or a constitution, with a view to its interpretation, the thing which we are to seek is the thought which it expresses. To ascertain this, the first resort in all cases is to the natural signification of the words employed in the order of grammatical arrangement in which the framers of the instrument have placed them. If thus regarded the words embody a definite meaning, which involves no absurdity and no contradiction between different parts of the same writing, then that meaning apparent on the face of the instrument is the one which alone we are at liberty to say was intended to be conveyed. In such a case there is no room for construction. That which the words declare is the meaning of the instrument, and neither courts nor legislatures have a right to add to or take away from that meaning.' * * * In interpreting clauses we must presume that the words have been employed in their natural and ordinary meaning. As Marshall, C. J., says: the framers of the constitution and the people who adopted it 'must be understood to have employed words in their natural sense and to have intended

what they have said.'" (Cooley, Constitutional Limitations, pp. 69–73.) And POST, J., in *Curtin v. Atkinson*, 36 Neb., 115, says: "One of the most familiar rules of construction is that words are to be taken in their ordinary grammatical sense, unless such a construction would be obviously repugnant to the framers of the instrument, or would lead to some other inconvenience or absurdity. (Sedgwick, Construction of Statutory & Constitutional Law [2d ed.], p. 220.)" Bearing these rules and directions in mind, I will now attempt to ascertain the meaning of section 10, article 5, the one by which the appointive power as to offices is conferred upon the governor and a limitation or prohibition in that respect placed upon the legislative powers. This section provides that the appointing power as to the two classes of officers shall be in the governor: First, "all officers whose offices are established by this constitution;" second, "or which may be created by law." This second class, giving to the words describing the officers included in it their ordinary acceptation or meaning, clearly included only the officers whose offices may be created or brought into being or existence by law in the future, not what had or then existed, and the offices of trustees, having been created in 1875 and prior to the adoption of the constitution, were not included in either class of offices referred to in section 10, and to be filled by appointment by the governor. The clause, "and no such officer shall be appointed or elected by the legislature," clearly refers to any and all officers covered by the section in which it is contained, and not to any offices or officers not included in the section. The propriety or policy of placing this inhibition upon the powers of the legislature to fill by appointment or election any of the offices referred to I need not comment upon or discuss, nor whether or not it should have included some which are not within the plain and ordinary meaning of its terms and by construction read them in. I am not seeking now to ascertain what should

or ought to have been the constitutional provisions in this particular, but what, from the import of the words or language employed, is it, or does it provide. If the makers of the constitution had desired to make the foregoing inhibition apply to all officers, apt terms could and would have been employed to make certain their intention, and this is just as true of the words and phrases used in conferring the appointive power to the extent they did, upon the governor. If it had been their intention to cover the office claimed by relator, language could and would have been used which would have effected the purpose and not left it to be done, if at all, by the aid of a doubtful and uncertain construction.

I have examined the cases cited by respondent, among them those in the 66 N. Car., 59, and 68 N. Car., 429, 520, and another case in the same report, page 457, on the same subject, the North Carolina cases all being in part in relation to the construction of a section of the constitution of that state treating of appointment of officers and in whom shall be lodged the appointive power. The section of the constitution of North Carolina referred to is as follows: "The governor shall nominate and by and with the advice and consent of a majority of the senators elect, appoint all officers whose offices are established by this constitution or which shall be created by law, and whose appointments are not otherwise provided for; and no such officer shall be appointed or elected by the general assembly." In construing this section the North Carolina court states that "the words 'whose appointments are not otherwise provided for'" evidently meant provided for by the constitution, thus eliminating from the section any question of the appointment or election of any officer or officers being provided for by law, and making the section of the constitution under consideration, and construed in the cases cited, radically different from the corresponding section of our constitution in respect to the appointment of officers by the chief executive

of the state, and the above construction of the portion of the section of the constitution of North Carolina naturally follows from, and is largely founded upon and induced by, the proposition that the appointive power as to officers is strictly an executive function, and that it was the intention of the framers of the North Carolina constitution and of those who adopted it, that since to the governor it most properly belongs, to him it should be given, and that to the exclusion of all others, unless in the same instrument which conferred such power upon him an exception as to any officer or officers was clearly expressed and provided, while in our fundamental law, in the portion in which the governor is vested with the appointive power as to certain officers, it is stated in clear and unmistakable terms that officers of the classes therein specified whose appointment or election is not otherwise by law or in the constitution provided for, he shall make the appointments, undoubtedly excepting officers for whose appointment or election the legislature, the department of state government nearest the people, shall prescribe by law other methods, or lodge the power in a person or persons other than the governor, clearly indicating that it was not the idea of the framers of our constitution, or the people by whom it was adopted, that the power to appoint officers was exclusively an executive function. The foregoing are some of the thoughts and reasons which lead me to conclude that the cases cited need not be considered as decisive of the points in controversy in the case at bar, and hence I do not feel constrained to follow the doctrine and rules announced in them.

Counsel for respondent, in a very forcible manner, invoke the rule of what is denominated "contemporaneous construction,"—the construction placed upon the constitution by one or more co-ordinate departments of the state government at the time of its taking effect as the primary law of the state, and claim that by the changes

which occurred at or near the same time in the affairs of the institution for the blind and the management thereof it was manifestly evidenced that it was considered by those interested and the departments of state concerned that the constitutional provisions in relation to offices and officers had destroyed the force of the provisions of the prior law of 1875 in respect to the officers of such institution and the source of their appointment and election. I have no desire to run counter to or conflict with what is known as the rule of contemporaneous construction, or to deny the rule its full force and significance; but my understanding is that where the text of the article or section to be construed is so worded as not to be doubtful or ambiguous in meaning, but is clear and distinct, the meaning apparent and conveyed by the words themselves, the doctrine of contemporaneous construction is not applicable and need not be invoked, but the intent and meaning to be gathered from the article or section itself must prevail. It has been said: "But where there has been a practical construction which has been aquiesced in for a considerable period, considerations in favor of adhering to this construction sometimes present themselves to the courts with a plausibility and force which it is not easy to resist. Indeed, where a particular construction has been generally accepted as correct, and especially when this has occurred contemporaneously with the adoption of the constitution, and by those who had opportunity to understand the intention of the instrument, it is not to be denied that a strong presumption exists that the construction rightly interprets the intention. * * Where, however, no ambiguity or doubt appears in the law, we think the same rule obtains here as in other cases, that the court should confine its attention to the law, and not allow extrinsic circumstances to introduce a difficulty where the language is plain. To allow force to a practical construction in such a case would be to suffer manifest perversions to defeat the evident purpose of the law

makers. 'Contemporary construction can never abrogate the text; it can never fritter away its obvious sense; it can never narrow down its true limitations; it can never enlarge its natural boundaries.'" (Cooley, Constitutional Limitations, 82, 84.) Believing as I do, that the true intention of the section of the constitution under consideration is clearly shown in its own text, I need not go further or resort to rules for its construction. When we further recall and consider the judicial construction which was made of the provisions of the constitution of 1875, in reference to offices and appointment thereto, and their bearing upon those of the institution for the blind, very closely following the establishment of the constitution of 1875, and the subsequent judicial construction of the same constitutional provisions, and in relation to the same institution and its affairs, and the changes consequent upon the later judicial construction, and the legislative action or election of trustees which followed, it destroys much of the weight which might be given to any contemporaneous construction, conceding that it is shown in the history of the institution in question to have occurred, and I do not think it of sufficient force to control the disposition of the points discussed or to establish that the law of 1875, in so much as it referred to officers of the institution for the blind and the manner of their election, is in conflict with the provisions of the constitution of 1875 or inconsistent therewith.

Another contention of the respondent is that section 26 of article 5, which is as follows: "No other executive state office shall be continued or created, and the duties now devolving upon officers not provided for by this constitution shall be performed by the officers herein created,"—is applicable and includes the trustees provided for in section 2 of the act of 1875, and that the last mentioned section is in direct conflict with the section of the constitution just quoted. With this I cannot agree. The officers referred to in section 26 of the constitution are the executive state

officers proper, and may probably be confined to those enumerated and denominated in the portion of the constitution which is devoted to defining the executive department of the state government and its officers, their powers and duties. It was said in regard to this section in connection with section 1 of the same article in the opinion in the case of *State v. Weston*, 4 Neb., 234: "It was claimed on behalf of the defendant that the office ceased to exist on the first day of November last, when the new constitution took effect. This claim is based upon sections 1 and 26, article 5, of the constitution. Section 1, among other things, provides that 'the executive department shall consist of a governor, lieutenant governor, secretary of state, auditor of public accounts, treasurer, superintendent of public instruction, attorney general, and commissioner of public lands and buildings;' and section 26, 'that no other executive state office shall be continued or created, and the duties devolving upon officers not provided for by this constitution shall be performed by the officers herein created.' This last section doubtless refers solely to executive state officers and to civil duties strictly executive." In this article of the constitution a distinction is drawn between the officers who may be styled strictly executive officers of the state and such officers as the trustees of the institution for the blind. Thus, in section 21 it is stated: "An account shall be kept by the officers of the executive department and of all the public institutions of the state," and again in section 22, "The officers of the executive department and of all the public institutions of the state shall, at least ten days preceding each regular session of the legislature, severally report to the governor, who shall transmit such reports to the legislature, together with the reports of the judges of the supreme court of defects in the constitution and laws, and the governor or either house of the legislature may at any time require information, in writing, under oath, from the officers of the executive department, and all officers and managers of

state institutions, upon any subject relating to the condition, management, and expenses of their respective offices." I have noticed the sections of the constitution referred to by counsel for respondent and have read and construed the section more especially under consideration in connection with them and in connection with such other clauses or sections of the constitution as might have a bearing upon or affect its meaning, and, in conformity to the views hereinbefore expressed, conclude that the sections of the act of 1875 under which the relator was elected trustee of the institution for the blind and treasurer of the board of trustees, and by virtue of which he executed and presented his bond to the governor for approval, were not in conflict with the provisions of the constitution of 1875 or inconsistent therewith.

In the brief filed for respondent appears the following statement: "The right of this court to issue a writ of *mandamus*, in this or any other case, to require the respondent, as chief executive, to perform any duty of his office, or to in any matter control his discretion, is not conceded, * * but, in accordance with the agreement entered into between the relator and this respondent before the honorable judges of this court, that the entire matter of the validity of the election of the relator as treasurer, and of the election of the board of trustees of the institution, should be submitted to the court in this cause for a decision upon the merits, the respondent will not, and does not, raise nor insist upon such objection, but expressly waives any objections upon that ground." Since the point of objection suggested in the above quotation is not raised nor insisted upon, but is expressly waived, it requires no discussion.

IRVINE, RAGAN, and RYAN, CC., concur in the foregoing dissenting opinion.

N. H. WARREN & COMPANY, APPELLANTS, V. JOHN RABEN, APPELLEE.

FILED OCTOBER 3, 1895. NO. 3591.

Accounting: DECREE FOR PLAINTIFF: REPORT OF REFEREE. Evidence examined, and *held* to support the findings of the referee. His report is confirmed and a decree entered in this court in compliance therewith.

MOTION by appellee to set aside report of referee. *Report confirmed.*

There is a former report of the case in 33 Neb., 380.

Hainer & Kellogg, for appellants.

A. W. Agee and *J. H. Smith, contra.*

RAGAN, C.

N. H. Warren & Co. sued John Raben in the district court of Hamilton county. From the judgment rendered therein Warren & Co. prosecuted proceedings in review to this court, which reversed *pro forma* the judgment and sent the case to a referee to hear the evidence and make certain findings and state certain conclusions of fact. The opinion of the court in this case is *Warren v. Raben*, 33 Neb., 380, where will be found a complete statement of all the facts necessary to an understanding of the case. The referee appointed by this court has heard the evidence, stated the account between the parties, together with his findings of fact, as directed, and the case is now before us on the motion of Raben to set aside the report of the referee. The grounds on which this motion is based are that the findings of the referee are not supported by sufficient evidence, and that the report is not made in accordance with the order of the court. The report of the referee

conforms to the order of the court, and it must suffice to say that after a somewhat protracted examination of the voluminous record we are entirely satisfied that the findings made by the referee, and each of them, are sustained by sufficient evidence. The report of the referee is therefore in all things confirmed; and in accordance with said report the decree of the district court is reversed, and a decree will be entered in this court in favor of N. H. Warren & Co., and against John Raben, for the sum of $3,255.88, together with interest thereon at the rate of seven per cent per annum from the 24th day of May, 1885, and costs of suit, in which costs are included the fee of the referee, H. A. Babcock, of $250.

DECREE ACCORDINGLY.

NORVAL, C. J., not sitting.

JOHN MCALEER V. STATE OF NEBRASKA.

FILED OCTOBER 3, 1895. NO. 6655.

1. **Criminal Law**: INSTRUCTIONS. An instruction by which it is sought to cover the whole case, and upon which, if met by the evidence, the jury is instructed to find in a certain way, should include all the elements necessarily involved in the case and within the evidence.
2. **Embezzlement**: EVIDENCE. Section 121, Criminal Code, construed. *Held*, That the exception as to the persons within the act relating to apprentices and those within the age of eighteen does not apply to officers, agents, attorneys, clerks, or servants of incorporated companies.
3. ———: ———. The corporate character of the employer is therefore an essential element of the offense of embezzlement when employment by a corporation is charged in the information, at least unless it is both charged and proved that the defendant is not an apprentice and not within the age of eighteen years.

4. ———: ———. To constitute embezzlement under section 121, Criminal Code, it is essential that the money or thing charged to have been embezzled should have come into the possession or care of the defendant by virtue of his employment.

5. ———: ———. A secreting with intent to convert to one's own use does not prove the offense under an information charging an actual embezzlement. To constitute embezzlement the owner must be deprived of his property by an actual adverse use or holding.

ERROR to the district court for Butler county. Tried below before BATES, J.

Steele Bros., for plaintiff in error.

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

IRVINE, C.

The plaintiff in error was convicted under an information charging him with embezzlement, in that on the 7th day of June, 1892, in the county of Butler, "he then and there being, and being then and there the agent of and for a certain incorporated company, to-wit, the Omaha Elevator Company, and the said John McAleer, being then and there not a person within the age of eighteen years and not being an apprentice, certain money belonging to the Omaha Elevator Company, of the amount and value of $150, the property of the said Omaha Elevator Company aforesaid, did unlawfully, fraudulently, and feloniously embezzle and convert to his own use without the assent of the said Omaha Elevator Company aforesaid, his said employer, and without the assent of any owner or owners of said money, which said money had then and there come into the possession and care of him, said John McAleer, by virtue of his said employment," etc. The attorney general, being convinced that there is error in the record, has declined to file a brief, and under the rule stated in *George v. State*, 44 Neb., 757, we would be warranted in reversing

the judgment without an examination of the record, but we think the trial court should be informed of our views upon what we deem the most serious questions in the case. Before stating these we wish to say that we have not examined the numerous assignments of error relating to rulings upon the evidence.

The eighth instruction given by the court was as follows: "If the jury find from the evidence, beyond a reasonable doubt, that the defendant, on or about the 7th day of June, 1892, in the county of Butler, the state of Nebraska, was then the agent of the Omaha Elevator Company, and the said John McAleer then and there certain money belonging to the Omaha Elevator Company of the amount of $150, the property of the Omaha Elevator Company, did unlawfully, fraudulently, and feloniously embezzle and convert to his own use without the assent of the Omaha Elevator Company, then you should find the defendant guilty." An instruction by which it is sought to cover the whole case, and upon which, if met by the evidence, the jury is instructed to find in a certain way, should include all the elements necessarily involved in the case and within the evidence. (*Runge v. Brown*, 23 Neb., 817; *Gilbert v. Merriam & Robertson Saddlery Co.*, 26 Neb., 194; *Bowie v. Spaids*, 26 Neb., 635; *City of Plattsmouth v. Boeck*, 32 Neb., 297.) The instruction we have quoted purports to state all the elements necessary to a conviction. When we analyze the instruction, we find that it requires the jury to find that there was proved, first, substantially the time; second, the venue; third, that the defendant was the agent of the Omaha Elevator Company; fourth, that the money was the property of the Elevator Company; fifth, that he embezzled it and converted it to his own use; sixth, that it was done without assent of the owner. Embezzlement is a statutory offense. The information in this case was framed under section 121 of the Criminal Code, which is as follows: "If any clerk, agent, attorney-at-law, or serv-

ant of any private person or any copartnership, except apprentices and persons within the age of eighteen years, or if any officer, attorney-at-law, agent, clerk, or servant of any incorporated company or joint stock company shall embezzle or convert to his own use, or fraudulently take or make away with or secrete with intent to embezzle or fraudulently convert to his own use without the assent of his or her employer or employers, or the owner or owners thereof, any money, goods, rights in action, or other valuable security, or effects whatever, belonging to any other persons, body politic or corporate, which shall come into his or her possession or care by virtue of such employment," etc. The plaintiff in error contends that this statute requires proof that the employer was an incorporated company, and that the defendant was over the age of eighteen, and not an apprentice. We do not so read the statute. Its language is that "if any clerk, agent, attorney-at-law, or servant of any private person or any copartnership, except apprentices and persons within the age of eighteen years, or if any officer, attorney-at-law, agent, clerk, or servant of any incorporated company or joint stock company shall embezzle," etc. That is, the law applies to all officers, attorneys, agents, clerks, or servants of incorporated companies, or joint stock companies, and it applies to clerks, agents, attorneys-at-law, or servants of private persons or copartnerships, provided they be not within the age of eighteen years, and not apprentices. This information charges that the elevator company is an incorporated company, and that fact, if proved, would render it unnecessary to prove that the defendant was not within the age of eighteen, and not an apprentice. On the other hand, the information charges that the defendant was not within the age of eighteen, and was not an apprentice; but this allegation might not relieve the state of the necessity of proving the character of the employer as averred. Therefore, in order to establish the offense, in addition to the elements stated in

the instruction quoted, it was at least necessary to show that the elevator company was an incorporated company, otherwise under any information it would become necessary to show that the defendant was not within the age of eighteen, and was not an apprentice. In any view the instruction omits some essential element of the offense, and is, therefore, erroneous.

In the examination of this instruction we do not consider whether the evidence was sufficient to show the corporate capacity of the elevator company, or even whether it was shown without contradiction, because in a criminal case it is incumbent upon the state on a plea of not guilty to establish every essential element of the charge beyond a reasonable doubt, and the court cannot assume that any such element has been so proved unless admitted by the defendant or treated by him as proved. (*Heldt v. State*, 20 Neb., 492; *Hill v. State*, 42 Neb., 503.) The instruction also omits the element that the money must have come into the defendant's possession or care by virtue of his employment, as the statute requires. It is true that the instruction tells the jury that it must find that the defendant embezzled the money, and this defect might have been cured by a correct definition of embezzlement under our statute. But the only definition given was in the ninth instruction, as follows: "Embezzlement is the fraudulently removing and secreting of money or personal property with which the party has been entrusted for the purpose of applying it to his own use." In *Chaplin v. Lee*, 18 Neb., 440, embezzlement was defined as "the act of fraudulently appropriating to one's own use what is entrusted to the party's care and management;" but, as we have stated, embezzlement is an offense created by statute. It has no common law signification. We must look to our statute to ascertain what here constitutes embezzlement, and while the statute uses the word "embezzle," and thereby refers us to the ordinary acceptation of the term for its definition, it at the

same time expressly requires that the thing embezzled must have come into the possession or care of the servant by virtue of his employment. It is not sufficient that he has been entrusted with it, but it must have been in his capacity as a servant—"by virtue of such employment."

It may be well in this connection to call attention to another feature of this ninth instruction. By it the jury is told that it is embezzlement to fraudulently remove and secrete money or personal property with which the party has been entrusted for the purpose of applying it to his own use, while in *Chaplin v. Lee, supra*, it is held that it is essential to constitute the crime that the owner should be deprived of the property by adverse use or holding. That is, the secreting of money with intention to convert it is not embezzlement; there must be an actual appropriation thereof. Under an information charging an actual embezzlement, proof of secreting with intent to embezzle is insufficient.

REVERSED AND REMANDED.

HERMAN DIERS V. JAMES P. MALLON ET AL.

FILED OCTOBER 15, 1895. NO. 5815.

1. **Sheriffs and Constables:** ARREST AND DETENTION WITHOUT WARRANT. In the absence of any statutory power or authority a sheriff, constable, or other peace officer may arrest, without process, a person whom he has reasonable cause to believe guilty of a felony, and detain him a reasonable time until a warrant can be procured. Such officer is justified in arresting without a warrant for a felony, even though he has no personal knowledge of the guilt of the accused, if the officer in good faith acted upon information received from others upon whom he had reason to, and did, rely, although it should subsequently turn out that the one so arrested was not guilty.

2. ———: ———: REASONABLE GROUNDS: BY WHOM DETERMINED. When the testimony is conflicting, the question whether the officer had reasonable ground for believing that the person arrested had committed a felony is for the jury under proper instructions. But where the facts are conceded or undisputed, probable cause is a question of law for the court to determine.

3. ———: ———: ———. Probable cause is a reasonable ground of suspicion, supported by facts and circumstances of such a nature as to justify a cautious and prudent person in believing that the accused was guilty.

4. **False Imprisonment:** REASONABLENESS OF DETENTION: BY WHOM DETERMINED. In an action for false imprisonment against an officer for arresting without a warrant, the reasonableness of plaintiff's detention is a question for the court, where there is no conflict in the evidence as to the length of time and the circumstances under which the plaintiff was held. Where the facts are in dispute, it is for the jury to determine as to the reasonableness of the detention, under proper instructions by the court.

5. ———: EVIDENCE OF PLAINTIFF'S GOOD CHARACTER. Evidence to establish the previous good character of the plaintiff in a suit for false imprisonment is inadmissible, where no attempt has been made to assail it.

6. **Instructions:** RECORD FOR REVIEW. The instructions given and refused not considered, because of the insufficiency of the assignments relating thereto both in the motion for a new trial and the petition in error.

7. **False Arrest and Imprisonment:** VERDICT FOR DEFENDANTS: EVIDENCE. Evidence considered, and *held* sufficient to justify a verdict for the defendants.

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

The opinion contains a statement of the case.

C. Hollenbeck and *N. H. Bell*, for plaintiff in error:

The sheriff is liable for the use of excessive force or violence whether inflicted wantonly or otherwise. (*Krug v. Ward*, 77 Ill., 603; *Blythe v. Tompkins*, 2 Abb. Pr. [N.

Y.], 468; *Parsons v. Harper*, 16 Gratt. [Va.], 64; *Foxhall v. Barnett*, 22 Eng. L. Eq., 179.)

Plaintiff's character is in issue, and if known to defendant, may be proved to show a want of probable cause. (*Israel v. Brooks*, 23 Ill., 575; *Hirsch v. Feeney*, 83 Ill., 548; *McIntire v. Levering*, 148 Mass., 546.)

W. H. Munger and *Frick & Dolezal, contra*, cited: *Rohan v. Sawin*, 5 Cush. [Mass.], 281; *Doering v. State*, 49 Ind., 56; *Rafferty v. People*, 69 Ill., 111; *Pepper v. Mayes*, 81 Ky., 674; 7 Am. & Eng. Ency. Law, 675; 2 Thompson, Trials, secs. 1559, 1560; *Firestone v. Rice*, 38 N. W. Rep. [Mich.], 885; *Cochran v. Toher*, 14 Minn., 385; *Fire Association v. Flemming*, 3 S. E. Rep. [Ga.], 420.

NORVAL, C. J.

This was an action for false arrest and imprisonment by Herman Diers against James P. Mallon, as principal, E. William and others, as sureties on the official bond of said Mallon, as sheriff of the county of Dodge. There was a verdict for the defendants, a new trial was denied, and judgment was entered upon the verdict. Plaintiff prosecutes error.

The facts in the case, as disclosed by the record before us, are, in substance, as follows: On the 10th day of December, 1889, one Carlos F. Pulsifer was murdered near the village of Crowell, in Dodge county. A day or two later the defendant sheriff arrested and held in his custody in the jail of said county, Charles Shepherd and Christian Furst upon the charge of having committed said murder. During said imprisonment, and on the 13th day of said month of December, the sheriff was present at a conversation had between said Shepherd and the attorney of the latter, T. M. Franse, Esq., in which the former stated to the latter, in substance and effect, that the plaintiff Diers

had hired him, Shepherd, to kill and murder said Pulsifer, which statement said Shepherd reiterated in the presence and hearing of the officer; that at the same time Mr. Franse said he was not surprised, or words to that effect; that he knew that some one was behind it, and further, Pulsifer had stated during his lifetime that if he was ever murdered it would be by Diers; that Mr. Franse also stated that Diers, the plaintiff, was a bad man, by which the sheriff understood that plaintiff was a vicious man, and one difficult to handle. On the 14th day of December Mr. Mallon took the train for Norfolk, and while going he had a conversation with Judge Crawford, of West Point, with whom he was acquainted, regarding the murder, and of whom he made inquiry in regard to the reported statement above referred to claimed to have been made by Pulsifer in his lifetime, and Judge Crawford informed the sheriff that Mr. Romberg had stated in West Point that Pulsifer had made the statement, "if he was killed, that Diers would be the one that would murder him;" that the judge also informed him that years before there were a number of incendiary fires at West Point, and that Diers was strongly suspicioned as being the perpetrator of the crimes; that it was getting pretty hot for Diers, and an attorney was consulted, who advised Diers to enlist in the army to prevent his being prosecuted, and he thereupon did so. On the information thus received from Shepherd, Franse, and Crawford, the defendant Mallon, on returning home from Norfolk, on Sunday, December 15, without any warrant, arrested Diers on the train for being implicated in the murder of Pulsifer; that plaintiff, upon being told that he was charged with murder, inquired of the sheriff, "Is it murder, or knowing of murder?" After the arrest of Diers he was handcuffed and in that condition brought to Fremont on the cars, and from the depot he was taken in a carriage to the jail, where he was placed and confined in one of the bedrooms in the living apartment of the jail

until December 19. Within an hour after reaching Fremont, which was on Sunday, the sheriff went to Mr. Loomis, the county attorney, told him of the arrest, detailed the circumstances to him, and asked that a complaint at once be filed. Mr. Loomis agreed to do so. The next morning, and several times during Monday, the sheriff saw the county attorney about it, and on Tuesday, December 17, a complaint was duly filed with the county judge charging the plaintiff with murder, upon which a warrant was issued, and by agreement of the parties the hearing was postponed until the 19th day of December, on which day an examination was had upon the complaint, which resulted in Diers being discharged by the county judge. It is further disclosed by the testimony adduced on the trial of this cause that the examination before the county judge was not had at an earlier date owing to the fact that the witnesses lived at so great a distance from Fremont that their attendance could not sooner be obtained; that the sheriff, at the time of the making of the arrest, believed to be true the information received from the different sources relating to Diers being implicated in the murder, and that Mr. Mallon in arresting and detaining Diers acted in the utmost good faith.

The ninth assignment of error, which is the first one discussed in the brief of counsel for plaintiff, is based upon the holding by the court as a matter of law that Mallon had probable cause for making the arrest and in withholding that question from the jury. The point is raised by the fourth instruction given, which reads as follows:

"4. The jury are instructed the evidence in this case shows that the defendant Mallon, at the time he made the arrest complained of, had reasonable and probable cause to suspect that the plaintiff was guilty of procuring the alleged murder to be committed, although as a matter of fact the plaintiff was innocent of that charge. The only questions then left for the jury to determine is: First—Did the defendant Mallon, in keeping the plaintiff in custody, use

more force and violence than was reasonably necessary to safely keep and retain him in custody? In other words, is the defendant Mallon guilty of an assault and battery upon the person of the plaintiff Diers? Second—What, if any, damages has the plaintiff suffered by reason of such assault and battery?"

That Pulsifer was murdered is not questioned. The plaintiff was arrested for being implicated in the crime, by the defendant Mallon, without any warrant therefor having been issued. The authority of a sheriff, constable, or peace officer, in the absence of any express statutory provision to arrest without process upon reasonable suspicion one who is charged with the commission of a felony, and detain him for a reasonable time until a warrant can be procured is most fully established by the adjudicated cases. (*Rohan v. Sawin*, 5 Cush. [Mass.], 281; *Wade v. Chaffee*, 8 R. I., 224; *Beckwith v. Philby*, 6 Barn. & Cress. [Eng.], 635; *Doering v. State*, 49 Ind., 56; *Davis v. Russell*, 5 Bing. [Eng.], 354; *Holley v. Mix*, 3 Wend. [N. Y.], 350; *Eanes v. State*, 6 Humph. [Tenn.], 53; *Burns v. Erben*, 40 N. Y., 463; *Firestone v. Rice*, 71 Mich., 377; *Filer v. Smith*, 96 Mich., 347; *Marsh v. Smith*, 49 Ill., 396; *Shanley v. Wells*, 71 Ill., 78; *Simmerman v. State*, 16 Neb., 615; 7 Am. & Eng. Ency. Law, 675, and cases cited; Cooley, Torts [2d ed.], 202.) Judge Cooley, in his valuable treatise on Torts, after discussing the liability of a private person for arresting one on suspicion of crime, observes: "A peace officer may properly be treated with more indulgence, because he is specially charged with a duty in the enforcement of the laws. If by him an arrest is made on reasonable grounds of belief he will be excused, even though it appear afterwards that in fact no felony had been committed." The reason of the rule is stated by Dewey, J., in *Rohan v. Sawin, supra*, in the following apt language: "It has been sometimes contended that an arrest of this character, without a warrant, was a violation of the great fundamental

principles of our national and state constitutions forbidding unreasonable searches and arrests, except by warrant founded upon a complaint made under oath. Those provisions, doubtless, had another and different purpose, being in restraint of general warrants to make searches, and requiring warrants to issue only upon complaint made under oath. They do not conflict with the authority of constables or other peace officers, or private persons under proper limitations, to arrest without warrant those who have committed felonies. The public safety and the due apprehension of criminals charged with heinous offenses imperiously require that such arrests be made without warrant by officers of the law. As to the right appertaining to private individuals to arrest without a warrant, it is a much more restricted authority, and is confined to cases of the actual guilt of the party arrested, and the arrest can only be justified by proving such guilt. But as to constables, and other peace officers, acting officially, the law clothes them with greater authority [than private persons], and they are held to be justified, if they act, in making the arrest, upon probable and reasonable grounds for believing the party guilty of a felony; and this is all that is necessary for them to show in order to sustain a justification of an arrest for the purpose of detaining the party, to await further proceedings under a complaint on oath and a warrant thereon."

Counsel for plaintiff insist that the question whether the sheriff had reasonable or probable ground for believing that plaintiff procured the murder to be committed should have been submitted to the jury, and, therefore, the court erred in not submitting to the jury the question to pass upon. If there was any conflict in the testimony upon the subject, then we would agree with counsel that it would have been reversible error for the court to withdraw the question of probable cause from the jury. Where the facts are in dispute, the question of reasonable ground for believing that the person arrested without process has com-

mitted, or is implicated in, a felony is for the jury under proper instructions. Such, undoubtedly, is the general rule. But when the facts are conceded or undisputed, as is the case here, the rule is that probable cause is a question of law for the court. A number of authorities may be cited in support of this doctrine: *Turner v. O'Brien*, 5 Neb., 542; *Ross v. Langworthy*, 13 Neb., 495; *Boyd v. Cross*, 35 Md., 194; *Burns v. Erben*, 40 N. Y., 463; *Hamilton v. Smith*, 39 Mich., 222; *Huntington v. Gault*, 81 Mich., 155; *Perry v. Sulier*, 92 Mich., 72, 52 N. W., 801; *White v. Queen*, 55 N. W. Rep. [Mich.], 843; *Filer v. Smith*, 55 N. W. Rep. [Mich.], 999.

Did Mallon have reasonable or probable cause for arresting the plaintiff? In determining this point it is important to keep in mind the meaning of "probable cause." We know of no clearer definition of that term than the one given by the court of appeals of Maryland in *Johns v. Marsh*, 9 The Reporter [Md.], 143, in the following language: "Probable cause, according to the definition adopted by this court, is a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing that the accused was guilty. (*Boyd v. Cross*, 35 Md., 197; *Cooper v. Utterbach*, 37 Md., 282.) It is very true, probable cause does not depend on the actual state of the case in point of fact as it may turn out upon legal investigation. It is made to depend upon knowledge of facts and circumstances which were sufficient to induce the defendant or any reasonable person to believe the truth of the accusation made against the plaintiff, and that such knowledge and belief existed in the mind of the defendant at the time the charge was made or being prosecuted, and were in good faith the reason and inducement for his putting the law in motion." Applying the foregoing to the case under consideration, did the trial court wrongfully determine, as a matter of law, that the sheriff had probable ground for making the arrest? We are firmly

convinced that the question must be answered in the negative. The uncontradicted facts and circumstances under which the officer acted, as disclosed by this record, were of such a character that any reasonable or prudent person, divested of passion or prejudice, would have fairly suspected and believed that plaintiff was implicated in the murder of Pulsifer. Prior to the arrest, as already stated, one of the murderers, then in the custody of the sheriff, and in his presence and hearing, asserted that plaintiff procured him to commit the crime. But this is not all. The sheriff, upon making inquiry of Mr. Franse and Judge Crawford, both reliable and credible persons, and with whom he was acquainted, had ascertained from them that Pulsifer had made the statement concerning Diers already mentioned, which tended to strengthen his belief in the truthfulness of the information imparted by Shepherd. In making the arrest Mallon was not prompted to do so by mere idle rumor, but acted in the utmost good faith upon information received from others, upon which he had reason to and did rely, and any cautious, prudent person, under the circumstances, would have so acted. We are constrained to hold that the officer was not required to make further inquiry regarding the truth of the charge imputed to the plaintiff, and that under this record the trial court was fully justified in not submitting to the jury for their determination the question whether the sheriff had reasonable or probable cause for believing that the plaintiff was guilty of the crime of murder.

What we have said disposes of the assignment of error based upon the refusal of the court below to permit plaintiff to prove that the relations existing between him and Pulsifer were the most friendly and confidential, and were so known in the community where they resided. Had this testimony been received it would not have shown want of probable cause. Mallon was not bound to show that Diers was in fact guilty, nor was he required to make inquiries of

his neighbors concerning plaintiff's character and the relations he sustained towards deceased. All that the law demanded of him was that he act in good faith upon information of such a character as to raise in his mind a reasonable ground to suspect that the plaintiff was implicated in a felony. This, as we have seen, was fully established upon the trial.

It is argued that the court erred in holding that the plaintiff was detained an unreasonable length of time before he was taken before the county court for examination,—in other words, that the question of unreasonable detention should have been submitted to the consideration of the jury. Had the evidence been conflicting upon that branch of the case, then it would have been for the jury to pass upon. But there is not a particle of conflict in the testimony as to the length of time, or the circumstances under which the plaintiff was held; therefore the reasonableness of the detention was a question of law for the court. This is the rule laid down in 2 Thompson, Trials, sections 1559 to 1561, and is believed to be sound. See *Roth v. Buffalo & S. L. R. Co.*, 34 N. Y., 553, where the court, in considering the same question, say: "When the testimony is conflicting and the facts are unsettled, the jury are to decide, under the instructions of the court, as to the law. When there is no dispute as to the facts, the question is purely one of law, and the court should decide it." In view of the facts already detailed we do not think plaintiff was held an unreasonable length of time, and the court did not err in so deciding. It was Sunday that the arrest was made, and although, as contended by plaintiff, the Code confers upon magistrates in criminal proceedings the power to hold an examination upon the first day of the week, they are not required so to do. (*Pepper v. Mayes*, 81 Ky., 674.) Therefore Mallon was not derelict of duty in not filing a complaint causing a warrant to be issued, and taking the plaintiff before a magistrate on the day of the arrest. As

stated elsewhere, the sheriff, immediately after arriving with the prisoner in Fremont, and frequently during the following day, called the attention of the prosecuting officer of the county to the matter, detailing to him the facts within his possession, and requested that he prepare a complaint and have a warrant issued, which the prosecutor promised to do. Upon this assurance Mallon had a right to rely, and was not required to procure another attorney to institute the prosecution. On Tuesday the complaint was filed, but by consent of the counsel representing Mr. Diers the examination was deferred until Thursday. It appears that the attendance of witnesses could not be sooner procured. Plaintiff was given as speedy a hearing as the circumstances would permit, and the court did not err in determining that the detention was not unreasonable.

The eleventh assignment of error is as follows: "The court erred in refusing to give to the jury instructions numbered 1, 2, 3, 4, and 5 as requested by plaintiff." These five requests to charge read thus:

"1. An officer should not receive every idle rumor, but should make such diligent inquiry touching the truth of the charge as the circumstances will permit, before he assumes to arrest upon the information of another.

"2. Mallon had no right to put irons upon plaintiff unless it was necessary for his safe keeping, and if it was not necessary for his safe keeping, then defendants are liable.

"3. The detention of plaintiff by defendant, without a warrant, under arrest until Tuesday following his arrest, was detaining him an unreasonable time, and renders the defendants liable.

"4. It was the duty of the defendant Mallon, when he arrested plaintiff, to procure a warrant as soon as he reasonably could, and if he did not so procure a warrant, he is guilty of false imprisonment for such length of time as plaintiff was so held without his consent.

"5. If you find from the evidence that plaintiff was sub-

jected to treatment unnecessarily severe after his arrest, the defendants are liable for such damages as plaintiff has suffered by reason of such unnecessary severity."

While it is urged the law of the case is correctly set forth in these requests, it is conceded that if the trial court was right in withholding from the jury the question of probable cause and that of the reasonableness or unreasonableness of the detention of plaintiff after his arrest, that the first, third, and fourth of these requests were rightly refused. We quite agree with the counsel in this, and as we have reached the conclusion that both the question of the probable cause for making the arrest and the reasonableness of the detention of the plaintiff were questions of law for the court, and that it properly determined them, it follows that no error was committed in not giving the said first, third, and fourth instructions. The refusing of plaintiff's requests copied above having been assigned as error *en masse*, both in the petition in error and motion for a new trial, and a portion of them having been rightly refused, under a rule established by an unbroken line of decisions the remaining requests to charge will not be considered by us.

What we have just stated applies with equal force to the twelfth assignment, which is predicated upon the giving of the fourth, fifth, sixth, seventh, and eighth instructions. The giving of these instructions is assigned as error in the motion for a new trial in this language:

"5. The court erred in giving to the jury instructions numbers 4, 5, 6, 7, and 8, and all other instructions excepted to by the plaintiff."

One or more of these instructions, and especially the eighth, on the measure of damages, stated the law applicable to the facts proved, hence the entire assignment will not be further considered.

Another contention is that the court erred in not permitting the plaintiff to introduce evidence of his good char-

acter. There is some conflict in the decisions as to the competency of evidence to establish the previous good reputation of the plaintiff in an action for false imprisonment, where, as in this case, his general reputation has not been assailed. We shall not at this time attempt a review of the authorities. The better rule is that where no attempt has been made to show the plaintiff's reputation to be bad, he must rely upon the general presumption of good character. (*Cochran v. Toker*, 14 Minn., 385; *Fire Association v. Flemming*, 3 S. E. Rep. [Ga.], 420.) This certainly is the correct principle, where, as in the case before us, the defendant did not live in the same neighborhood with the plaintiff, and had but little acquaintance with him prior to the arrest. But it is said that Mallon had abundant time, after receiving the first information implicating plaintiff, and prior to the arrest, to make inquiries of the neighbors of Diers as to his habits, standing, and character, and that he was negligent in failing so to do. We do not think so. An atrocious crime had been perpetrated, and it was important that the officer should act promptly to prevent a possible escape of the person accused. He was justified in acting upon reliable information in his possession, which was sufficient to raise an honest belief in the mind of a prudent person of the probable guilt of the plaintiff. He was not required to make further investigation to ascertain if the accused was not in fact innocent.

It is argued that the verdict is not sustained by sufficient evidence and is contrary to law. The basis of this contention is the treatment which the plaintiff received at the hands of the sheriff at the time he was taken into custody and during his imprisonment. In *Atwood v. Atwater*, 43 Neb., 147, which was an action for false imprisonment, we had under consideration the liability of a police officer for making an arrest under a warrant, and it was held that if such officer acts oppressively in the execution of the process placed in his hands and unnecessarily abuses the person

arrested, he must answer therefor in damages. The rule is not different where the arrest is made without process. Was the plaintiff treated unnecessarily severe? It is undisputed that the sheriff put handcuffs upon him immediately upon his arrest, but the evidence is conflicting as to the length of time they remained on. The plaintiff's testimony is to the effect that they were not removed until Thursday after he was taken into custody, while the evidence on behalf of the defendants tends to show that the irons were removed for a short period a number of times prior to Tuesday, on which date they were taken off and not put on again, and that plaintiff at the time made no complaint about his treatment. It was also shown that plaintiff's feet were manacled, but here again there is a conflict in the proofs adduced as to how long the fetters were so left upon them. It is argued that there was no necessity for placing the plaintiff in irons, since he offered no resistance and at no time made any attempt to escape. It is said: "From all that appears to the contrary, the sheriff might have written to the plaintiff and he would have come in and submitted quietly to arrest and might have been tied to a tree in the jail yard with woolen yarn, in the safe assurance that he would be found there when he was wanted for examination." This may be true, and yet the sheriff was not at the time aware of it. He did not know that the plaintiff would not attempt to escape. Diers was charged with a heinous crime, which caused considerable excitement and commotion among the people of the county, and the sheriff had been informed that the plaintiff was a bad man. The evidence bearing upon the sheriff's treatment was submitted to the jury under these instructions:

"While an officer is bound to treat his prisoners with such kindness as may be consistent with security, and will not be warranted in employing any harsh or unnecessary restraint, yet it is his duty to use such reasonable precautions as the case requires to prevent escape, especially in ar-

rest for felony or offenses of great magnitude. His action in this regard is to be considered in the light of all the facts and circumstances proved by the evidence on the trial of the case, bearing upon the question of what means are reasonably necessary to keep the prisoner safe and secure.

"The jury are instructed that in order to constitute an assault and battery in this case it is necessary that the jury, from the evidence, find that the defendant Mallon had, at the time and place complained of, unlawfully used force and violence upon the person of the plaintiff in excess of what was reasonable and necessary under the circumstances to safely detain and secure the safe-keeping of the plaintiff. If the jury from the evidence find there was no excess of force or violence used by the defendant beyond what was sensibly necessary to safely keep the plaintiff, then the defendant would not be liable in this action; but if the jury from the evidence believe that the defendant Mallon did use any excess of force or violence beyond what was reasonably necessary to safely keep the plaintiff, then the defendant would be liable to the plaintiff for any injury or damage suffered by the plaintiff by reason alone and rising solely out of the use of such excessive force or violence wantonly or excessively inflicted."

Under these instructions, which are substantially the same as those approved by the supreme court of Michigan in *Firestone v. Rice*, 71 Mich., 377, the jury decided that the sheriff was justified in placing the plaintiff in irons. After a careful consideration of the evidence returned in the bill of exceptions we are satisfied that it sustains the verdict. The sheriff was not prompted to do as he did through malice or ill-will, but he acted in good faith, believing it was necessary to handcuff the plaintiff to prevent his escape. In the language of Morse, J., in *Firestone v. Rice, supra:* "Having reasonable cause for making the arrest, the question arises, was the officer justified in handcuffing the parties? We think the rule laid down by the circuit

judge a proper one. There must be some discretion reposed in a sheriff, or other officer, making an arrest for a felony, as to the means taken to apprehend the supposed offender, and to keep him safe and secure after such apprehension; and this discretion cannot be passed upon by a court or jury unless it has been abused through malice or wantonness or a reckless indifference to the common dictates of humanity. It must be found that the officer was unnecessarily rough and inhuman in his treatment of the person arrested, and without any view to prevent the escape of such person. It is not necessary, as claimed by the plaintiff's counsel, that the prisoner must be unruly, or attempt to escape, before he can be handcuffed, or do anything indicating a necessity for such restraint. Nor, in the event that he does nothing at the time of the arrest in the way of attempting to escape, or resisting the officer, is it necessary that he should be a notoriously bad character in order to justify the tying of his hands. There may be other and sufficient reasons, as it seems to me there were in this case, why such extreme measures should be resorted to in order to secure and safely lodge the prisoner. * * * That it turned out afterwards that the plaintiff was innocent of any offense, was neither a 'slippery' or desperate character, but an inoffensive and reputable citizen, and that he never had the remotest idea of trying to escape, cannot alter the rule which saves the sheriff harmless from an act which appeared, at the time it was done, to be both necessary and reasonable. The arrest of an innocent man is an indignity hard to be borne, and the tying of his hands with cords or irons is something that makes the blood run chill to contemplate; but both are indignities ofttimes without redress, and a necessary consequence of the due administration of justice in the suppression of crime. An officer is bound to act humanely, and cannot lightly and without reason either arrest or harshly treat a supposed offender, be he innocent or guilty. * * * The sheriff cannot stop,

when the man is unknown to him, at the moment of arrest, to inquire into his character, or his intentions as to escape, or his guilt or innocence of the offense charged against him. His duty is to take him, to safely keep him, and to bring his body before a magistrate. If he does this without wantonness or malice, it is not for a jury to find that his precautions were useless and unnecessary in the light of after-acquired knowledge of the true character and intent of the accused, and to punish the sheriff in damages for what honestly appeared to him at the time to be reasonable."

After a careful consideration of the record and the able arguments of counsel, we are convinced that plaintiff has had a fair and impartial trial, and there being no reversible error committed by the trial court, the judgment is

AFFIRMED.

POST, J., not sitting.

STATE OF NEBRASKA, EX REL. BERMUDA BEER, V. JOHN M. THAYER, GOVERNOR.

FILED OCTOBER 15, 1895. No. 4063.

Contracts: SCHOOL LANDS: APPRAISEMENT. The decision in *State v. McPeak*, 31 Neb., 139, followed.

ORIGINAL application for *mandamus*.

Darnall & Babcock and *H. M. Grimes*, for relator.

William Leese, Attorney General, contra.

NORVAL, C. J.

The controlling facts in this case are the same as in *State v. McPeak*, 31 Neb., 139, and following the decision

therein, a peremptory writ of *mandamus* will issue as prayed.

WRIT ALLOWED.

JOHN EINSPAHR, APPELLEE, V. ALFRED H. SMITH ET AL., APPELLANTS.

FILED OCTOBER 15, 1895. No. 4995.

1. **Appeal:** FINAL ORDER. An appeal cannot be prosecuted from the district court to this court until after a final judgment or final order has been entered in the action.
2. **Final Order:** TEMPORARY INJUNCTION: APPEAL. An order continuing in force during the pleasure of the court a temporary injunction theretofore issued is not final, and is, therefore, not appealable.
3. ———: APPEAL. *Horn v. Queen*, 5 Neb., 472, distinguished.

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

Sedgwick & Power, for appellants.

Tibbets, Morey & Ferris, contra.

NORVAL, C. J.

This was an action brought by the appellee in the district court of Adams county to vacate and set aside a certain judgment obtained against him in the county court of York county, and to restrain the levying of an execution issued upon a transcript of said judgment filed in the district court of the first named county. A temporary injunction was granted at the commencement of the suit restraining the defendant Crane, as sheriff, from levying the execution then in his hands, the defendant Spicer, clerk of

the district court, from issuing another execution upon said judgment, and the other defendants from transferring, or assigning, or attempting to enforce, said judgment. Issues were joined by the defendants filing answers to the petition and plaintiff replying to the answers. For our purposes it will be unnecessary to set out copies of the pleadings, or even give the substance thereof. After the hearing, the court entered the following findings and decision upon the journal:

"And now on this 26th day of March, 1891, the same being one of the days of the regular March, 1891, term of said court, this cause came on to be heard, the plaintiff and all of the defendants appearing by counsel. Thereupon this cause comes on for hearing upon the petition of the plaintiff, the answers of the defendants, and the reply of the plaintiff. A jury being waived, the issues being joined, testimony was thereupon introduced, and the court, after hearing said testimony, and after consideration of the case, and being fully advised in the premises, finds that the plaintiff never signed the note upon which the judgment in controversy was rendered; that at the time the summons was served upon this plaintiff in the action in which said judgment was obtained, plaintiff was seriously afflicted with dropsy and heart disease and was in danger and expectation of immediate death, and was thereby incapacitated from giving attention to said action. It is therefore ordered, adjudged, and decreed by the court that, pending further consideration of this case by the court, and pending further proceedings therein, the temporary injunction heretofore granted in this action be continued until otherwise ordered by this court."

It is from the foregoing order that the defendants appeal. We do not regard the order appealable. Under our statute neither the decision of the district court, nor the finding made by it, can be reviewed until there has been rendered a judgment or final order in the case. (*Seven Valleys Bank v.*

Smith, 43 Neb., 237, and cases there cited; *Johnson v. Parrotte*, 46 Neb., 51.) Section 581 of the Code defines a final order as follows: "An order affecting a substantial right in an action when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment, is a final order which may be vacated, modified, or reversed, as provided in this title." It is obvious that the effect of the order sought to be reviewed is not to determine the action and prevent a judgment, nor was it made in a special proceeding, nor in a summary application after judgment; therefore the order continuing the temporary injunction in force for an indefinite time is not a final order within any of the statutory definitions of that term, and is not appealable. True, the district court has made findings of fact in the case, and it may have been the intention of the trial judge to render a final decree thereon, but there was a total failure so to do. There is nothing to prevent the court below from dissolving the injunction or to make it perpetual. Had the district court perpetually enjoined the judgment upon which the execution was issued, such decree would be a final judgment and reviewable on appeal (*Rickards v. Coon*, 13 Neb., 419); but such is not this case. The order complained of is interlocutory merely, and not appealable under the provisions of our statute. The court below has not as yet vacated the judgment upon which the execution issued, nor perpetually restrained the collection thereof. No disposition of the cause upon the merits has been made, but the suit, so far as this record discloses, is still pending in the court below. The conclusion reached does not conflict with *Horn v. Queen*, 5 Neb., 472, since the record in that case shows that a final judgment was entered in the district court setting aside a judgment and granting the plaintiff a new trial in an action before a justice of the peace, although the journal entry of the judg-

ment appealed from was not very formal. Here there has been no final disposition of the case by the district court or final judgment entered therein. The appeal is therefore dismissed.

APPEAL DISMISSED.

WIELHELM VIERGUTZ ET AL. V. AULTMAN, MILLER & COMPANY ET AL.

FILED OCTOBER 15, 1895. No. 6443.

Estoppel: LIEN OF JUDGMENT: REPRESENTATION AS TO VALIDITY. One S., the owner of land against which a judgment is an apparent lien, represented to M. that the judgment is a valid lien and that he would pay the amount due thereon. M., relying upon such representations, purchased the judgment. *Held*, That S. is estopped from asserting against M. that the judgment is not a lien.

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

George N. Beels and *W. F. Schoregge*, for plaintiffs in error, cited: *Ferguson v. Kumler*, 25 Minn., 184; *Giles v. Miller*, 36 Neb., 346.

Mapes & Licey, contra, cited: *Harrington v. Latta*, 23 Neb., 84; *Grant v. Cropsey*, 8 Neb., 205; *Newman v. Mueller*, 16 Neb., 523; *Betts v. Sims*, 25 Neb., 166; *St. Louis Wrought Iron Range Co. v. Meyer*, 31 Neb., 543.

NORVAL, C. J.

The object of this proceeding is to obtain a review of an order of the district court confirming the sale of a quarter section of land sold upon execution. The record discloses that on the 8th day of December, 1890, Aultman,

Miller & Co. recovered a judgment in the county court of Wayne county against Wielhelm Viergutz in the sum of $185.62, which was subsequently transcripted to the district court of the county for the purpose of making the same a lien upon the real estate of the debtor in the county. At the date of the filing of the transcript Viergutz owned 160 acres of land in the county, upon which he resided with his family as a homestead, and continued so to do until about December 28, 1891, when he sold and conveyed the tract to Julius A. Sanders, one of the plaintiffs in error herein, for $2,500. From said sum the purchaser deducted the amount of all mortgage liens and taxes against the property and the sum due upon the judgment aforesaid. The remainder of the purchase price was paid to the vendor. In August, 1892, Aultman, Miller & Co. assigned the judgment to Horace McBride, one of the defendants in error, who subsequently caused an execution to be issued on said transcripted judgment by the clerk of the district court, which was levied by the sheriff upon the quarter section in controversy. The land was duly appraised and advertised, and was sold to D. C. Main. Prior to the sale Viergutz served a notice in writing upon the sheriff, claiming the land exempt as a homestead, and, upon the return of the execution into court, Viergutz and Sanders objected to the confirmation on the ground that the land was not liable to sale upon execution, because it was a homestead when the judgment was obtained and filed and thereafter until the conveyance to Sanders was made. The objection was overruled and the sale confirmed. No question was made in the lower court, nor is any point here urged, as to the regularity of the sale, but it is insisted that the judgment was not a lien upon the land. The evidence fully establishes that the property was at all times the homestead of Viergutz so long as he remained the owner thereof, and that his interest therein above the mortgage liens was much less than $2,000. Therefore, the judgment

was not a lien upon the property. (*Hoy v. Anderson*, 39 Neb., 386.) Evidence was introduced tending to show that when the conveyance was made to Sanders the amount due upon the judgment was deducted from the consideration and that the purchaser assumed the payment of the judgment. The court found that there was no agreement between Viergutz and Sanders whereby the latter should pay the judgment, and, we think, there is sufficient evidence in the record before us to sustain the finding.

It is argued by counsel for defendants in error that Sanders, the vendee of Viergutz, is estopped from now asserting that the judgment is not a lien upon the land, as against Horace McBride, the purchaser and owner of the judgment. This position is unassailable. The proofs are uncontradicted to the effect that in August, 1892, Aultman, Miller & Co. were threatening to enforce the collection of the judgment against Sanders, and the latter, being then unable to pay it, represented to McBride that he had bought the land and that the judgment was a lien thereon, and he would pay it. Upon these representations McBride was induced to purchase the judgment, he agreeing to extend the time for payment several months. We are constrained to hold that Sanders is estopped from claiming that the judgment was not a valid lien upon the land, although as a matter of fact it was not a lien. (*Kruger v. Adams & French Harvester Co.*, 9 Neb., 526; *Koch v. Losch*, 31 Neb., 625; *Grant v. Cropsey*, 8 Neb., 205; *Newman v. Mueller*, 16 Neb., 523.) The facts constituting the estoppel are well pleaded, and the evidence supports the findings of the court.

Complaint is made in the brief of the admission of incompetent testimony. This objection is of no avail, for two reasons: First, because the point is not raised either in the motion for a new trial or in the petition in error, and second, the hearing was before the court without a jury, and in such case error in the admission of testimony is not

alone sufficient cause for reversal of a judgment by a reviewing court. This has been too often held by this court to require the citation of authorities in support thereof. The order confirming the sale is

AFFIRMED.

CORA WHITNER V. STATE OF NEBRASKA.

FILED OCTOBER 15, 1895. No. 6539.

1. **Criminal Law:** FAILURE TO TRY ACCUSED: TIME: DISCHARGE. In construing section 391, Criminal Code, providing for the discharge of any person indicted who after having given bail shall not be brought to trial before the end of the third term of court held after the finding of the indictment, the term at which such indictment is found should be excluded.

2. ———: VARIANCE BETWEEN INDICTMENT AND COMPLAINT: OBJECTION. Objection on the ground that the offense charged in an indictment or information differs from that named in the complaint upon which the accused was held to answer should be made by plea in abatement and not by motion to quash.

3. ———: DIFFERENT GRADES OF OFFENSES: INSTRUCTIONS. The rule recognized in the second paragraph of the syllabus of *Botsch v. State*, 43 Neb., 501, is applicable to cases only in which there is an entire failure of proof to sustain the higher grade of offense charged.

4. ———: ———: ———. It is not error in a criminal prosecution to submit to the jury the question of the defendant's guilt of a higher grade of offense than that for which the conviction is had, provided there is evidence to sustain such charge, although it is possible or even probable that a verdict therefor, had one been rendered, would have been set aside as unsupported by the evidence.

5. **Assault:** EVIDENCE. Evidence *held* to sustain the conviction for an assault and battery.

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

Phelps & Sabin, for plaintiff in error:

Plaintiff in error, standing *in loco parentis*, had the right to reasonably chastise the child to enforce her authority. (*Snowden v. State*, 12 Tex. App., 105; *Gormon v. State*, 42 Tex., 221; *Dowlen v. State*, 14 Tex. App., 61; 1 Am. & Eng. Ency. Law, 794.)

In addition to the general presumption of innocence, the plaintiff had in her favor the presumption that the punishment was proper and reasonable, and the burden was on prosecutrix to prove that it was excessive. (*Marlsbary v. State*, 37 N. E. Rep. [Ind.], 558; *Anderson v. State*, 2 Head [Tenn.], 455; *Lander v. Seaver*, 32 Vt., 114; *Patterson v. Nutter*, 8 East. Rep. [Me.], 652.)

The following cases were also referred to in argument: *Friederich v. People*, 35 N. E. Rep. [Ill.], 473; *Patterson v. State*, 85 Ga., 131; *Chrisman v. State*, 54 Ark., 283; *Tiffany v. Commonwealth*, 121 Pa. St., 165; *Turner v. Muskegon Circuit Judge*, 50 N. W. Rep. [Mich.], 310; *Commonwealth v. Roby*, 12 Pick. [Mass.], 496; *State v. Wheeler*, 3 Vt., 344; *State v. Kyne*, 53 N. W. Rep. [Ia.], 420; *Child v. State*, 34 Neb., 236.

A. S. Churchill, Attorney General, and *George H. Thomas*, for the state.

POST, J.

The plaintiff in error was by information in the district court for Colfax county charged with assaulting one Annie Walker, a child nine years of age, with intent, unlawfully and feloniously, to inflict great bodily injury, etc. Upon the filing of the information, to-wit, March 28, 1893, a motion to quash and for the discharge of the accused was interposed, in which the following grounds were in different forms alleged: (1.) No preliminary examination of the accused was had previous to the filing of said information.

(2.) Said information was not filed until the third regular term of court after the pretended examination before the magistrate. (3.) Said information was filed without authority of law. Said motion having been overruled, a plea of "not guilty" was entered and a trial had, resulting in a verdict finding the accused guilty of an assault and battery, upon which judgment was subsequently entered and which it is sought to reverse by means of this proceeding.

It is further shown by the record that on the 22d day of June, 1892, an information was filed by the county attorney, charging the accused with assaulting the said Annie Walker with intent to inflict great bodily injury, etc. The record of each of said informations is preceded by a recital to the effect that a preliminary examination was had before J. W. Brown, a justice of the peace for Colfax county, on the 5th day of February, 1892. It also appears that on the 14th day of March, 1893, there was filed a plea in abatement directed to the last mentioned information, which was on the same day sustained by the court, and the county attorney was thereupon permitted to file the second or amended information, upon which the accused was subsequently tried. It should, however, be mentioned that the record does not contain a transcript of the docket of the examining magistrate, or of the plea in abatement, our only information with respect to either being that imparted by the recitals above mentioned.

1. It is argued that the accused was entitled to be discharged under the provisions of sections 389, 390, and 391, Criminal Code, and that the district court accordingly erred in denying the motion to which reference has been made. Section 389 refers to cases only in which the accused has been committed to jail, and can have no application to the facts of this case, since it is affirmatively shown by the record that the accused had given bail for her appearance before the district court. It was held in *Hammond v. State*, 39 Neb., 252, that the defendant in a crimi-

nal prosecution, who has never been committed to jail or otherwise detained in custody, is not entitled to be discharged under the provisions of section 390 on the ground that he has not been brought to trial before the end of the second term of court after the finding of the indictment or the filing of the information. It was further held that in construing the provision of section 391 for the discharge of any person indicted who, after having given bail, shall not be brought to trial before the end of the third term held after the finding of the indictment, the term at which such indictment is found should be excluded. The May, 1893, term, at which the accused was convicted, was the third term after the filing of the first information, reckoned by the rule thus stated. It is clear, therefore, that she was not entitled to be discharged on account of the delay of the state, and the court did not err in denying the motion on that ground.

2. It is conceded by counsel that the plaintiff in error was given a preliminary hearing, as recited by the record of the district court, upon some charge, presumably that stated in the information, upon which she was subsequently tried. It has been held that objection on the ground that the offense charged in the indictment or information is not the one named in the complaint upon which the accused was held to answer should be made by plea in abatement and not by means of a motion to quash. (See *Cowan v. State*, 22 Neb., 519; *Hill v. State*, 42 Neb., 503.) It follows that the motion to quash was rightly overruled.

3. It is argued that there was no evidence of an intent on the part of the accused to inflict great bodily injury upon the child named in the information, and that the district court erred in submitting that question to the jury. In *Botsch v. State*, 43 Neb., 501, the information contained two counts, the first charging an assault with intent to murder, and a second charging an assault with intent to inflict great bodily injury. There being no evidence what-

ever of the intent essential to the crime charged in the first count, it was held error to submit that question to the jury. It was said in *Murphey v. State*, 43 Neb., 34, that the term "great bodily injury," as employed in the Criminal Code, is not susceptible of a precise definition, but implies an injury of a graver and more serious character than an ordinary battery, and that whether a particular case is within the meaning of the statute is generally a question of fact for the jury. The accused in this case at bar is shown to have struck the child named with her hand upon the side of the head and cheek. At that time, and some four days later when examined by Dr. Long, the child's nose and one ear were swollen and inflamed, showing evident marks of violence. Some discretion is confided to the district court in the conduct of the trial, and although it is possible or even probable that a verdict for the offense charged, had such a one been rendered, would have been set aside as unsupported by the evidence, it does not follow that the submission of that question to the jury was error. In brief, the rule relied upon is applicable only to cases where, as in *Botsch v. State*, there is entire failure of proof to sustain the higher grade of offense.

4. It is contended that the accused, at the time of the alleged assault, stood *in loco parentis* to the child named, and that the striking proved was by way of punishment for disobedience and was reasonable and proper for that purpose. The question of the reasonableness of the punishment inflicted was fairly submitted to the jury, and the verdict, upon the record submitted, should not be disturbed.

AFFIRMED.

PATRICK O. HAWES V. STATE OF NEBRASKA.

FILED OCTOBER 15, 1895. No. 7473.

1. **Contempt:** REVIEW OF PROCEEDINGS. Presumptions and intendments will not be indulged in order to sustain convictions for contempt of court.
2. ———: ———: EVIDENCE. To sustain a conviction for contempt it should appear that the language or conduct imputed to the accused is contemptuous *per se*, or, if it may be contemptuous or innocent according to the circumstances of the case, it should appear from the record to have been employed in its culpable sense.
3. **Attorneys:** APPEARANCE BEFORE JUDGE: CONTEMPT. It is the right of an attorney at law to refuse a retainer which would require his appearance before a particular judge. And a candid statement to the court or judge, in respectful language, of the reasons for such a course will not of itself sustain a conviction on the charge of contempt.

ERROR to the district court for Douglas county. Tried below before SCOTT, J.

George O. Calder, for plaintiff in error.

A. S. Churchill, Attorney General, for the state.

POST, J.

The plaintiff in error Patrick O. Hawes was by the district court for Douglas county adjudged guilty of contempt of court and sentenced to imprisonment in the county jail for a period of fifteen days, which judgment we are asked to reverse for reasons hereafter appearing.

In addition to the fact that the plaintiff in error is an attorney at law engaged in the practice of his profession in the courts of Douglas county, our only information regarding the conviction complained of is derived from the following record:

"STATE OF NEBRASKA
v.
PAT. O. HAWES. } Charge: Contempt.

"The said defendant Pat. O. Hawes having in open court stated that he refused to appear as counsel in the case of the State of Nebraska v. William Milbourn and Frank Jones, now pending in this court; that he would not appear in this court; that he could not be treated fair, and that this court was unfair, thereupon the said Pat. O. Hawes was by the court found guilty of contempt of court.

"It is therefore considered and adjudged by the court that the said defendant Pat. O. Hawes be taken hence by the sheriff to the jail of the said Douglas county and there confined for the period of fifteen days, from and after this 10th day of November, A. D. 1894, and that he pay the costs of these proceedings, taxed at ——— dollars, and execution is awarded therefor."

The attorney general has declined to submit a brief in behalf of the state or otherwise defend the judgment, on the ground that it is unsupported by the findings of the district court,—a conclusion in which we fully concur. Section 669, Civil Code, provides: "Every court of record shall have power to punish by fine and imprisonment, or by either, as for criminal contempt, persons guilty of any of the following acts: First—Disorderly, contemptuous, or insolent behavior towards the court or any of its officers in its presence." The language quoted is declaratory merely of the common law. Indeed, it is doubtful if the several sections of the Code under the title "Contempt" add anything to the law of the subject, since, as has been often said, the authority to punish for contempt is inherent in all courts of record possessing common law jurisdiction, and is beyond the power of the legislature to abridge. (See *Krigel v. Bartling*, 23 Neb., 852; *Holman v. State*, 105 Ind., 513; Rapalje, Contempts, sec. 1, and authorities cited.) It is also true that language not in itself contemptuous may be

treated as such if used in an insulting or defiant manner. (*Holman v. State, supra; Wilson's Case*, 7 Q. B. [Eng.], 984.) Acts and conduct such as contemplated by the statute cited are known as direct contempts and may be punished summarily; but to sustain a conviction in such a case it should appear that the language or conduct imputed is *per se* contemptuous, or, if it may be contemptuous or innocent according to the sense or manner in which it is employed, the record should show it to have been used in the culpable sense. It is held by this court that proceedings for contempt are in their nature criminal and governed by the strict rules of construction applicable to criminal prosecutions. (*Boyd v. State*, 19 Neb., 128; *Johnson v. Bouton*, 35 Neb., 903; *Percival v. State*, 45 Neb., 741.) It is said in *Batchelder v. Moore*, 42 Cal., 412: "It is essential to the validity of proceedings in contempt, subjecting a party to fine and imprisonment, that they show a case in point of jurisdiction within the provisions of the law by which such proceedings are authorized, for mere presumptions and intendments are not to be indulged in their support." (See, also, *State v. Sweetland*, 3 S. Dak., 503, and cases cited.) Referring again to the findings of the court we are impressed with the fact that the statements imputed to the accused are *per se* neither contemptuous nor defiant, or necessarily inconsistent with the candor and courtesy which should ever characterize intercourse between the bench and bar. The circumstances which induced the statement by the accused of his refusal to appear in the criminal division of the district court do not appear, but his right to refuse a retainer imposing upon him the duty to appear in a particular branch of the court, or before any one or more of the several judges thereof, cannot be doubted; and a candid statement to the court or judge, in respectful language, of the reasons for such a cause, so far from being a contempt, is rather to be commended as tending to remove the cause for whatever differences may exist between them, by remind-

ing court and counsel of their reciprocal rights and duties. Of course, the demeanor of the accused on the occasion in question may have been such as to fully warrant the judgment of the court, but, as we have seen, the record, which is silent upon the subject, will not be aided by presumption. It follows that the judgment complained of must be reversed and the cause remanded for further proceedings in the district court.

REVERSED.

STATE OF NEBRASKA V. WILLIAM MEYERS.

FILED OCTOBER 15, 1895. No. 7630.

1. **Witnesses**: COMPETENCY: INSANITY. One who by reason of insanity or imbecility is unable to comprehend the obligation of an oath, or to understand and intelligently answer the questions put by the court upon a *voir dire* examination, is, under the provisions of section 328, Code Civil Procedure, incompetent to testify as a witness.
2. **Rape**: COMPLAINTS OF INJURY: EVIDENCE. Evidence of the complaints of the injured person in a prosecution for rape is admissible only as corroborative of her testimony, and such complaints are not, except when made *in extremis*, admissible as independent evidence of the offense charged. (*Oleson v. State*, 11 Neb., 276.)
3. ———: ———: ———. When in such case the injured female does not testify as a witness, her declarations relating to the alleged assault are not admissible in evidence, and the fact that she is incompetent to testify on account of imbecility or for other reasons is wholly immaterial. (*Hornbeck v. State*, 35 O. St., 277.)

EXCEPTIONS to rulings of the district court for Richardson county. Tried below before BABCOCK, J. The case was filed in the supreme court under the provisions of section 515 of the Criminal Code. *Exceptions overruled.*

C. F. Reavis and *Edwin Falloon*, for the exceptions.

F. Martin, contra.

POST, J.

The defendant below, William Meyers, was charged with the crime of rape alleged to have been committed upon one Elizabeth Schuler. A trial was had in the district court for Richardson county, resulting in a verdict for the accused under the direction of the court. The county attorney, having at the trial excepted to the ruling in excluding certain evidence offered in behalf of the state, has filed a petition in error in this court in order to secure a review of the judgment of acquittal based upon said verdict.

1. The said Elizabeth Schuler was produced as a witness, when objection was made to her competency on the ground that she is an imbecile and incapable of comprehending the obligation of an oath. She was examined at length by the court in order to determine the question of her competency, at the conclusion of which said objection was sustained. The state then sought to put in evidence certain declarations made by the said Elizabeth to her mother and sister shortly after the alleged assault tending to prove the commission by the accused of the crime charged; which were also excluded upon the objection of the latter, and which are the rulings now assigned as error. Section 328, Code Civil Procedure, provides: "Every human being of sufficient capacity to understand the obligation of an oath, is a competent witness in all cases, civil and criminal, except as otherwise herein declared. The following persons shall be incompetent to testify: First—Persons of unsound mind at the time of their production," etc. The competency of a person to testify as a witness concerning the matter in issue is, in the first instance, a question for the court, and whereas, in the case at bar, the presiding judge has seen and personally examined the proposed witness, all presumptions

are in favor of the correctness of his finding. As said by NORVAL, J., in *Davis v. State*, 31 Neb., 248: "The question of competency of a person to be a witness must be left to the sound legal discretion of the trial judge, leaving to the jury to determine the credit that ought to be given to the testimony." But the bill of exceptions clearly demonstrates the incompetency of Elizabeth Schuler and proves beyond a doubt that she was not of unsound mind merely, but an imbecile, unable to comprehend the simple preliminary questions addressed to her by the court. The objection upon that ground was accordingly well taken.

2. Did the court err in rejecting evidence of the statements above mentioned? It was shown, without objection, that the said Elizabeth left the home of her sister, Mrs. Rauscher, about 2 o'clock P. M. of the day in question, going into "the timber" to look for the cows, and returned between 4 and 5 o'clock. At that time her underclothing was torn and the condition of her person strongly indicated the commission of the wrong alleged. Indeed, so strong is the inference of the outrage from the facts in evidence that we may for the purpose of this examination assume the *corpus delicti* to have been fully established. It was held by this court in *Oleson v. State*, 11 Neb., 276, that while it is permissible to show that the prosecutrix made complaint of the alleged injury, such complaint constitutes no part of the *res gestæ*, but is a circumstance only, corroborative of the story of the prosecutrix, and that unless she is a witness in the case is wholly inadmissible. (See, also, *Mathews v. State*, 9 Neb., 337; *Hannon v. State*, 70 Wis., 448; *People v. McGee*, 1 Den. [N. Y.], 19; *Weldon v. State*, 32 Ind., 81; *Reg. v. Nichols*, 61 English C. L., 246; 1 Greenleaf, Evidence, 213.) But the identical question here involved was presented in *Hornbeck v. State*, 35 O. St., 277, in which, after a careful review of the authorities, it is held that where the female alleged to have been assaulted is, by reason of imbecility, incompetent to be sworn

as a witness, her declarations are inadmissible for the purpose of proving the alleged offense. In the opinion in that case by Gilmore, C. J., we find the rule thus tersely stated: "In cases of violence to the person, except when made *in extremis*, the declarations of the injured party are hearsay, and therefore inadmissible to prove the offense, and the fact that the declarant is incapable of taking an oath, by reason of imbecility, insanity, or infancy, will not justify a departure from the long and firmly established rule of evidence on the subject." The ruling of the district court must, in the light of the authorities cited, be regarded as sound. The exceptions are accordingly overruled.

EXCEPTIONS OVERRULED.

FRANK KEESHAN V. STATE OF NEBRASKA.

FILED OCTOBER 15, 1895. NO. 5788.

1. **Justice of the Peace:** JURISDICTION: OFFENSES. The jurisdiction of justices of the peace is by section 18, article 6, of the constitution limited to offenses for which the penalty prescribed does not exceed three months' imprisonment in the county jail, or a fine not exceeding $100.
2. ———: ———. The only authority of a justice of the peace under section 17, Criminal Code, previous to the amendment thereof in 1893, was that of an examining magistrate.
3. **Appeal:** JURISDICTION OF TRIAL COURT. Where the trial court is without jurisdiction of the subject-matter of an action, the appellate court will not acquire jurisdiction thereof by appeal.

ERROR to the district court for Colfax county. Tried below before MARSHALL, J.

John M. Thurston, *W. R. Kelly*, and *E. P. Smith*, for plaintiff in error.

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

POST, J.

This cause originated before a justice of the peace for Colfax county, by whom the plaintiff in error was adjudged guilty of the charge contained in the following information:

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

"James Gadson, being first duly sworn, upon his oath, before J. W. Brown, justice of the peace in and for said county of Colfax, state of Nebraska, deposes and says that on the 22d day of October, 1891, in the county of Colfax and state of Nebraska, one Frank Keeshan, whose first or Christian name is unknown, then and there being, did unlawfully and feloniously assault in a menacing manner, and did threaten to strike and wound him, the said Gadson, then and there being, contrary to the form of the statute," etc.

From that judgment an appeal was taken to the district court for Colfax county, where a trial was had, resulting also in a verdict and judgment against the accused, which it is sought to reverse by means of this proceeding.

It is unnecessary to notice the allegations of error which relate to the giving and refusing of instructions, for the reason, as held in *State v. Yates,* 36 Neb., 287, that the offense charged was not within the jurisdiction of the justice to try, and the objection on that ground was equally available to the accused in the district court. The provision involved in the case cited was section 30 of the Criminal Code, which, like section 17 upon which the state relies in this case, prescribes as the maximum penalty a fine not exceeding $100, or imprisonment in the county jail not exceeding three months, or both, in the discretion of the court. It was held that the jurisdiction of police judges

and justices of the peace is by section 18, article 6, of the constitution restricted to offenses the penalty for which does not exceed three months' imprisonment, or a fine of $100, and that their only authority under the statute then in force was that of examining magistrates. However, the legislature of 1893 amended section 17 by striking out the words "or both," thus conferring upon justices of the peace jurisdiction to punish for the offenses therein denounced. It has been settled by numerous decisions in this state that unless the court in which an action is brought has jurisdiction of the subject-matter, the appellate court will acquire none by the appeal. (*Brondberg v. Babbott*, 14 Neb., 517; *Ogilvy v. Union P. R. Co.*, 18 Neb., 638.) The question of the authority of the justice to proceed at this time as an examining magistrate is not discussed by counsel and is accordingly not determined. The judgment is reversed and the cause remanded to the district court for appropriate action therein.

REVERSED.

THOMAS O'CONNOR V. STATE OF NEBRASKA.

FILED OCTOBER 15, 1895. No. 6849.

1. **Physicians and Surgeons:** STATE BOARD OF HEALTH: CERTIFICATES. By the act of the legislature of 1891 (Session Laws, 1891, p. 280, ch. 35) to establish a state board of health and regulate the practice of medicine in the state of Nebraska it was made unlawful for any person to practice medicine, surgery, or obstetrics, or any of the branches thereof, without first having obtained and registered a certificate from the state board of health as provided in the act.

2. ———: ACT CREATING STATE BOARD OF HEALTH: INFORMATION FOR VIOLATION. The exceptions made by section 11 of the act were not from the operation of the portion of the law which required a certificate to be obtained from the state board of health and its registration by persons practicing medicine, surgery, or

obstetrics. After the expiration of six months from the passage of the act the persons designated in the exceptions were as liable to prosecution for non-compliance with the law in these particulars as were any others, and the subject of the exception did not become a part of the description of the offense of non-compliance with the provisions of the act, or limit or qualify the language of the act creating such offense, nor was any negative averment in regard to the exceptions necessary in an information charging a person with practicing medicine, etc., without having complied with the provisions of the act.

3. ———: ———: ———. The decision in the case of *Gee Wo v. State*, 36 Neb., 241, overruled to the extent that it held that a negative averment in regard to the matter of the exceptions contained in section 11 of the act referred to, was necessary in the information filed in that case.

4. **Informations.** In an information it is necessary to state specifically the essential facts constituting the crime charged.

5. **Physicians and Surgeons:** PRACTICE IN VIOLATION OF STATUTE: INFORMATION. The law of 1891 regulating the practice of medicine (see Compiled Statutes, 1895, secs. 3684-3702), after providing that any person not possessing the qualifications for the practice of medicine required by its provisions, or any person who, not having complied with the requirements of its provisions, shall engage in the practice of medicine, shall be deemed guilty of a misdemeanor, further states that "Any person shall be regarded as practicing medicine within the meaning of this act who shall operate on, profess to heal or prescribe for or otherwise treat any physical or mental ailment of another." (Session Laws, 1891, p. 285, sec. 17, ch. 35.) *Held*, To be a definition of practicing medicine, and further, that in charging the crime of practicing medicine without having complied with the provisions of the act, there must be a statement of facts showing the doing by the accused person of one or more of the acts included within the foregoing statutory definition.

ERROR to the district court for Lancaster county. Tried below before TIBBETS, J.

The facts are stated in the opinion.

Charles A. Robbins, for plaintiff in error:

The information does not state an offense under the law. (*Gee Wo v. State*, 36 Neb., 241.)

The verdict of the jury and judgment of the court are not sustained by the evidence. (*People v. Phippin*, 37 N. W. Rep. [Mich.], 888.)

The act under which the information was filed is unconstitutional. (*People v. Phippin*, 37 N. W. Rep. [Mich.], 898; Constitution, United States, sec. 2, art. 4, sec. 1, art. 14; Constitution, Nebraska, secs. 1, 3, art. 1; *Taylor v. Porter*, 4 Hill [N. Y.], 147; *Poppen v. Holmes*, 44 Ill., 360; *In re Graduates*, 11 Abb. Pr. [N. Y.], 301; *In re Railroad Commissioners*, 15 Neb., 679.)

A. S. Churchill, Attorney General, contra, cited: *State v. Hathaway*, 21 S. W. Rep. [Mo.], 1081.

W. H. Woodward and *F. W. Collins*, also for the state.

HARRISON, J.

The plaintiff in error was tried in the district court of Lancaster county on a charge of practicing medicine in said county without first obtaining a certificate and filing the same or a copy thereof in the office of the county clerk, and was convicted and sentenced. The information was as follows:

"Be it remembered that Novia Z. Snell, county attorney in and for Lancaster county and the third judicial district of the state of Nebraska, who prosecutes in the name and by the authority of the state of Nebraska, comes here in person into court at this, the February term, A. D. 1892, thereof, and for the state of Nebraska gives the court to understand and be informed that one Thomas O'Connor, late of the county aforesaid, on the 1st day of March, 1892, and thereon continuously until the 28th day of April, A. D. 1892, in said county of Lancaster and state of Nebraska aforesaid, did unlawfully practice medicine without having first obtained a certificate from the state board of health and filing it, or a copy thereof, in the office

of the county clerk of Lancaster county, that being the county in which the said Thomas O'Connor at all times herein mentioned resided and in which he practiced medicine as aforesaid.

"Second Count.—And the county attorney aforesaid, by the authority aforesaid, shows to the court by a second and further count that one Thomas O'Connor, on the 8th day of December, 1891, in the county of Lancaster and state of Nebraska, did unlawfully practice medicine without having first obtained a certificate from the state board of health and filing it, or a copy thereof, in the office of the clerk of Lancaster county, that being the county in which the said Thomas O'Connor at all times herein mentioned resided and in which he practiced medicine as aforesaid.

"Third Count.—And the county attorney aforesaid, by the authority aforesaid, shows to the court by a further and third count that one Thomas O'Connor, on the 9th day of December, 1891, and then continually until the 1st day of January, 1892, in the county of Lancaster and state of Nebraska, did unlawfully practice surgery without having first obtained a certificate from the state board of health and filing it, or a copy thereof, in the office of the clerk of Lancaster county, that being the county in which the said Thomas O'Connor at all times herein mentioned resided and in which he practiced surgery as aforesaid, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Nebraska."

There was a stipulation filed in which it was agreed that the second count of the information was to be ignored and the prosecution to rest upon the first and third counts, and if convicted the sentence was to be for the charge in but one, either the first or third of the counts of the information.

It is contended that there was no sufficient statement of an offense in the information, in that it does not negative

certain exceptions contained in a section of the statutory provisions under which the prosecution was instituted; that the exceptions referred to were of such a character as to enter into and become necessary parts of the description of the offense, and being omitted in the information, it did not state the offense; that an information precisely similar to this one, except as to names and dates, was considered and passed upon by this court in the case of *Gee Wo v. State*, 36 Neb., 241, and within the rule therein announced held not to state an offense. The doctrine stated in that case was as follows: "In charging an offense under a statute the general rule is that a negative averment of the matter of a proviso is not required in an information unless the matter of such proviso enters into and becomes a part of the description of the offense or is a qualification of the language defining or creating it. Where, however, the matters of the proviso point directly to the character of the offense, or where the statute includes two or more classes which will be affected thereby, such as physicians who remove into the state to practice after the passage of an act to regulate the practice of medicine, and persons who were residing in the state and practicing under a former act, in such cases the information must show on its face that the accused does not belong to either class." By an act of the legislature of 1891 there was established a state board of health, and it was made one of the duties of this board to see that all the provisions of the act were strictly enforced, and to grant certificates to qualified persons to engage in the practice of medicine, surgery, or obstetrics, or any of the branches thereof, on compliance with the requirements of the act and furnishing the proof of such qualifications, among which is that the applicant be a graduate of a legally chartered medical school or college in good standing and the possession of a diploma attesting such fact. Section 7 of the act is as follows: "It shall be unlawful for any person to practice medicine, surgery, or obstetrics, or any of the branches

thereof, in this state without first having obtained and registered the certificate provided for by this act; and no person shall be entitled to a certificate herein provided for unless he shall be a graduate of a legally chartered medical school or college in good standing; said qualifications to be determined by the board; *Provided, however*, That nothing in this act shall be construed to prevent physicians residing in other states from visiting patients in consultation with resident physicians who have complied herewith." Sections 9 and 10 provide what proof of qualifications shall be produced, how made, and for the issuance of the certificate and the filing of the same, or a copy thereof, with the county clerk of the county in which the party resides or intends to practice medicine. Section 11, which contains the exceptions, is as follows: "All physicians who shall be engaged in practice at the time of the passage of this act shall, within six months thereafter, present to said board their diplomas and affidavits as hereinbefore provided, or in the case of persons not graduates who were entitled to registration and practice under the act entitled 'An act to regulate the practice of medicine in the state of Nebraska,' approved March 3, 1881, on affidavit showing them to have been entitled to so register and practice and a certified transcript of their registration under said act, and upon their doing so, shall be entitled to the certificate herein provided, which they shall file with the county clerk as herein provided; *Provided*, That no one having the qualifications required in and having complied with said act of March 3, 1881, shall be liable to prosecution for failure to comply with this act until the expiration of said period of six months." Section 16, which defines unlawful practice of medicine, etc., and provides the penalty therefor, reads as follows: "Any person not possessing the qualifications for the practice of medicine, surgery, or obstetrics required by the provisions of this act, or any person who has not complied with the provisions of this act who shall engage in the

practice of medicine, surgery, or obstetrics, or any of the branches thereof, in this state shall be deemed guilty of a misdemeanor and on conviction thereof shall be fined in any sum not less than fifty ($50) dollars nor more than three hundred ($300) dollars, and costs of prosecution for each offense, and shall stand committed until such fine and costs are paid." By the provisions of section 7 it was made unlawful for any person to practice medicine, etc., without having first obtained and registered the certificate of the state board, and that to enable him to obtain it the applicant must be a graduate of a medical college or school legally chartered and in good standing. In section 11 certain parties were excepted from the requirements of the act in relation to their being graduates of a medical school or college, but not relieved from the necessity of obtaining a certificate and its registration. From these exactions of the law there were no exceptions. After the expiration of six months from the passing of the act it was just as necessary that the persons designated in section 11 should have procured certificates and their registration as any others. None were exempted from these duties. The act was approved March 27, 1891. Courts take judicial notice of the time of passage and approval of laws. The dates of the acts charged in the complaint in this case were more than six months from the passage of the law in question, and the prosecution was for non-compliance with its demands, for unlawfully practicing medicine without first having obtained a certificate from the state board of health and filed it, or a copy of it, in the office of the county clerk of Lancaster county. There being no persons excepted from the full operation of the act wherein it commanded that the certificate be procured and registered, the exceptions of section 11 of the act, not relieving the persons pointed out from procuring and registering a certificate, were not relevant to or a part of the description of the crime sought to be charged in the information, hence

no negative averment in regard to them was necessary in the information, and the same was true of the information in the case of *Gee Wo v. State*, 36 Neb., 241. The date of the act charged as unlawful in that case was more than six months after the passage of the act of 1891, under the provisions of which the prosecution was instituted, and the opinion in that case, inasmuch as it applied the rule announced to the information filed therein and held it insufficient for lack of a negative averment in reference to the exceptions stated in section 11 of the act of 1891, is overruled. Had the information in that case or the case at bar contained a charge of the unlawful practice of medicine, etc., without having the necessary medical educational qualifications, not being a graduate of a medical college and possessing the diploma, then the exceptions of section 11 might have been relevant and the averment of them necessary, but this we need not now, and do not, determine.

It is further urged that the information contained an insufficient statement of the crime, in that it charged the defendant with unlawfully practicing medicine, etc., on and between certain dates and did not state specifically any facts or acts constituting the crime sought to be charged. Section 17 of the act of 1891, immediately following the section declaring the practice of medicine without possessing the prescribed qualifications, or without having complied with the requirements of the law in regard to the certificate, a misdemeanor, and providing a penalty therefor, defines a practitioner as follows: "Any person shall be regarded as practicing medicine within the meaning of this act who shall operate or profess to heal or prescribe for or otherwise treat any physical or mental ailment of another." It is claimed that here is a plain definition of what constituted practicing medicine, contained in the act itself, and that the information in this case, in order to sufficiently charge the commission of the crime, should have

contained specific averments of facts showing acts committed which were within the definition of practicing given in the law under which the prosecution was commenced. The information was insufficient. The pleader should not have stopped with merely saying that on a certain day the defendant unlawfully practiced medicine, but should have averred that defendant, on a day or date stated, did operate or profess to heal or prescribe for or otherwise treat a physical or mental ailment of some person; set forth facts showing that he did one or all of these acts stated in the law, for some one for a bodily or mental ailment, and failure to do this rendered the information fatally defective. In charging an assault, or an assault and battery, a larceny, or perjury, it would not be sufficient to say in the information that on a certain day the party committed an assault, or a larceny, or a perjury, with no further allegations descriptive of the crime to be alleged, but in each instance it would be necessary to aver specifically the facts constituting the crime, but no more so than in alleging the crime the pleader sought to charge in the information in the case at bar. (*State v. Carey*, 30 Pac. Rep. [Wash.], 729; *Dee v. State*, 9 So. Rep. [Miss.], 356.) "It is a rule of criminal law, based upon sound principles, that every indictment should contain a complete description of the offense charged, that it should set forth the facts constituting the crime, so that the accused may have notice of what he is to meet." (*Lamberton v. State*, 11 O., 284.) "A complaint must charge explicitly all that is essential to constitute the offense." (*Smith v. State*, 21 Neb., 552; *Rakes v. People*, 2 Neb., 157.) It follows that the judgment must be reversed and the case remanded.

REVERSED AND REMANDED.

MICHAEL MCMAHON V. STATE OF NEBRASKA.

FILED OCTOBER 15, 1895. No. 7102.

1. **Criminal Law**: ARGUMENT: MISCONDUCT OF ATTORNEY: HARMLESS ERROR. Alleged misconduct of the attorney for the state by use of improper language during his argument to the jury, *held*, when viewed in connection with the evidence and all facts and circumstances of the case, not prejudicial to the rights of the defendant.

2. ———: MISCONDUCT OF JURORS: EVIDENCE: REVIEW. Where the evidence as to the alleged misconduct of jurors is conflicting, the finding of the trial court thereupon will not be disturbed.

3. **Burglary**: CONVICTION: EVIDENCE. Evidence in respect to the element of intent *held* sufficient to sustain the finding and verdict of the jury.

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

John Patterson, for plaintiff in error.

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

HARRISON, J.

The plaintiff in error was tried in the district court of Merrick county on a charge of burglary and was convicted and sentenced, and error in the proceedings is alleged.

It is first argued that there was misconduct of the prosecuting attorney during the trial of the cause, which entitles the plaintiff in error to a reversal of the judgment. During the course of his argument to the jury the prosecutor made use of language which counsel for defendant claimed was improper and asked that the statements of counsel for the state might be reduced to writing, and, together with the objections thereto, made a part of the record, but the stenographer not being in the court room, this was not done.

It appears that the court reproved the prosecuting attorney and in this manner made an effort to remedy the wrong, if any was committed. It is stated that afterwards, and at or near the close of his argument, the prosecutor made another statement to the jury which was highly objectionable in its character and calculated to prejudice the rights of defendant. These events were not properly incorporated in the record, owing to the absence of the official stenographer at the time they occurred, but were made to appear by means of affidavits filed and presented with the motion for a new trial. There was an affidavit made and filed by the county attorney in which he denied the use of the language attributed to him by the affirmations of the affidavits on behalf of plaintiff in error, and further set forth the language employed by him at the times during his argument to which reference was made in the affidavits filed for defendant. The judge who was present at the trial and listened to the argument doubtless heard the words used by the county attorney and understood their import and possessed superior facilities for forming a correct judgment of their probable effect upon the jurors, and saw fit to overrule this ground of the motion for a new trial, and, when viewed in connection with the evidence adduced and all the facts and circumstances in the case, we cannot discover wherein the alleged misconduct of the prosecuting attorney was to any extent or in any degree harmful to the rights of plaintiff in error, hence the ruling of the trial court in this particular must be sustained. (*Debney v. State*, 45 Neb., 856.)

Another assignment of the petition which is urged, is one in relation to alleged misconduct of the jury after the cause was submitted and they had retired to deliberate. The evidence in respect to the allegations of misconduct was directly conflicting, and the finding of the trial court on this point will not be disturbed. It was fully and amply sustained by the evidence. (*Carleton v. State*, 43 Neb., 373.)

It is further urged that defendant was so intoxicated at

the time of the acts charged against him as to be incapable of forming an intention to steal, it being charged in the complaint that the breaking and entering the building was done with intent to steal certain liquors. A careful examination of the evidence discloses that the verdict is fully supported as to its element or finding in respect to the intent with which plaintiff in error broke and entered the building. It shows that it was to obtain the liquor, and that when obtained he secreted or assisted in secreting it. The judgment of the district court is

AFFIRMED.

REED BROTHERS COMPANY ET AL. V. FIRST NATIONAL BANK OF WEEPING WATER.

FILED OCTOBER 15, 1895. NO. 5924.

1. **Incorporation of Failing Partnership:** LIABILITY OF CORPORATION FOR PARTNERSHIP DEBTS. Where a partnership engaged in a general mercantile business, in straitened and failing circumstances, incorporated, and the assets and business of the partnership were transferred or assigned to the corporation and appropriated to its objects and purposes, the business of the partnership being continued by the corporation, the corporation was presumptively liable for the partnership debts.

2. **Corporations:** RATIFICATION OF ACTS OF AGENTS OR OFFICERS. The acts of an agent or officer of a corporation which he was not authorized to perform may be ratified by it. The approval may be by express action or indirectly. It may be proved by evidence of a direct recognition or acceptance of the act or an acquiescence, or may be an inference from the facts and circumstances shown.

3. **Fraudulent Conveyances:** SALE OF GOODS: GROUNDS OF ATTACHMENT. Statements by a debtor engaged in a general mercantile business disclosing a determination to defeat the claim of a creditor, and arrangements made in pursuance of such intention, combined with the further facts that the stock of

goods has, during several months, been as rapidly as possible converted into cash by sales, and depleted in the aggregate several thousand dollars and no satisfactory account given of the disposition of moneys derived from the sales, may be sufficient to sustain an attachment on the stock of goods on the grounds of a fraudulent disposal or concealment of property.

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

See opinion for reference to authorities.

Byron Clark, Joseph R. Clarkson, and *Isaac E. Congdon,* for plaintiffs in error.

Wooley & Gibson, contra.

HARRISON, J.

The First National Bank of Weeping Water commenced this action against Reed Bros. Company, alleged to be a corporation doing business at Weeping Water, E. L. Reed, and James A. Leach to recover the sum of $6,358.15, alleged, in the petition filed, to be due the bank upon two promissory notes, as executed and delivered to it by the parties named. The answer denied, generally, each and every allegation of the petition except that of the corporate character of Reed Bros. Company, which it admitted, and alleged that the notes sued upon were given for debts which were the liabilities of a copartnership doing business under the name and style of Reed Bros. & Co. and were signed by the company or partnership, and were not a liability of the corporation; and especially denied that the signature of Reed Bros. Company was attached to the notes in suit, or either of them. The reply of the bank was as follows: "Comes now the above named plaintiff, and for reply to defendant's answer denies each and every allegation therein, except such as admit the allegations of plaintiff's petition. Further replying plaintiff alleges that if the notes sued on

are not those of Reed Bros. Company, but is the signature of Reed Bros. & Co., that the plaintiff was deceived at the time said notes were signed, and led to believe by the representations of E. L. Reed, president of the corporation, that they were signed Reed Bros. Company, and that it is immaterial whether the signature is Reed Bros. Company or Reed Bros. & Co., for the reason that the assets sought to be reached are those of Reed Bros. & Co. absorbed by Reed Bros. Company, and that while said business is conducted in the name of Reed Bros. Company it is still but a partnership name, the firm of Reed Bros. & Co. having never been legally converted into a corporation, or the corporation of Reed Bros. Company having never been legally formed or incorporated." The counsel for Reed Bros. Company and its co-defendants filed a motion to strike what was styled in the motion the "pretended reply" from the files, the grounds therefor being three in number: First, that the issues were complete without the reply; second, the allegations contained in said pretended reply were immaterial and irrelevant; third, for the reason that the reply was filed without leave of court and out of time. This motion was sustained by the court, but, upon motion, leave was granted to refile it *instanter*. A general demurrer to the reply was then filed, which, upon hearing, was overruled and an exception noted. At some date after the commencement of the action there was filed an affidavit in attachment, the grounds alleged therein being "That the defendants, and each of them, are about to remove their property, or a part thereof, out of the jurisdiction of the court with intent to defraud their creditors; are about to convert their property, or a part thereof, into money for the purpose of placing it beyond the reach of their creditors; have property or rights of action which they conceal; have assigned, removed, disposed of, and are about to dispose of, assign, and remove their property, or a part thereof, with intent to defraud their creditors." An undertaking was also filed and approved

and a writ of attachment issued and served by levy upon a stock of general merchandise then in the possession of, and being handled and sold by the corporation, at its place of business in Weeping Water. There was a separate motion filed for defendants, the corporation, Leach, and Reed, respectively, to discharge the attachment, the reasons being the same in each, and as follows: "First, because the facts stated in the affidavit are not sufficient to justify the issuing of the same; second, because the statement of facts in said affidavit are untrue; third, because the facts set forth in the affidavit are not shown to have existed at the time the order of attachment was issued and the affidavit filed." These motions were heard and overruled and the attachment sustained May 31, 1892, an exception being noted for each party, for whom motion had been filed. During the progress of the case there was a petition filed by the bank, the relief sought being the appointment of a receiver to take possession and dispose of the effects of the corporation, Reed Bros. Company, and after answer to this petition and reply to the answer a trial of the issues with reference to the appointment of a receiver was had and the application was denied. There was a trial to the court without the intervention of a jury, of the issues in the main action, and findings and judgment in favor of the bank, and the attached property ordered sold. Motions for new trial were filed on behalf of each of the parties defendant, and upon hearing they were overruled and exceptions noted on behalf of such parties, and the case has been presented to this court for review.

The first assignment of error which we shall notice is that the court erred in overruling the demurrer to the reply. We are inclined to the view of counsel for plaintiffs in error, that the reply was unnecessary. The existence of the company as a corporation was alleged in the petition and admitted by the answer, and the bank could not in a reply change front entirely and make this a suit against the

copartnership and deny the existence of what it had pleaded in the petition, *i. e.*, the corporate being of the company. It is further assigned for plaintiffs in error in this connection that the court, having overruled the demurrer to the reply and thus outlined the issues, evidence was offered and allowed to be introduced, the tendency and object of which was to show that the corporation was conceived and born of a fraudulent purpose in regard to the creditors of the copartnership, was but a device having for its object the defrauding of creditors of the partnership, and hence without a legal being, and naught but the copartnership under the mask of an attempted incorporation. Evidence of the character indicated was adduced and received during the trial. We think it is quite clear, however, that it was not with the purpose and intent stated by counsel for plaintiffs in error in their argument, but as tending to show how and why the indebtedness, which was originally that of the copartnership, became that of the corporation, and for such purpose it was in the main competent. As we view the action as established by the pleadings, and as, from its course during the hearing, the trial court evidently did, it was against the corporation, and to so maintain it devolved upon the bank, or, failing in this, to fail entirely. The evidence which was introduced at the trial of the application for a receiver, having been presented in transcript form, was allowed and made a part of the testimony during the trial of the issues in the case proper and in respect to the attachment and contained fully as much of the alleged objectionable matter as any other portion of the testimony. If counsel expected to present and insist upon this point in the case they should have, instead of agreeing that it become part of the record, continued their objections. Furthermore, the case was tried by the court without the intervention of a jury, and it must be held to have been considered only in the portions and to the extent it was competent and material, and it follows that the action of the court in

overruling the demurrer, if erroneous, was clearly without prejudice to the rights of the complaining parties.

We will not give a summary of the entire evidence or a discussion of its parts and phrases applicable to the issues, but will refer particularly to those portions which we deem specially indicate the reasons which, probably, largely influenced the trial court to the conclusions reached and announced, and only generally to other portions. It was disclosed by the evidence that there was a copartnership engaged in a general mercantile business in Weeping Water, this state, under the firm name and style of Reed Bros. & Co., and which had existed for a number of years under this or a very similar name; that on or immediately prior to April 1, 1890, the members composing the firm were E. L. Reed, Harry D. Reed, James A. Leach, and Helen F. Reed, or the heirs of Lucius F. Reed, deceased; that on this last mentioned date the firm had an indebtedness of about $30,000 and was possessed of a stock of goods of the value of $20,000, and notes and accounts of the aggregate face value of $10,000 or $12,000. On this 1st day of April, 1890, the corporation styled Reed Bros. Company was formed, the parties incorporators being the same as the members of the partnership with the addition of J. H. Bellows and R. S. Wilkinson. The $20,000 worth of merchandise owned by the partnership was made the fund or property basis of the corporation, and stock aggregating a like amount, in shares of $100 each, was issued and taken by the parties as follows: E. L. Reed, seventy-five shares; Harry D. Reed, twenty-five shares; Helen F. Reed, fifty shares; James A. Leach, twenty-five shares; R. S. Wilkinson, ten shares; and J. H. Bellows, ten shares. The certificates of stock distributed to Harry D. Reed and Helen F. Reed by their face value represented in amount the interest each had in the $20,000 stock of merchandise when it belonged to the partnership. The twenty-five shares allotted to James A. Leach repre-

sented his interest in the partnership and $690.67, which, it is stated in the evidence, he paid to E. L. Reed at the time the shares of stock were delivered to him. The R. S. Wilkinson shares were executed in his wife's name and were issued in payment of an indebtedness of the partnership to Wilkinson for services rendered for it by him as an employe in the capacity of book-keeper. J. H. Bellows, it is claimed, purchased the ten shares which were allotted to him, and executed and delivered to E. L. Reed his promissory notes in the amount of their face value, which were not paid and the shares were returned to E. L. Reed. It is also of the evidence that the corporation received title to and possession of the merchandise from E. L. Reed, that he guarantied the payment of the debts of the partnership and received the stock of goods for so doing, and turned it over to the corporation, and issued, or caused to be issued, to the persons hereinbefore named, certificates of stock, in the manner and for the purposes we have just indicated, mainly to extinguish their claims as partners against the merchandise as partnership property. It was further shown that the stock of the corporation, except the ten shares standing in the name of Mrs. Wilkinson, was, just a short time prior to the commencement of this action, placed under the control of E. L. Reed, or he was allowed, for some reason which was not disclosed at the trial, to assign it to J. V. Farwell & Co. as collateral security for the payment of indebtedness of the former partnership in the sum of $8,000, which it is further claimed E. L. Reed had assumed, and of which he had guarantied the payment. The evidence in regard to the inception and formation of the corporation, including its succeeding to the property in and possession of the merchandise and business of the partnership, and the manner in which these events transpired and were effected, has no force in this case to the extent that it is claimed that it shows an illegal and fraudulent attempt to organize a corporation and absorb the as-

sets of the partnership and thus defraud the creditors of the firm, for this action was predicated upon a promise or contract of the corporation and the suit was instituted against it to collect from it, as a corporation, the amount alleged to be due by virtue of its promise. The corporate existence and character of the company were pleaded and recognized in the petition. The action was not in any extent or in any degree to recover whatever of the property of the partnership might be discovered and subject it to the payment of the debts owing by the firm at the time the corporation was created, on the ground of fraud and deceit practiced in its formation, but, under the issue raised by the statement in the answer, that the debts evidenced by the notes in suit "form no liability or claim against the defendant corporation herein," this evidence was competent and material as tending to show that this debt of the firm was assumed by the corporation, although no open agreement was entered into to that effect, and these facts, coupled with the others in evidence, fully warranted a conclusion in this case that the partnership became incorporated and received and accepted a transfer of the assets of the partnership to be appropriated and used in forwarding the objects and purposes of the corporation, and by so doing it assumed the liabilities or debts of the firm. (Cook, Stock & Stockholders [3d ed.], sec. 671; *Williams v. Colby*, 6 N. Y. Sup., 459; *Breman Savings Bank v. Branch-Crookes Saw Co.*, 16 S. W. Rep. [Mo.], 209; *McElwee Mfg. Co. v. Trowbridge*, 62 Hun [N. Y.], 471; *Haslett v. Wotherspoon*, 1 Strob. Eq. [S. Car.], 209; *Booth v. Bunce*, 88 Am. Dec. [N. Y.], 372.)

The testimony in respect to which signature was attached to the notes in suit, whether that of the corporation or of the partnership, was conflicting, and the finding of the trial court that it was the corporate name will not be disturbed. E. L. Reed was president of the corporation, and he was the person who, according to the finding of the trial

court, signed the corporate name to these notes. The authority to execute notes for the corporation was conferred upon its secretary and treasurer, and it is contended that the president was without authority to sign the notes, and his doing so did not bind the corporation. The corporation could give notes, it was liable for this debt, and after the notes were signed in its name by the president of the company there was evidence to warrant the conclusion that it acquired knowledge of the act of signing, or that at least it was known to the secretary and treasurer, who was its business manager and who possessed power to act for it in the execution of notes. This, with other evidence bearing upon this point, was sufficient to sustain the finding of the trial court, that the corporation acquiesced in and ratified the act of the president by which its signature appeared upon the notes. (4 Thompson, Corporations, secs. 4941, 5286; *Singer Mfg. Co. v. Belgart*, 4 So. Rep. [Ala.], 400; Taylor, Private Corporations, secs., 212, 214, 215; *Campbell v. Pope*, 96 Mo., 468; *Indianapolis Rolling Mill Co. v. St. Louis, F. S. & W. R. Co.*, 7 Sup. Ct. Rep., 542.)

The assignments of error in this case were mainly directed against the findings made by the trial court, and the views we have expressed dispose of those which refer to the findings on the questions adjudicated in the main case. There are some which relate to the conclusion announced by the trial judge in the attachment branch of the case. The one which we will notice particularly was, in substance, that the stock of goods belonged to the corporation and had for several months been as rapidly as possible converted into cash and the stock reduced in the aggregate at least several thousand dollars, and no satisfactory account was made of the money derived from the sales, and that an intent was shown to defraud at least the plaintiff creditor. The evidence as to some points involved in the attachment portion of the suit was, we think, somewhat meager and unsatisfactory, and we do not deem it necessary, nor do we

think it would serve any useful purpose to quote from, summarize, or discuss it at length. There was testimony to support the finding of the trial court, and we cannot say, after a careful examination of the evidence, such finding was manifestly wrong, hence it will not be disturbed. The judgment of the district court is

AFFIRMED.

JAMES LINDSAY V. STATE OF NEBRASKA.

FILED OCTOBER 15, 1895. No. 7612.

1. **Criminal Law**: RULINGS ON MOTIONS: REVIEW. A ruling of the district court upon a question of fact presented by motion supported by affidavits will not be disturbed in the supreme court unless such ruling is clearly without support of sufficient evidence.

2. ———: ELECTION AS TO CASE IN WHICH A MOTION WAS FILED: REVIEW. On a motion made in the district court to compel an election as to whether the case in which the motion was made or another case involving a prosecution for the same offense in the same court should be dismissed, the ruling of the district court cannot be reviewed in the supreme court in the absence of a proper showing that in the district court there were in fact pending two cases of the nature indicated.

3. ———: HOMICIDE: TRIAL: MISCONDUCT OF BY-STANDERS: REPROOF: HARMLESS ERROR. During a trial on the charge of murder, where the mother of the deceased, without incitement thereto or responsibility therefor on the part of the prosecution, in the presence and hearing of the jury, charged the accused with having caused the death of her son, there is found no reversible error, since the record shows that the offender, with the prompt approval of the prosecuting attorney, was promptly by directions of the court removed from the court room, to which she did not return during the trial. Following *Debney v. State*, 45 Neb., 856, and *McMahon v. State*, 46 Neb., 166.

4. ———. MISCONDUCT OF PROSECUTING ATTORNEY: CONVERSATIONS WITH JURORS: HARMLESS ERROR. While the district

court might properly set aside the verdict of guilty on the mere showing that the prosecuting attorney, notwithstanding the instructions of the court forbidding conversation with jurors, had talked with one of them, yet where, upon a full disclosure of what was in fact said, and that it had no relation whatever to the subject-matter of the trial in progress, the district court overruled a motion for a new trial, such motion will not be disturbed in the supreme court.

ERROR to the district court for Cass county. Tried below before CHAPMAN, J.

The facts are stated by the commissioner.

William F. Gurley and *Beeson & Root*, for plaintiff in error:

The following cases are cited in support of the assignment that the court erred in overruling the motion for a change of venue: *Richmond v. State*, 16 Neb., 391; *State v. Crafton*, 56 N. W. Rep. [Ia.], 257.

The court should have compelled the county attorney to elect whether he would prosecute for prize-fighting or murder. (Criminal Code, sec. 435.)

The scene enacted in the court room during the trial by the mother of the deceased entitles accused to a new trial. (*Dower v. Church*, 21 W. Va., 55; *Coster v. Merest*, 3 Brod. & Bing. [Eng.], 272; *Knight v. Inhabitants of Freeport*, 13 Mass., 217; *Johnson v. Root*, 2 Clif. [U. S.], 108; *Heffron v. Gallupe*, 55 Me., 567.)

There was error in the statements of the prosecuting attorney. (*Hill v. State*, 42 Neb., 503; *Leahy v. State*, 31 Neb., 566; *Johnson v. Root*, 2 Clif. [U. S.], 108; *Cleveland Paper Co. v. Banks*, 15 Neb., 20.)

The judgment should be reversed for misconduct of counsel for the prosecution in communicating with members of the jury. (*Lyons v. Lawrence*, 12 Ill. App., 531; *Commonwealth v. Wormley*, 8 Gratt. [Va.], 712; *State v. Hascall*, 6 N. H., 352; *Springer v. State*, 34 Ga., 379; *Stafford v.*

City of Oskaloosa, 57 Ia., 748; *Veneman v. McCurtain*, 33 Neb., 643; *Gandy v. State*, 24 Neb., 727.)

There was error in the instructions for the following reasons: They were unnecessarily multiplied (*City of Lincoln v. Holmes*, 20 Neb., 39); the meaning was obscure (*Omaha Street R. Co. v. Craig*, 39 Neb., 601); they failed to present all the issues (*Carruth v. Harris*, 41 Neb., 789); some stating abstract propositions of law were prejudicial (*Vollmer v. State*, 24 Neb., 838; *Ballard v. State*, 19 Neb., 609; *Runge v. Brown*, 23 Neb., 817); they withdrew questions of fact from the jury (*Heldt v. State*, 20 Neb., 493; *People v. Dick*, 32 Cal., 216; *People v. Casey*, 65 Cal., 260; *State v. Mackey*, 12 Ore., 154; *State v. Whitney*, 7 Ore., 386; *Dolan v. State*, 44 Neb., 643.)

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

The motion for a change of venue was properly overruled. (Criminal Code, sec. 455; *State v. Crinklaw*, 40 Neb., 759; *Smith v. State*, 4 Neb., 286; *Olive v. State*, 11 Neb., 1; *State v. Dunn*, 53 Ia., 526; *State v. Williams*, 63 Ia., 135; *State v. Perigo*, 70 Ia., 661; *State v. Beck*, 73 Ia., 616; *Perrin v. State*, 81 Wis., 135; *State v. Rowland*, 72 Ia., 327; *King v. State*, 20 S. W. Rep. [Tenn.], 169; *Horn v. State*, 13 So. Rep. [Ala.], 329; *Power v. People*, 28 Pac. Rep. [Colo.], 1121; *Muscoe v. Commonwealth*, 12 S. E. Rep. [Va.], 790; *State v. Lee*, 12 S. W. Rep. [Mo.], 254; *People v. Goldenson*, 19 Pac. Rep. [Cal.], 161; *Hasson v. Commonwealth*, 11 S. W. Rep. [Ky.], 286.)

The court did not err in overruling the accused's motion to require the prosecuting attorney to elect as to the information upon which he would proceed to trial. (*Commonwealth v. Bubser*, 80 Mass., 83; *Commonwealth v. Harrison*, 77 Mass., 308; *Commonwealth v. Bakeman*, 105 Mass., 53; *Commonwealth v. Harris*, 13 Allen [Mass.], 534; *State v. Standifer*, 5 Port. [Ala.], 523; *Commonwealth v. An-*

drews, 2 Mass., 408; *Vaughan v. Commonwealth*, 2 Va. Cases, 273; *Teat v. State*, 24 Am. Rep. [Miss.], 708.)

The conduct of the mother of deceased in the presence of the jury during the trial is not sufficient ground for reversal in view of the action of the court in reference thereto. (*State v. Dusenberry*, 20 S. W. Rep. [Mo.], 461; *State v. Laxton*, 78 N. Car., 564.)

Prejudice to accused did not result from misconduct of the jury or officers of the court. (*State v. Craig*, 43 N. W. Rep. [Ia.], 462; *State v. Richmond*, 7 So. Rep. [La.], 459; *State v. Bellow*, 7 So. Rep. [La.], 782; *State v. Harper*, 7 S. E. Rep. [N. Car.], 730; *Bailey v. State*, 9 S. W. Rep. [Tex.], 270; *Boyett v. State*, 9 S. W. Rep. [Tex.], 275; *Commonwealth v. Gagle*, 18 N. E. Rep. [Mass.], 417; *Territory v. Clayton*, 19 Pac. Rep. [Mont.], 293; *People v. Yut Ling*, 16 Pac. Rep. [Cal.], 489; *Prewit v. State*, 4 So. Rep. [Miss.], 346; *State v. Peyton*, 2 S. W. Rep. [Mo.], 394; *State v. Collins*, 86 Mo., 250; *Territory v. Hart*, 7 Mont., 489.)

To sustain the instructions the following cases are cited: *Carleton v. State*, 43 Neb., 373; *Seville v. State*, 49 O. St., 117.

RYAN, C.

Plaintiff in error was convicted of manslaughter in the district court of Cass county. His term of imprisonment in the penitentiary was by the judgment of the court fixed at two years. By mutual agreement the plaintiff in error and Fletcher Robbins engaged in an exhibition about midnight between August 9 and August 10, 1894. An entrance fee was charged for the privilege of witnessing the entertainment, and a prize of $200 was to be paid to the successful contestant. The prosecution insisted upon the trial that this contest was a prize fight. The defense described it as "a sparring match for scientific points." The accused, upon his cross-examination, when asked what

was boxing for scientific points, answered: "The men stand off and hit each other with the back of their gloves." It is not, perhaps, within the lines of the orderly discussion of this case now to say it, but we cannot forbear the present observation that whether the descriptive term of "prize fight" or the more euphonious designation "sparring for scientific points" is employed, one fact without question was established by the evidence, and that was that the accused caused the death of Fletcher Robbins.

In the brief submitted on behalf of the plaintiff in error the first proposition discussed, which has not already received incidental notice, is that the court erred in overruling the motion for a change of venue. Technically this ruling could be sustained upon the authority of *Olive v. State*, 11 Neb., 1, for the motion was in terms for a change of venue to the county of Otoe. We are mindful, however, that Otoe county and Cass county constitute the second judicial district, and that, therefore, if the motion had been made in the most approved form and had been sustained, the result would have been of necessity the same as though sustained in the form in which it was made. An examination of the affidavits submitted in support of the motion with those in opposition convinces us that this assignment is not well founded as a matter of fact, for nearly all the affirmative affidavits ascribed such prejudice as existed to the inhabitants of Plattsmouth, a city which is shown to contain but about one-fourth of the inhabitants of Cass county; and the negative affidavits fairly overcame the force of those in resistance of which they were filed.

The next contention for plaintiff in error relates to the refusal to compel the county attorney to elect whether he would prosecute upon the information in this case or for engaging in a prize fight charged, as was alleged in the motion, in another case pending in the same court. In the record we find no proof that such a prosecution as that last described was ever pending in the district court of Cass

county. The reliance of counsel apparently is upon that part of the motion which states: "Reference is hereby made to the records and files of the court in support of this motion." In *Lowe v. Riley*, 41 Neb., 812, it was held: "A bill of exceptions must contain all the evidence upon which questions of fact are to be determined, a reference in such bill to evidence to be found by reference to another bill filed in an independent case not being sufficient." On the same principle it is not proper to ask a ruling in this court upon a question of fact not presented by the record under consideration.

While the trial was in progress the mother and a sister of Fletcher Robbins were seated near and within sight of the jurors. The accused was called to the witness stand in his own behalf. Just as he took his seat the mother of the deceased suddenly arose and, stepping forward, pointed her finger at the prisoner in an excited manner and cried out, "You have killed my boy! You have killed my boy!" This is assigned as error because, first, it was permitted by the county attorney, and second, because it prevented a fair trial. In regard to the alleged remissness of the county attorney it is but fair to say that Mrs. Robbins had been told by him before the trial began that her attendance was not necessary; that he had no reason to expect that this lady would in any way interfere with the orderly course of the trial, and that, as soon as the scene above described took place, he joined the attorney for the prisoner in the request that Mrs. Robbins be removed from the court room. On the assignment that a fair trial was prevented it is proper to say that immediately after Mrs. Robbins used the language above quoted she was by direction of the presiding judge removed from the court room and was not again present during the trial. The language of Chief Justice NORVAL, in an opinion filed October 1, 1895, in *Debney v. State*, 46 Neb., 856, so well illustrates the rule which should govern the branch of the case under

consideration that without comment it is reproduced as follows: "It appears that at the close of the argument of the county attorney to the jury the spectators applauded by stamping of feet and clapping of hands, which applause was immediately suppressed by the presiding judge, who rebuked the persons for making the same. It was also shown that the applause was without the knowledge or connivance of those connected with the prosecution. * * The incident complained of occurred in the presence and hearing of the trial judge and he is better enabled than we to determine the effect, if any, the applause had upon the jury. By overruling the motion for a new trial containing an assignment relating thereto, submitted upon the affidavits both on behalf of the accused and the state, the trial court must have been of the opinion that the demonstration was not of such a nature as to influence the verdict, and no prejudice being shown its determination will not be interfered with. (*Edney v. Baum*, 44 Neb., 294; *State v. Dusenberry*, 20 S. W. Rep. [Mo.], 461.)" (See, also, *McMahon v. State*, 46 Neb., 166.) The language quoted is applicable to another error alleged, to-wit, that the prosecuting attorney misquoted the testimony of one of the witnesses as to the manner in which the accused had managed to inflict injuries upon the person of the deceased.

After the jury had been impaneled the court directed that the jurors should not be permitted to separate or to communicate with outside parties except within the limitations which, in that connection were prescribed, and were such as were indispensable to arriving at and returning a verdict. It is now insisted that the district court erred in refusing to set aside the verdict upon the showing made in the motion for a new trial. There were minor violations of these instructions of the court urged, but as to them it is unnecessary to enter into an extended review of the evidence submitted, for it was insufficient to justify any disapproval of

the ruling complained of. The principal offense in this respect is imputed to E. H. Wooley, Esq., an attorney who assisted the county attorney in conducting the prosecution in the district court. As the misconduct alleged is charged against one of the managers of the prosecution, who, by reason of being a member of the bar, should not be permitted to urge ignorance as an excuse, it is deemed best to set out the evidence on this point at considerable length.

The plaintiff in error made affidavit that at about 11 o'clock P. M. of the day preceding that on which this cause was finally submitted to the jury the said affiant was upstairs in the Perkins Hotel at Plattsmouth; that upon request of his attorney he went down-stairs to the hotel office for some cigars; "that when affiant then came down-stairs at said hour he saw five of the jurymen before whom the above entitled cause was being tried; that affiant could not discover the whereabouts of the other seven members of said jury; that the said five members of said jury were sitting down in said office and engaged in conversation; that in the midst of the group composed of said jurymen was E. H. Wooley, prosecutor for the state in this case; that the said Wooley was talking, but what he said the affiant did not hear, nor did he hear what any of the said jurymen said."

The affidavit of Mr. Gurley, one of the attorneys for the accused, showed that when Mr. Lindsay was in affiant's room he was sent to the hotel office on an errand, "and that in about fifteen or twenty minutes defendant returned and stated to the affiant that five of the jurymen in said case, together with the deputy sheriff and E. H. Wooley, one of the attorneys for the prosecution, were seated down-stairs in the office of said hotel, apparently engaged in conversation; that defendant stated that he could not discover the whereabouts of the other jurymen."

This was all that was disclosed in the affidavits in support of the motion for a new trial with reference to the al-

leged misconduct of Mr. Wooley. In view of the fact that in a matter of this kind a presumption is more likely to arise against an attorney assisting in or conducting the prosecution than against a disinterested party, it is required that what really transpired should be set out as shown in the affidavits submitted for that purpose.

Mr. Wooley's counter-affidavit showed that between 10 and 11 o'clock of the night referred to in the affidavit of Mr. Lindsay, and in that of Mr. Gurley, he went to the Perkins Hotel, and having removed his hat and coat, "stepped near the stove for the purpose of warming himself; that there were present R. W. Hyers and several of the jurors that tried this case—affiant does not remember how many of said jurors were present; that said Hyers was a deputy sheriff or bailiff in charge of the jury; that affiant and John Adams engaged in conversation upon the subject of irrigation, the said Adams being six or eight feet distant from affiant, and that all of said conversation was audible to those present, and that not a word was said at that time, either by the affiant or any one else, regarding this case; that such conversation continued for a period of about ten minutes, when said Hyers took all the said jurors up to their room."

R. W. Hyers, in his affidavit, said that as deputy sheriff of Cass county he had charge of the jurors in this cause. His language in one part of the affidavit was as follows: "This affiant further states that during the whole time that he had charge of said jury no person whatever except the officers in charge of said jury ever spoke to any member of said jury on any subject whatsoever, except at one time when a few words passed between juror Adams and attorney Wooley on the subject of irrigation; that at no time was any person allowed to mingle with said jury, and at the time said Adams spoke to said Wooley they were not nearer than eight feet." In his affidavit Mr. Hyers stated that when the above conversation took place, five of the

jurors were present, having just returned from the water-closet with affiant, and that on their way back to their room these five jurors, with affiant, had stopped to warm themselves at the stove in the hotel office when the conversation between Mr. Wooley and Mr. Adams took place.

In respect to this conversation Mr. Adams in his affidavit stated that during the trial he had had no conversation on any subject "except on the evening of March 6, when a few of the jurors in charge of the deputy sheriff, R. W. Hyers, on returning from the water-closet, stopped a few moments at the stove of the hotel to warm themselves, and, while there, the said Hyers entered into a short conversation with attorney Wooley on the subject of irrigation, and while they were thus conversing the affiant addressed a few questions to them on the same subject; that this is the whole conversation had by the affiant with any one not a court officer in charge of the jury."

It is apparent to the most casual reader of these affidavits that there was no attempt to show by either Mr. Lindsay or Mr. Gurley what conversation took place between Mr. Wooley and any member of the jury. From the fact unexplained that an attorney for the prosecution, contrary to the directions of the court, conversed with one of these jurors the district court would be justified in setting aside the verdict of guilty afterwards returned. In this case, however, while Mr. Wooley should not so far have disregarded the instructions of the court as to converse with one of the jurors upon the most innocent subject, yet we cannot believe that this indiscretion should be fraught with consequences so serious as the reversal of the judgment of conviction when the conversation could have had no tendency to prejudice the right of the accused to a fair and impartial trial.

There are several criticisms of the instructions given and of those refused, but we are not able to discover substantial grounds for an inference of prejudice either from giving or

refusing instructions. It is quite probable that nothing would have been lost, and something would have been gained, had fewer instructions been given. Counsel for the accused presented every question possible in different forms and by repeated requests for instructions, and it was evidently to meet every phase presented that the numerous instructions were given. In modifying such instructions as were modified there was no prejudicial change made, though, perhaps, in some instances the instructions might as well have been given as requested. The judgment of the district court is

AFFIRMED.

DOUGLAS S. CONLEY V. STATE OF NEBRASKA.

FILED OCTOBER 15, 1895. No. 7446.

1. **Sheriffs**: CONVERSION: EMBEZZLEMENT. A sheriff is an officer elected to an office of public trust in this state, and for the conversion to his own use of any moneys that shall come into his hands by virtue of his office may be prosecuted for embezzlement under section 121 of the Criminal Code.

2. ———: ———: ———: INFORMATION. Where a sheriff by virtue of an order of sale issued upon a decree of foreclosure had sold the lands therein described and collected the amount of the bid of the purchaser, which, before an order of the court directing to whom it should be paid out had been made, he had converted to his own use, it was not essential in an information against such officer to allege to whom such money belonged, and an allegation of that kind should be rejected as surplusage when the information independently of such allegation fully stated the facts above indicated.

ERROR to the district court for Phelps county. Tried below before BEALL, J.

J. L. McPheely, Hall, St. Clair & Roberts, and *F. G.*

Hamer, for plaintiff in error, cited: *People v. Allen*, 5 Den. [N. Y.], 76; *Stoker v. People*, 114 Ill., 320; *State v. Denton*, 22 Atl. Rep. [Md.], 305; *Doyle v. Alderman of Raleigh*, 45 Am. Rep. [N. Car.], 677; *Worthy v. Barrett*, 63 N. Car., 199; *Eliason v. Coleman*, 86 N. Car., 235; *State v. Stanley*, 8 Am. Rep. [N. Car.], 488; *Walker v. City of Cincinnati*, 21 O. St., 14; *Braithwaite v. State*, 28 Neb., 835; *Burke v. State*, 34 O. St., 79; *Lightner v. Steinagel*, 33 Ill., 513; *Reg. v. Gibbs*, Dears [Eng.], 445; *State v. Foster*, 11 Ia., 291; *Rex v. Mason*, Dowl. & R. N. P. [Eng.], 22; *Rex v. Barker*, Dowl. & R. N. P. [Eng.], 19; *Reg. v. Glover*, Leigh & C. [Eng.], 466; *Reg. v. Fletcher*, Leigh & C. [Eng.], 180; *Reg. v. Hastie*, Leigh & C. [Eng.], 269; *Rex v. Hodgson*, 3 C. & P. [Eng.], 422; *State v. Butler*, 5 Am. Crim. L. [S. Car.], 207; *Snapp v. Commonwealth*, 6 Am. Crim. L. [Ky.], 189.

A. S. Churchill, Attorney General, and *George A. Day, Deputy Attorney General*, for the state, cited: *Doyle v. Alderman of Raleigh*, 89 N. Car., 133; *People v. Bedell*, 2 Hill [N. Y.], 196; *Vaughn v. English*, 8 Cal., 41; *In re Corliss*, 11 R. I., 638; *State v. Brooks*, 42 Tex., 63; *Ogden v. Raymond*, 22 Conn., 379; *State v. Anderson*, 45 O. St., 196; *Commonwealth v. Tuckerman*, 76 Mass., 173; *State v. Tompkins*, 32 La. Ann., 620; *Commonwealth v. Ricketson*, 5 Met. [Mass.], 412; *Taylor v. Shemwell*, 4 B. Mon. [Ky.], 575; *McDowell v. Crawford*, 11 Gratt. [Va.], 377; *Hess v. Wilcox*, 58 Ia., 380; *Tierney v. Spiva*, 76 Mo., 279; *Ruggles v. Coffin*, 70 Me., 468; *Breedlove v. Bundy*, 96 Ind., 319; *Fisher v. State*, 40 N. J. Law, 169.

A. J. Shafer, also for the state.

RYAN, C.

The plaintiff in error was convicted of embezzlement in the district court of Phelps county. There were three counts in the information, but as the verdict of guilty referred

only to the offense described in the last count, this alone need be considered. In this count it was charged that Douglas S. Conley, at all times referred to, was the sheriff of the aforesaid county; that said office of sheriff was one of public trust; that said Conley on August 16, 1893, as sheriff, made and conducted a sale of the northwest quarter of section 30, in town 5 north, of range 19 west, 6th P. M., the said land being in Phelps county, by virtue of an order of sale issued and directed to him as such sheriff in an action of foreclosure of mortgage had by the Colonial & United States Mortgage Company (Limited) against Charles A. Draws and others; that as such sheriff and public officer, and by virtue of his said office of public trust, he received $667, the amount bidden on the sale. The embezzlement charged was the unlawful conversion of the sum above mentioned by said sheriff to his own use without the consent of the mortgage company aforesaid.

The facts above charged were unquestionably established by the evidence. It is contended on behalf of the plaintiff in error, however, that in the information there was no averment, and by the evidence no proof that the mortgage company was a corporation. It is furthermore insisted that since by the information, in addition to the averments already noted, it was charged that the money misappropriated belonged to the mortgage company above described, the conviction cannot be sustained, for the reason that the proofs merely showed that the amount of the bid was paid into the sheriff's hands, and that, at least until ordered paid to said mortgage company, that company had no ownership of it. There was a confirmation of the foreclosure sale, but there has been no order to pay the proceeds of the sale to any one. The sale by foreclosure is regarded as a sale by the court itself, conducted by means of its executive officer, the sheriff, liable as such, or by some other person thereto authorized by the court. (Code of Civil Procedure, sec. 852.) In case of a refusal to pay the amount of his bid a

purchaser may be compelled to complete his purchase by such payment. (*Gregory v. Tingley*, 18 Neb., 318; *State v. Holliday*, 35 Neb., 327.) By section 854, Code of Civil Procedure, it is provided that "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." The clause last quoted applies not merely to the surplus but to the entire proceeds of the sale, which, therefore, are "subject to the order of the court," until paid out. In the case at bar it was shown that by the decree of foreclosure there had been adjudged due to the Colonial & United States Mortgage Company the sum of $781.45. For the payment of this sum with interest and costs a sale was directed, and the return of the sheriff upon the order of sale issued under this decree recited that after payment of costs there was applicable to the judgment the sum of $600.28. Until this return was approved by the court this money in strictness would not belong to the foreclosure plaintiff. The information supported by the proofs showed fully how the money was realized and in what situation it was when misappropriated. The conclusion of the county attorney that the money belonged to the mortgage company, superadded to the essential facts set out in the information, was merely surplusage and may therefore be ignored. If required to allege correctly who would be entitled to the money when the court should direct its distribution, the county attorney, in a case like that under consideration, would have been required to state not only all existing facts, but in effect, anticipating the future, would be required to state what order the court would have made had the money in the meantime not been misappropriated. The law does not require a vain thing, and this, if a requirement, would amount to nothing less. If there was no requirement of mention of owner-

ship as above indicated, there was no necessity that by the information or proofs should be described the corporate capacity of one whose ownership was not required to be shown. That part of section 121 of the Criminal Code which is essential in this case is in this language: "If any officer elected or appointed to any office of public trust in the state * * * shall embezzle or convert to his or her own use any money, property, rights in action, or other valuable security or effects whatever, belonging to any individual, or company, or association, that shall come into his or her possession by virtue or under color of his or her relation as officer, * * * every such person so offending shall be punished in the manner provided by law for feloniously stealing property of the value of the article so embezzled."

It is urged that the sheriff, in conducting the sale which he did, and afterwards acting as custodian of the moneys realized, was not acting as an officer elected to an office of public trust. In support of this position several adjudged cases have been cited with great apparent confidence. Of these we shall notice such as in oral argument were specially relied upon, and from their similarity to each other it may readily be inferred upon what lines all the cited cases were determined. The case more relied upon than any other was *Stoker v. People*, 114 Ill., 320. In that case an indictment had been found against Stoker, a constable, who, by virtue of certain executions in favor of Aultman, Miller & Co. entrusted to him as such officer, had collected over $200 which he had failed to pay over. The section of the statute under which this prosecution was had provided: "Whoever embezzles or fraudulently converts to his own use * * * money, goods, * * * delivered to him which may be the subject of larceny, or any part thereof, shall be deemed guilty of larceny." The court held that no conviction should have been had under the provisions of this section, for the reason that it was

general in its terms and did not contain the word "constable," whereas, in section 79 of the same chapter, in which the section quoted is found, there was express mention of constables in connection with a different definition of embezzlement. *People v. Allen*, 5 Den. [N. Y.], 76, is also a favorite citation of the plaintiff in error. In that case Snyder had employed Allen, a constable, to collect several bills due him. This constable was authorized to take out summonses before a justice of the peace named and go with them and demand payments. If the demand was paid, process was not to be served, but if not, service was to be made and Allen was then to appear for Snyder and obtain judgment. Daniel Darrow paid one of these bills against him on presentation; nevertheless, without service of process, Allen procured a judgment against him in favor of Snyder. The indictment of Allen was for embezzling the amount he, as an agent of Snyder, had collected of Darrow. In the supreme court it was held that as the statute limited the term "embezzlement" to clerks and servants, an indictment which charged that the misappropriation was by an agent was bad. In *State v. Denton*, 22 Atl. Rep. [Md.], 305, the indictment of clerk of the board of county commissioners as a public officer was held bad for the reason that such clerk was appointed under a statute which provided: "The county commissioners of each county in this state are declared to be a corporation and shall have full power to appoint * * * road supervisors, collectors of taxes, trustees of the poor, a clerk to their board, and all other officers, agents, and servants required for county purposes." There is no argument necessary to show how inapplicable these adjudications are to the facts of the case which we have under consideration. A further review of citations would but serve to present for consideration other cases equally foreign to our inquiry. It admits of no question that a sheriff is a public officer; that is, one who has a duty to perform concerning the public, as defined in *Hill v. Boy-*

land, 40 Miss., 625. He is equally to be so regarded under the definition given in *Bunn v. People*, 45 Ill., 400, that, "Every man is a public officer who hath any duty concerning the public; and he is not the less a public officer when his authority is confined to narrow limits, because it is the duty and nature of that duty which make him a public officer and not the extent of his authority." Of like applicability is this definition in *Bradford v. Justices' Inferior Court*, 33 Ga., 336, to-wit: "Where an individual has been appointed or elected in a manner prescribed by law, has a designation or title given him by law, * * * he must be regarded as a public officer." The language of section 121, Criminal Code, is "if any person elected or appointed to any office of public trust, etc." This is, in effect, if any public officer; for, in *Matter of Daniel Wood*, 1 Hopk. Ch. [N. Y.], 8, it was said: "The words 'public trust,' still more comprehensive, appear to include every agency in which the public, reposing special confidence in particular persons, appoint them for the performance of some duty or service." It has already been noted that the plaintiff in error when he misappropriated the funds in his hands was acting as sheriff. By virtue of his office of public trust he obtained and appropriated to his own use this money, is but a concise and accurate description of his offense which is clearly within the terms of the statute under which he was convicted.

It is complained that one of the jurors had expressed an unqualified opinion as to the guilt of Conley before he was called into the box. We have considered fully this complaint, and our conclusion is that there exists no ground for this contention. The proofs submitted on this point show that just before the juror was called he said he hoped he would not be required to serve in this case. When asked how he would avoid it when called, he said that he would tell them that he would send the prisoner up for life, so that he, the juror, would get off the jury. This was not

the expression of an opinion. It was but an excuse which he said that he would present to avoid being compelled to serve. This juror, on oath, said that this was spoken in jest, merely, and this we are inclined to believe, for in his *voir dire* examination submitted for our consideration no such language occurs.

There is no question presented or argued which has not been already discussed, and there being found no error in the record the judgment of the district court is

AFFIRMED.

AMERICAN WATER-WORKS COMPANY V. STATE OF NEBRASKA, EX REL. W. I. WALKER.

FILED OCTOBER 15, 1895. NO. 5152.

1. **Pleading:** DEMURRER. A demurrer to a pleading admits the truth of the facts well pleaded for the purpose of determining their sufficiency as a cause of action or defense, but it does not admit the correctness of the conclusions of law drawn therefrom by the pleader.
2. **Water Companies:** DUTY TO INHABITANTS OF CITY: PUBLIC USE. A private corporation which procures from a municipal corporation a franchise for supplying the latter and its inhabitants with water, and by virtue of which franchise it is permitted to and does use the streets and alleys of such municipal corporation in the carrying on of its business, becomes thereby affected with a public use and assumes a public duty. That duty is to furnish water at reasonable rates to all the inhabitants of the municipal corporation, and to charge each inhabitant for water furnished the same price it charges every other inhabitant for the same service under the same or similar conditions.
3. ———: RULES. Such a corporation has the right to adopt all such rules for its convenience and security as are reasonable and just, and to decline to furnish water to any inhabitant who refuses to comply with such reasonable rules.

4. ——: ——. For such a rule to be valid and enforceable it must in itself be lawful and just and must not be discriminatory in its nature.

5. ——: ——: VALIDITY OF CHARGE FOR TURNING ON AND OFF WATER. A rule of a private corporation engaged in supplying a city and its inhabitants with water in pursuance of a franchise granted by such city, provided: "Water rents will be due and payable on the 1st days of January and July of each year in advance at the company's office. * * * If not paid within thirty days after they fall due, the water will be turned off and not turned on again until all back rents are paid, including a charge of $1 for turning the water off and on." *Held*, That so much of said rule as required a patron in default for water rents to pay $1 as a condition precedent to his right to again be furnished with water was unreasonable, discriminatory, and void.

6. ——: ——: ——: MANDAMUS. A patron of such corporation failed to pay his water rent on July 1. His default continued to August 17, when the corporation shut the water off from the patron's premises. August 18 the patron tendered the corporation the water rent fixed by its rules from July 1 to December 31, and requested that the water might again be turned on, but refused to pay the $1 required by the rule for turning on and off the water. *Held*, (1) That the corporation would be compelled by *mandamus* to turn the water on the patron's premises; (2) that the inability of the corporation to collect the $1 from the patron by the ordinary process of law, because of the latter's insolvency, afforded no excuse to the corporation for not supplying the patron with water.

7. Public Corporations: DISCRIMINATION: MANDAMUS. *State v. Nebraska Telephone Co.*, 17 Neb., 126, followed and reaffirmed.

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

The facts are stated in the opinion.

Connell & Ives, for plaintiff in error:

The water company has the right and power to make and enforce the regulation providing for a charge for shutting off and turning on water, provided it is a reasonable rule

and free from the charge of unlawful discrimination. (*Dartmouth College v. Woodward*, 4 Wheat. [U. S.], 518; *Girard Life Ins. Co. v. City of Philadelphia*, 88 Pa. St., 394; *Wendell v. State*, 62 Wis., 300; *Cleveland, C. & C. R. Co. v. Bartram*, 11 O. St., 457; *Shepard v. Milwaukee Gas Light Co.*, 6 Wis., 539; *Rockland Water Co. v. Adams*, 24 Atl. Rep. [Me.], 840; *Tacoma Hotel Co. v. Tacoma Light & Water Co.*, 28 Pac. Rep. [Wash.], 517; *Thomas v. Peterson*, 24 S. W. Rep. [Tex.], 1125; *William v. Mutual Gas Co.*, 18 N. W. Rep. [Mich.], 236; *Shepard v. Milwaukee Gas Light Co.*, 6 Wis., 539; *State v. Sedalia Gas Light Co.*, 34 Mo. App., 501; *Ferguson v. Metropolitan Gas Light Co.*, 37 How. Pr. [N. Y.], 191; *People v. Manhattan Gas Light Co.*, 45 Barb. [N. Y.], 136.)

The rule in controversy does not make an unlawful discrimination, and is a reasonable rule. (2 Rorer, Railroads [ed. 1884], 1369).

The *Webster Telephone Case*, 17 Neb., 126, does not apply for the following reasons: (1.) In that case no violation of a general rule or regulation of the respondent was shown. (2.) The reasonableness of the respondent's charge against the relator was in dispute between the parties. (3.) The relator was financially able to respond to any judgment which the telephone company might obtain against him. (4.) The action of the respondent was arbitrary and discriminative against the relator.

Charles A. Goss, contra:

The rule of the company providing for a charge of one dollar for shutting off the water and turning it on is unreasonable and should not be enforced. (*Shiras v. Ewing*, 48 Kan., 170; *Shepard v. Milwaukee Gas Light Co.*, 11 Wis., 234; *McDaniel v. Springfield Water-Works Co.*, 48 Mo. App., 273; *Gas Light Co. v. Colliday*, 25 Md., 1; *Lloyd v. Washington Gas Light Co.*, 1 Mackey [D. C.], 331; *Morey v. Metropolitan Gas Light Co.*, 38 N. Y. Superior Ct.,

185; *New Orleans Gas Light Co. v. Paulding*, 12 Rob. [La.], 378; *Sickles v. Manhattan Gas Light Co.*, 64 How. Pr. [N. Y.], 33; *Gray v. Elbling*, 35 Neb., 278.)

The rule is discriminatory. (*Webster Telephone Case*, 17 Neb., 126; *Jeffersonville R. Co. v. Rogers*, 38 Ind., 116; *Indianapolis, P. & C. R. Co. v. Rinard*, 46 Ind., 293; *Cleveland, C. & C. R. Co. v. Bartram*, 11 O. St., 457.)

RAGAN, C.

The state of Nebraska, upon the relation of W. I. Walker, filed an application in the district court of Douglas county against the American Water-Works Company (hereinafter called the "Water Company") for a peremptory writ of *mandamus* to compel the Water Company to furnish the relator water for use at his residence in the city of Omaha. The relator alleged in his application that the Water Company was a corporation doing business in the city of Omaha; that it was a common carrier and furnisher of water to the city of Omaha and its inhabitants; that it had secured a franchise from the city in and by which it had the right to use the streets, alleys, and public grounds thereof for laying its water mains and erecting its hydrants; that it was in the possession and use of the streets and alleys of said city for the purpose of supplying said city and its inhabitants with water; that the relator occupied a dwelling on Davenport street, in said city, near which dwelling the Water Company had a water main; that the Water Company had furnished him water at his premises since the 10th of February, 1890, at the rate charged by the Water Company of $11 per year; that he had always paid his water rents promptly on the 1st days of January and July in each year, as required by the rules of the company, until the 1st day of July, 1891; that his water rents were paid up to the last day mentioned; that on said date there became due to the Water Company $5.50, being the water rents from that date to the 1st day of January, 1892; that

he was absent from home on the 1st of July, 1891, and remained absent until about the first of August of that year; that by reason of the press of business he forgot after his return to pay his water rents until the 17th day of August, when the Water Company shut the water off from his residence; that on the 18th of August he went to the office of the Water Company in the city of Omaha and tendered it the rent from the 1st day of July, 1891, to the 1st day of January, 1892, and requested the Water Company to turn on the water at his residence, and that the Water Company refused to do so. The answer of the Water Company to the relator's application, so far as material here, alleged: That the relator had actual notice of the rules and regulations of the Water Company; that these rules were reasonable; that they were proper and necessary for carrying on its business and supplying water to its customers, and were enforced against all citizens and customers alike; that among such rules and regulations was the following: "Water rents will be due and payable on the 1st days of January and July of each year in advance at the company's office. * * If not paid within thirty days after they fall due, the water will be turned off and not turned on again until all back rents and charges are paid, including a charge of $1 for turning the water off and on;" that the relator refused to comply with this rule by paying the sum of $1 as required by it for turning the water off and on at his premises, and that relator was insolvent. The relator submitted a demurrer to this answer, which the district court sustained and issued the writ prayed for.

1. It is insisted that the judgment of the district court is wrong because the answer alleges, and the demurrer admits, that the charge of $1 demanded of relator for turning off and on the water was a reasonable charge; that the rule itself was a reasonable and proper and necessary to the carrying on of respondent's business and that relator was insolvent. But we are of opinion that all these aver-

ments of the answer, except the one as to the insolvency of the relator, are mere conclusions of law. "A demurrer to a pleading admits the truth of the facts well pleaded, for the purpose of determining their sufficiency as a cause of action or defense; but it does not admit the correctness of the conclusions of law therein set out." (*Smith v. Henry County*, 15 Ia., 385; *Branham v. Mayor of San Jose*, 24 Cal., 585.)

2. The allegation in the answer that the relator was insolvent, we think, tendered an immaterial issue, as will be seen further on.

3. The Water Company, though a private corporation, by virtue of the franchise granted it by the city of Omaha and its user of such franchise, became affected with a public use. By accepting such franchise and entering upon the business of furnishing water to the city and its inhabitants it assumed a public duty. That duty was to furnish water at reasonable rates to all the inhabitants of the city, and to charge each inhabitant of the city for water furnished the same price it charges every other inhabitant for a like service under the same or similar conditions. (*Williams v. Mutual Gas Co.*, 18 N. W. Rep. [Mich.], 236; *Shepard v. Milwaukee Gas Light Co.*, 6 Wis., 526.) And we have no doubt but that the Water Company had and has the right to prescribe all such rules and regulations for its convenience and security as are reasonable and just, and to refuse to furnish water to any inhabitant who refuses to comply with such reasonable rules and regulations. But such rules must be reasonable, just, lawful, and not discriminatory. (*Shepard v. Milwaukee Gas Light Co., supra.*) Is the rule pleaded by the respondent in its answer a reasonable and valid one with which relator must have complied as a condition precedent to his right to compel respondent to furnish him water? It is to be observed that the rule provides that if default shall be made in the payment of water rents the water shall be turned off and that

it will not be again turned on until two things are done: First, all back rents and charges paid; second, the payment of $1 extra for turning off and on the water. As the relator in this case tendered to the respondent the water rents from the 1st of July, 1891, to the 1st of January, 1892, the question whether that part of the rule requiring one in default for water rents to pay such rents as a condition precedent to his right to have the water turned on again is not necessarily involved in this case. The precise inquiry here is whether that part of the rule is reasonable which requires one in default for water rents, in order to procure the use of water, to pay this charge or penalty of $1. To be valid and enforceable it must in itself be lawful and reasonable and just, and it must not discriminate between persons similarly situated. The reasonableness and validity of the rules of private corporations which had assumed the performance of public duties, or by reason of the acceptance of franchises, and engaging in the business of serving the public by supplying it with water, gas, etc., and had thereby become public service corporations, have been frequently before the courts, but, so far as we know, no court has suggested a test for determining whether or not the rules of such a corporation are reasonable.

In *Tacoma Hotel Co. v. Tacoma Light & Water Co.*, 28 Pac. Rep. [Wash.], 517, it is said in the syllabus: "A rule of a water company which requires water rates to be paid quarterly, adds a penalty of five per cent in case of default of payment for ten days, and provides that after a default for fifteen days the water shall be shut off from the premises is a reasonable regulation."

In *Williams v. Mutual Gas Co.*, 18 N. W. Rep., [Mich.], 236, it was held: "The requirement of a deposit of money to guaranty the payment of the price of the gas used is not an unreasonable one, and the company may discontinue furnishing the gas unless complied with."

In *Shiras v. Ewing*, 48 Kan., 170, it was held that a

rule of a water company giving it the right to shut off water from the premises of a consumer who wastes it is reasonable.

In *People v. Manhattan Gas Light Co.*, 45 Barb. [N.Y.], 136, the right of a gas company to refuse to furnish a customer with gas until he paid his past due gas bills was affirmed.

In *Shepard v. Milwaukee Gas Light Co., supra*, the reasonableness of several rules of the gas company were considered. The ninth rule authorized the company, by its inspector, to have free access at all times to buildings and dwellings, to examine the whole apparatus and for the removal of the meter and service pipe. The court said: "This regulation is too general and cannot be upheld, or at least a party cannot be required to subscribe to it to entitle him to be furnished with gas." Rule 14 provided that the company should have the right at any time to shut off the gas if it should find it necessary to do so to protect itself from fraud. The court said: "Here the company assume the whole power to decide upon the question of abuse or fraud either in fact or in anticipation, without notice, without trial, of their own mere motion. This summary jurisdiction would not be given to any of the judicial courts in any case, but upon the most urgent emergency. * * * It is no hardship for the company to resort to the same tribunals, upon like process, for protection against fraud, as the law provides for individuals." Rule 16 provided that after the admission of gas into the fittings they should not be disconnected or opened, either for alteration or repairs, or extensions, without a permit from the company, which might be obtained at the company's office, free of expense, "and any gas fitter or other person who may violate this regulation will be held liable to pay treble the amount of damages occasioned thereby." The court said: "It is not to be allowed that the gas company can impose penalties in this way, or make the sub-

mission to such penalties a condition precedent to the right of the citizen to be furnished with gas. It is singular, if the legislature has given to the gas company the right to inhibit the citizen from altering the arrangement of his gas apparatus in his dwelling without their assent first had and obtained, or from extending the same; and still more singular that the company should claim the sovereign right to inflict penalties upon him for doing so."

In *Gas Light Co. of Baltimore v. Colliday*, 25 Md., 1, it was held that the gas company could not refuse to furnish gas to a person because he refused to pay a former gas bill or a bill contracted for gas used on other premises. (See *Lloyd v. Washington Gas Light Co.*, 1 Mackey [D. C.], 331; *New Orleans Gas Light Co. v. Paulding*, 12 Rob. [La.], 378.)

In *Sickles v. Manhattan Gas Light Co.*, 64 How. Pr. [N. Y.], 33, a dispute arose between the gas company and the consumer, and it was held that the latter was entitled to have his rights investigated by the courts, and that the company would be enjoined from cutting off the gas until a trial of the case could be had.

In *Rockland Water Co. v. Adams*, 24 Atl. Rep. [Me], 840, a rule of the water company provided that users of water should be liable to pay rent for the whole year, whether they actually used it for that length of time or not, and the payments for water should be made yearly in advance. This rule was held to be unreasonable and void.

In *State v. Nebraska Telephone Co.*, 17 Neb., 126, during the year 1883, Webster had a telephone in an office, but the telephone company for some reason neglected to furnish him a list of its subscribers residing in the city of Lincoln and other cities and villages reached by its telephone lines. When Webster's telephone rent became due he refused to pay for that part of the time he had used the telephone and during which he had been deprived of the list of subscribers. A dispute arose between Webster and the telephone company, and the company removed its telephone from

Webster's office. Some time after that Webster requested the telephone company to put a telephone in his office, and tendered the company the sum charged its regular subscribers for such work. It does not appear that Webster tendered his telephone rents in advance nor that the rents were payable in advance, but it appears from the report of the case that Webster was financially able to pay the telephone rents when they matured. The telephone company refused to put in the telephone, alleging that the telephone had been removed from Webster's office by reason of his refusal to pay his rents. Webster then applied to this court for a *mandamus* to compel the telephone company to furnish him a telephone, and the court awarded the writ. The court said: "It is insisted that the conduct of the relator [the refusal of Webster to pay the rent of the telephone which had been removed from his office] now relieves respondent from any obligation to furnish the telephone even if such obligation would otherwise exist. We cannot see that the relations of the parties to each other [growing out of their past transactions] can have any influence upon their rights and obligations in this action. If relator is indebted to respondent for the use of its telephone the law gives it an adequate remedy by an action for the amount due. If the telephone [company] has become such a public servant as to be subject to the process of the courts in compelling it to discharge public duties, the mere fact of a misunderstanding with those who desire to receive its public benefits will not alone relieve it from the discharge of those duties. While either, or perhaps both, of the parties may have been in the wrong, so far as the past is concerned, we fail to perceive how it can affect the rights of the parties to this action." This case is decisive of the question under consideration and also disposes of the issue of relator's insolvency tendered by the answer of respondent. In the *Webster Telephone Case* respondent refused to furnish a telephone be-

cause it alleged that Webster was indebted to it for the rent of a telephone previously furnished to and used by him, and which had been removed because of his failure to pay the rent. In the case at bar the Water Company refused to furnish relator water because it alleged that the relator was indebted to it for having turned off the water from his premises while he was in default in paying his water rent. The cost and expense of turning off and on water for a patron enters into and forms a part of the semi-annual water rent paid in advance by such patron under the rules of the company. It would be unjust to permit the Water Company to exact payment for this service a second time. An enforcement of the rule would compel a citizen who had once made a default in his water rent, though he afterwards paid all such rents, to pay a greater price or rate for water than that paid by another citizen for the same water under the same conditions. We reach the conclusion that the respondent in this case has shown no sufficient excuse for not furnishing the relator with water; and that the rule invoked by it to stay the process of the courts is unreasonable and discriminatory in its nature, and therefore void. The judgment of the district court is

AFFIRMED.

IRVINE, C, not sitting.

MARY M. BOHNER v. GEORGE W. BOHNER.

FILED OCTOBER 15, 1895. No. 4919.

1. **Witnesses:** HUSBAND AND WIFE. Except in an action for divorce, and in a criminal proceeding for a crime committed by the husband against her, the wife can in no case testify against her husband. *Greene v. Greene*, 42 Neb., 634, followed.
2. **Crime:** DEFINITION. A crime is a wrong of which the law

takes cognizance as injurious to the public, and punishes in a criminal proceeding in the name of the state.

3. Slander: CHARACTER OF OFFENSE. Verbal slander, though a tort for which an action will lie in behalf of the party slandered is not a crime under our statutes, and a person cannot be punished therefor by a criminal proceeding at the suit of the state.

4. ———: DAMAGES: HUSBAND AND WIFE. Whether an action at law for damages can be maintained by a wife against her husband for verbally slandering her, not decided.

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

Harlan & Harlan, for plaintiff in error.

Sedgwick & Power, *contra*.

RAGAN, C.

Mary M. Bohner sued George W. Bohner for damages for slander in the district court of York county. The parties were husband and wife and such fact appeared from the pleadings. A jury was impaneled to try the issues and Mrs. Bohner was called as a witness to testify in her own behalf. The husband objected to his wife being permitted to testify. The court sustained the objection and the wife excepted. Mrs. Bohner then made the following offer: "Plaintiff offers to prove by this witness, Mary M. Bohner, that the allegations and facts set forth in her petition in this case are true, and that the statements therein alleged to have been made by George W. Bohner in the defamation of her character were made as alleged." To this offer the husband of the plaintiff objected. The court sustained the objection and the wife excepted. No other witness was called by Mrs. Bohner, nor did she make any offer to prove the allegations of her petition by any other person whomsoever, and thereupon the jury, in obedience to an instruction of the court, returned a verdict in favor of the defendant, the husband, upon which the court entered a

judgment dismissing the wife's action, to reverse which she has prosecuted to this court a petition in error.

1. The record presents but a single question, viz., whether the district court was correct in refusing to permit Mrs. Bohner to testify. Section 331, Code of Civil Procedure, provides: "The husband can in no case be a witness against the wife, nor the wife against the husband, except in a criminal proceeding for a crime committed by the one against the other, but they may in all criminal prosecutions be witnesses for each other." The wife, therefore, was not a competent witness in this action and the court did not err in refusing to permit her to testify. (See, also, *Niland v. Kalish*, 37 Neb., 47; *Skinner v. Skinner*, 38 Neb., 756; *Greene v. Greene*, 42 Neb., 634.)

2. Counsel for Mrs. Bohner seem to be of the opinion that she was a competent witness in the case because slander or defamation of character, being an actionable tort, should be held to be a crime within the meaning of said section 331. But we do not think this contention tenable. "A crime, or misdemeanor, is an act committed or omitted in violation of a public law, either forbidding or commanding it." (2 Blackstone's Commentaries, book 4, p. 3.) In *Re Bergin*, 31 Wis., 386, a crime is defined as follows: "A wrong of which the law takes cognizance as injurious to the public, and punishes in what is called a criminal proceeding prosecuted by the state in its own name or in the name of the people or the sovereign." Verbal slander, though a tort for which an action will lie in behalf of the party slandered, is not made a crime under our statutes, and a person cannot be punished therefor by a criminal proceeding at the suit of the state.

3. The case has also been argued here upon the theory that the district court held that a wife could not sue her husband at law for damages for slander; but the record fails to disclose that that question was presented to and passed upon by the district court. The district court ruled,

and properly, that the wife was not a competent witness in the action, as it was against her husband, and as she produced no other witness and offered no other testimony to support the allegations of her petition, there was nothing left for the court to do but to instruct the jury to return a verdict in favor of the husband and to enter a judgment dismissing her action. Whether therefore an action at law for damages for verbal slander can be maintained by a wife against her husband we do not decide. The judgment of the district court is

AFFIRMED.

IDA H. HANSEN v. ALPHEUS A. KINNEY.

FILED OCTOBER 15, 1895. No. 6133.

1. **Review in Absence of Motion for New Trial:** EXAMINATION OF PLEADINGS. Where it is sought to review on error in this court the judgment of a district court, no motion for a new trial having been filed, this court will look into the record to ascertain if the pleadings state a cause of action or defense and support the judgment or decree rendered; but this court will not go back of the verdict rendered by the jury or the findings of fact made by the trial court to review anything done or any proceeding had.

2. **Laborers' Liens:** SEPARATE CONTRACTS: EVIDENCE. Where labor is performed for a contractor on an improvement on real estate at two different periods of time, and more than sixty days intervene between the last labor day of the first period and the first labor day of the second period, the presumption is that such labor was performed under two different contracts. *Buchanan v. Selden*, 43 Neb., 559, followed.

3. ———: ———: CLAIM FOR LIEN: TIME TO FILE. In such case, to entitle the laborer to a lien under the statute (Compiled Statutes, 1895, sec. 3667) for the labor performed during such first period of time, he must file in the office of the register of deeds a sworn statement of the labor performed and the amount due

him therefor from the contractor within sixty days of the last day on which he labored during such first period of time.

4. Mechanics' Liens: SEPARATE CONTRACTS: TACKING. The mechanics' lien law will not be so construed as to enable a laborer to tack one contract to another and procure a lien for all the labor performed under two or more contracts by filing in the office of the register of deeds a sworn statement of the labor performed and the amount due him therefor within sixty days of the date of performing the last labor performed in pursuance of the last contract. *Central Loan & Trust Co. v. O'Sullivan*, 44 Neb., 834, followed.

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

Calkins & Pratt, for plaintiff in error.

John E. Decker, contra.

RAGAN, C.

Alpheus A. Kinney brought this suit in equity in the district court of Buffalo county against Ida H. Hansen to have established and foreclosed against the latter's real estate a laborer's lien which he alleged he had acquired against said real estate by virtue of having performed certain labor for a contractor who in pursuance of a contract with Hansen had erected certain improvements on said real estate. Alpheus A. Kinney had a decree as prayed, and Hansen has prosecuted to this court a petition in error.

1. Hansen did not file a motion for a new trial. In order for this court to review on error any proceeding had in the trial of an equity case, a motion for a new trial must be filed as in an action at law. (*Carlow v. Aultman*, 28 Neb., 672.) Therefore we cannot look into the bill of exceptions for the purpose of ascertaining whether the findings of fact made by the district court are supported by sufficient evidence, nor review the action of the court in admitting or excluding evidence. In other words, our re-

view of the action of the district court must begin with what occurred, with what the court did, after making its findings of fact. When it is sought to review on error in this court the judgment of a district court, no motion for a new trial having been filed, this court will look into the record to ascertain if the pleadings state a cause of action or defense and support the judgment or decree rendered; but it will not go back of the verdict rendered by the jury or the findings of fact made by the trial court to review anything done or any proceeding had. In the case before us the petition of Alpheus A. Kinney states a cause of action and the pleadings in the record support the decree rendered, and had the district court made a general finding only in favor of Kinney and based its decree thereon, the same would have been affirmed. But the district court in this case made special findings of fact. These, because of the absence of a motion for a new trial, must be held to be absolutely correct, and the extent of our inquiry is, did the court reach the right conclusion of law, render the correct judgment or decree, on the facts found?

The facts found by the learned judge are as follows: (*a.*) Prior to June, 1889, one T. F. Kinney made a contract with Hansen in and by which he agreed to furnish the labor and material and erect for her an improvement on her real estate. (*b.*) T. F. Kinney employed Alpheus A. Kinney to perform labor on said improvement, and that said Alpheus A. Kinney during the months of June and July, 1889, labored on said improvement twenty-eight days at an agreed price of $2.50 per day. (*c.*) That Alpheus A. Kinney performed no other labor on said improvement until the 17th day of October, 1889, on which day he labored thereon six hours. (*d.*) That on the 14th day of November, 1889, Alpheus A. Kinney filed in the office of the register of deeds of Buffalo county a sworn statement of the labor performed and the amount due him therefor from said contractor for labor performed on the improvement erected un-

der said contract, and claimed a lien on the real estate on which said improvement was situate under section 3667, Compiled Statutes, 1895. And thereupon the district court decreed that Alpheus A. Kinney was entitled to a lien against the real estate of Hansen to secure the payment of said twenty-eight days and six hours labor.

It is to be observed that Alpheus A. Kinney performed labor for the contractor on two different occasions: First, during the months of June and July, when he worked twenty-eight days. Second, on the 17th day of October when he worked six hours. More than sixty days intervened between the 31st day of July, the date on which Alpheus A. Kinney stopped work on the improvement, and the 17th day of October, when he again began work on the improvement. This being the case, the presumption is that the labor performed on the 17th of October was so performed under a separate contract from that under which the labor performed on the 31st of July and prior thereto. (*Buchanan v. Selden*, 43 Neb., 559.) Therefore, to entitle Alpheus A. Kinney to a lien for the labor performed for the months of June and July, he should have filed a sworn statement of the labor performed by him and the amount due him from the contractor therefor and claimed a lien as provided by said section 3667, Compiled Statutes, within sixty days from the 31st of July. The mechanics' lien law should not be so construed as to enable a laborer to tack one contract to another and procure a lien for all the labor performed under two or more contracts by filing in the office of the register of deeds a sworn statement of the labor performed and the amount due him therefor within sixty days of the date of performing the last labor performed in pursuance of the last contract. (*Central Loan & Trust Co. v. O'Sullivan*, 44 Neb., 834.) Under the facts found by the district court Alpheus A. Kinney was entitled to a decree giving him a lien upon the property of Hansen for the value of the labor performed on the 17th day of

October only. The decree of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

ALONZO J. TULLOCK V. WEBSTER COUNTY.

FILED OCTOBER 15, 1895. No. 3148.

1. **Bridges:** COUNTIES. Prior to the enactment of chapter 72, Session Laws, 1887, a county under township organization was not invested with the power nor charged with the duty of building or repairing bridges situate in the county. (*Whitcomb v. Reed*, 24 Neb., 50.)

2. ———: ———. By the enactment of said chapter 72 it was not intended to make counties under township organization liable for the payment of bridges already constructed, nor for the payment of repairs made on bridges prior to the taking effect of said act.

3. **Action Against County to Recover for Labor and Material Furnished Under Bridge Contract:** PLEADING: ULTRA VIRES. A petition filed in a suit against a county to recover for labor and material of the value of more than $100 furnished in 1887 towards the construction of a bridge in pursuance of a contract between the plaintiff and the county board of such county did not allege that the bridge constructed was situate in the county; nor that at the time the contract was made there was on hand money available for the purpose of paying for such labor and material, as provided by section 83, chapter 78, Compiled Statutes, 1887; nor that the county authorities advertised for bids for the furnishing of the labor and material sued for. *Held*, (1) That the petition did not state a cause of action; (2) that these facts must have existed as a condition precedent to invest the county board of said county with jurisdiction to make the contract sued on; (3) that as such facts did not exist, the contract made was *ultra vires* and void and incapable of ratification by the county. *Townsend v. Holt County*, 40 Neb., 852, and *Gutta Percha & Rubber Mfg. Co. v. Village of Ogalalla*, 40 Neb., 775, followed and reaffirmed.

ERROR from the district court of Webster county. Tried below before GASLIN, J.

See opinion for statement of the case.

O. P. Mason filed a brief on behalf of plaintiff in error wherein the following points appear:

Municipal corporations have the power to enter into contracts by committees on behalf of the proper officers. (*Hitchcock v. Galveston*, 96 U. S., 348.)

Municipal corporations may ratify unauthorized expenditures which they deem beneficial, and such ratification is equivalent to previous authority. (Dillon, Municipal Corporations, sec. 463; *People v. Swift*, 31 Cal., 26; *Kimball v. School District*, 8 Vt., 8.)

Even if there be a defect of power in a corporation to make a contract, yet if the contract was not in violation of its charter or of any statute prohibiting the contract, and the corporation had induced a party who relied on the contract to expend money in the performance of the same on his part, the corporation will be liable. (*City of East St. Louis v. East St. Louis Gas Light & Coke Co.*, 98 Ill., 415; *State Board of Agriculture v. Citizens Street R. Co.*, 47 Ind., 407.)

The plaintiff in error having entered into the contract in good faith, and performed the services, relying upon the regularity of the proceedings of the county board, the county, having received the benefit of the performance, is estopped from questioning the regularity in that regard. (*Moore v. Mayor of New York City*, 73 N. Y., 238.)

Where a corporation has purchased chattel property and the property is delivered to it, and all things are completed except the performance of its own promise to pay the price, a plea cannot be entertained that it had no authority to make the purchase, or enter into the contract, so long as it retains and insists on retaining the benefits of the con-

tract. (*Parish v. Wheeler*, 22 N. Y., 494; *Rutland R. Co. v. Proctor*, 29 Vt., 93; *Pittsburgh, C. & St. L. R. Co. v. Keokuk & Hamilton Bridge Co.*, 131 U. S., 381; *Bank of Columbia v. Patterson*, 7 Cranch [U. S.], 299; *Bank of United States v. Dandridge*, 12 Wheat. [U. S.], 64; *Zabriskie v. Cleveland*, 23 How. [U. S.], 381; *Gold Mining Co. v. National Bank*, 96 U. S., 640; *Pneumatic Gas Co. v. Berry*, 113 U. S., 322.)

It is sufficient that the corporation has made the contract, and by so doing has placed in its corporate treasury the fruits of other's labor, and every friend of justice forbids that it should be permitted to evade payment by an appeal to the limitations upon its manner of doing business. (*Bradley v. Ballard*, 55 Ill., 413; *Darst v. Gale*, 83 Ill., 136; *Poock v. La Fayette Building Association*, 71 Ind., 357; *Hayes v. Gallion Gas Co.*, 29 O. St., 340; *Wright v. Pipe Line Co.*, 101 Pa. St., 204; *Union Nat. Bank v. Hunt*, 7 Mo. App., 42.)

While courts are inclined to maintain with vigor the limitations of corporate action, whenever it is a question of restraining the corporation in advance from passing beyond the powers of its charter, they are equally inclined, on the other hand, to enforce against them contracts, though *ultra vires*, by which they have received the benefit. (*Bissell v. Michigan S. & N. J. R. Co.*, 22 N. Y., 258; *Parish v. Wheeler*, 22 N. Y., 494; *Argenti v. City of San Francisco*, 16 Cal., 256; *Hale v. Mutual Fire Ins. Co.*, 32 N. H., 297; *Railroad Co. v. Howard*, 7 Wall. [U. S.], 413.)

J. N. Rickards, also for plaintiff in error.

J. R. Wilcox, *J. S. Gilham*, and *Case & McNeny*, *contra*, cited: *School District v. School District*, 12 Neb., 242; *Driftwood Valley Turnpike Co. v. Board of Commissioners of Bartholomew County*, 72 Ind., 226; *Cummins v. City of Seymour*, 79 Ind., 497; *State v. Messenger*, 25 Neb., 674; *Sovereign v. State*, 7 Neb., 410; *Smails v. White*, 4 Neb., 357.

RAGAN, C.

Alonzo J. Tullock sued Webster county in the district court thereof, which sustained a demurrer to Tullock's petition. He refused to plead further, whereupon the court entered a judgment dismissing his action, to reverse which he has prosecuted here a petition in error.

The allegations of Tullock's petition necessary to an understanding of the points made here are in substance that on the 16th day of June, 1887, Tullock entered into a contract in writing with Joseph Garber, Alfred McCall, and Reese Thompson, "bridge committee for and in behalf of said Webster county." By the terms of the contract Tullock agreed to furnish the material and labor and construct a bridge for the bridge committee over the Republican river south of Red Cloud and have the same completed by the 1st day of November, 1887. The petition then alleged that Tullock fully performed his contract before the date last mentioned and that "*during the execution* of said contract the said defendant, Webster county, directed and required and then and there consented and agreed to pay the said plaintiff for the extra work and material hereinafter more particularly set forth, viz.: That after Tullock had excavated the bed of the river to the first stratum of rock, for the purpose of building the north pier of said bridge according to the plans and specifications made a part of the contract, that Tullock was requested and required by Webster county to make said excavation to the second stratum of rock; that he did so; that Webster county then and there agreed to pay Tullock for the extra work and material required to carry the pier to the second stratum of rock; that said extra labor and material were of the value of $942.20."

Webster county during the entire year of 1887 was under township organization, and at the time the contract for this bridge was entered into by the "bridge committee"

and Tullock, the county was not invested with the power nor charged with the duty of building or repairing bridges in the county. (See *Whitcomb v. Reed*, 24 Neb., 50, where all the statutes bearing on the subject of the duties and liabilities of counties under township organization for the erection and reparation of bridges in the county were examined, and the conclusion stated above reached.) But the legislature, on the 24th day of March, 1887, passed an act (Session Laws, 1887, p. 587, ch. 72) which provided:

"Sec. 1. That in counties under township organization the expense of building, maintaining, and repairing bridges on public roads over streams shall be borne exclusively by the counties within which such bridges are located.

"Sec. 2. The county board of every such county shall build, maintain, and repair every such bridge, and make prompt and adequate provision for the payment of the expense thereof."

The legislature of 1887 adjourned on the 31st day of March of that year, consequently this law did not take effect before the 1st day of July of that year, and there is no allegation in the petition as to the date when Webster county contracted with Tullock to furnish the extra labor and material, nor is there any allegation in the petition showing when he furnished such extra labor and material. The allegation is that the labor and material were furnished at the request of Webster county during the time that Tullock was constructing the bridge; that is, some time between the 16th day of June, 1887, and the time of the completion of the work. This is too indefinite. We cannot presume from this language that the county contracted for nor that Tullock furnished the extra labor and material subsequent to the 1st of July, 1887. The legislature did not intend by the act just quoted to make counties under township organization liable for the payment for bridges already constructed; nor for the payment of repairs made on bridges, which repairs had been made prior to the pas-

sage of the act. The obvious purpose of the act was to put the burden upon the counties instead of the townships, of building and repairing such bridges as might become necessary in the county after the taking effect of the act. But this statute must be construed in connection with sections 83 and 84 of the said chapter 78, Compiled Statutes, 1887, which provided: "All contracts for the erection and reparation of bridges and approaches thereto, for the building of culverts, and improvements on roads, the cost or expense of which shall exceed one hundred dollars, shall be let by the county commissioners to the lowest competent bidder; but no contract shall be entered into for a greater sum than the amount of money on hand in the county road fund derived from the levy of previous years, and two-thirds of the levy for the current year, together with the amount of money in the district road fund of the district where such work is to be performed." Section 84: "Before any contracts, as aforesaid, shall be let, the county commissioners shall advertise for bids therefor," etc.

The petition does not allege that the bridge built by Tullock, and towards the construction of which the extra labor and material sued for were furnished, was in Webster county. It appears from the petition that the value of the extra labor and material was more than $100; but the petition does not allege that the supervisors of Webster county, before they let the contract to Tullock to build this bridge or to furnish the extra material and labor therefor, advertised for bids; nor does it allege that the amount of money on hand in the county road fund derived from the levy of previous years and two-thirds of the levy for the current year, 1887, together with the amount of money in the district road fund of the district where such bridge was situate was equal to the amount agreed to be paid for such extra labor and material; nor does the petition allege that Tullock was the lowest competent bidder. If the act of March 24, 1887, quoted above, had been in force at the

time Tullock contracted with Webster county to furnish the extra labor and material, still the petition would not state a cause of action because of the absence therefrom of the several matters just enumerated. The advertisements for bids, the fact that the bridge to be built was in Webster county, and the fact that there was on hand money available for the purpose of building and paying for said extra labor and material as provided by said section 83, were facts which must have existed to invest Webster county, or its proper authorities, with jurisdiction to enter into any valid contract for furnishing the labor and material made the subject-matter of this suit. In *Townsend v. Holt County*, 40 Neb., 852, Holt county, through its board of supervisors, duly entered into a written contract with Townsend, in and by which the latter agreed to furnish the material and erect a bridge over the Niobrara river. It appears that the board of supervisors appointed a building committee to supervise the construction of the bridge on behalf of the county. After the contract was made this building committee authorized Townsend to depart from the original plans and specifications for the bridge and to build it higher than Townsend was required to do by his written contract. Townsend made the alterations at an expense of $500. He then sued the county for the value of this extra labor and material. A general demurrer was sustained to his petition and he prosecuted a petition in error here, but the court held: "Under the provisions of section 83, chapter 78, Compiled Statutes, an increase of $500 from the contract price for the erection of a bridge cannot be enforced when such increase was contracted for without bids being required or made in respect thereto." We conclude, therefore, that Webster county, by its proper authorities, had no jurisdiction or authority of law to enter into a contract with Tullock to furnish extra labor and material—the cost of which exceeded $100—towards the erection of the bridge built by Tullock, without there being on hand funds as above stated

and without first having advertised for bids for such extra labor and material. But it is argued here that Webster county, by accepting the bridge and paying Tullock the original contract price thereof, thereby ratified the illegal and unauthorized act of its board of supervisors in contracting with Tullock for the extra labor and material.

The question of the power of a municipal corporation to ratify the invalid contracts of its officers was before this court in *Gutta Percha & Rubber Mfg. Co. v. Village of Ogalalla*, 40 Neb., 775. The provision of the statute (Compiled Statutes, sec. 89, ch. 14,) entitled "Cities of the Second Class and Villages" is as follows: "No contract shall be hereafter made by the city council or board of trustees, or any committee or member thereof; and no expense shall be incurred by any of the officers or departments of the corporation, whether the object of the expenditure shall have been ordered by the city council or board of trustees or not, unless an appropriation shall have been previously made concerning such expense, except as herein otherwise expressly provided." It appears that the trustees of the village of Ogalalla, or some of them, purchased of the manufacturing company certain hose, hose-carts, reels and ladders, and that the articles purchased were accepted and used by the village; but it further appears that no appropriation for the purpose of purchasing and paying for these articles had previously been made. The village having refused to pay for the fire apparatus, the manufacturing company sued it, and it was argued in this court that the village could not repudiate its contract after having received the benefits thereof; in other words, that by accepting the fire apparatus and using it, the village had thereby ratified the unauthorized contract of its officers in purchasing the apparatus. The court said: "The cases bearing upon the question of the power of municipal corporations to ratify their unauthorized contracts are confusing and apparently irreconcilable. It would subserve no useful purpose to

examine them at length in this connection or to attempt a statement of the grounds upon which they rest. It is sufficient that there is one principle which seems to run through them all, viz.: If a contract is invalid when made, because in violation of some mandatory requirement of statute, it will be deemed *ultra vires*, and can be ratified only upon the conditions essential to a valid agreement in the first instance; but where the formalities prescribed or conditions imposed are not intended as a restriction upon the corporate power, a binding ratification may be made in a different mode. * * * It is plain that the statute under consideration is mandatory and an express limitation upon the powers of cities and villages of the class to which it applies." It was accordingly held that the village was not liable for the apparatus purchased by its officers because no appropriation of money for that purpose had previously been made. This case disposes of the argument made here that Webster county had ratified the unauthorized act of its board of supervisors in contracting with Tullock to furnish the extra labor and material sued for. The authorities of Webster county had no jurisdiction or authority to make this contract without first having advertised for bids therefor and without there being on hand the moneys specified in said section 83, chapter 78, Compiled Statutes, quoted above. The contract, therefore, of the supervisors was not voidable or capable of ratification, but absolutely null and void and incapable of ratification. The judgment of the district court is

AFFIRMED.

JOHN JOHNSON, APPELLANT, V. J. E. BUTT, APPELLEE.

FILED OCTOBER 15, 1895. NO. 5382.

1. **Action to Quiet Title: JUDGMENT FOR DEFENDANT.** Evidence *held* sufficient to sustain the finding of the trial court.
2. **———: ADVERSE POSSESSION: EVIDENCE.** Occupancy of land by permission of and subservient to the true owner will not establish a title by adverse possession.

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

Frank Dean, for appellant.

C. Thompson, contra.

IRVINE, C.

This was an action by the appellant against the appellee to quiet title to a tract of land in Saunders county. The plaintiff claimed title by adverse possession only. There was a finding and decree for the defendant. The brief of the appellant does not call attention to any specific errors, but is addressed generally to the argument that the findings were contrary to the evidence. The findings have sufficient support from the evidence on at least two grounds: First, there is sufficient evidence to justify the trial court in finding that there was an interruption of the plaintiff's possession; in other words, that the plaintiff did not show continuous possession for the statutory period. Second, there is evidence justifying the trial court in finding that the plaintiff's possession was not adverse, but was permissive in its character for a portion of the period at least. The evidence we refer to is that the agent of Butt, the true owner, made an arrangement with plaintiff whereby plaintiff was to have the use of the land in consideration of his

paying the taxes thereon, and that plaintiff's occupancy was by virtue of that arrangement; that is, as a tenant of Butt, and not as one holding adversely to him. Such a permissive occupancy does not establish title by adverse possession. (*Smith v. Hitchcock*, 38 Neb., 104).

JUDGMENT AFFIRMED.

THEODORE MAYER v. J. A. VER BRYCK.

FILED OCTOBER 15, 1895. No. 5366.

1. **Quantum Meruit**: SPECIAL CONTRACT: PLEADING. On a petition alleging merely a special contract and performance by the plaintiff, the plaintiff cannot recover on a *quantum meruit* for part performance. *Powder River Live Stock Co. v. Lamb*, 38 Neb., 339, followed. *West v. Van Pelt*, 34 Neb., 63, distinguished.
2. **Sales**: CONTRACTS: TENDER OF DELIVERY. On a contract for the delivery of goods the vendee is not entitled to recover where delivery was tendered at the time for performance and the tender kept good till the trial.

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

John Everson, for plaintiff in error.

W. M. Morning, contra.

IRVINE, C.

This was an action by Mayer to recover for services alleged to have been performed for Ver Bryck as a real estate broker. There was a verdict and judgment for the defendant, a reversal of which is sought by the plaintiff.

The plaintiff requested the following instruction, which was refused: "If you find that defendant Ver Bryck re-

quested plaintiff Mayer to assist in the sale of defendant's property, described in the petition of plaintiff, and that plaintiff Mayer did assist in said sale, even if plaintiff did not wholly procure said purchaser, still, if plaintiff Mayer, at the request of defendant Ver Bryck, assisted in procuring the sale, he is entitled to what his services are reasonably worth, and your verdict must be for plaintiff." The refusal of this instruction is assigned as error. The plaintiff also requested the following instruction: "The jury are instructed that if you find from the evidence that the defendant Ver Bryck requested the plaintiff to procure a purchaser for the brick store described, and in pursuance thereof the said plaintiff Mayer procured a purchaser, with whom defendant J. A. Ver Bryck afterwards negotiated a sale himself, nevertheless the said plaintiff Mayer would be entitled to recover, and you will find for the plaintiff." This the court gave, adding the following modification: "Provided plaintiff found a purchaser and effected a sale, and defendant promised to pay said plaintiff $50 therefor, as averred in the petition." The modification of this instruction is assigned as error. These two assignments may be treated together.

The plaintiff contends that the law is as stated in the instructions requested without modification, and cites in support of that contention a number of decisions of this court. The question must, however, be determined as one rather of pleading than of substantive law. The petition is as follows: "On or about the —— day of January, 1890, the defendant requested plaintiff to find him a purchaser of lot 2, in block 16, in First Addition to Alma, Nebraska, on terms fixed by the defendant, and agreed to pay plaintiff for his services, and as compensation for finding said purchaser and making said sale the sum of $50. On or about the —— day of ——, 1890, this plaintiff found a purchaser for said premises for said defendant and sold said premises to him on terms fixed by defendant, whereby said defend-

ant became indebted to plaintiff in the sum of $50. No part of said sum has been paid and there is now due from defendant to this plaintiff the sum of $50, for which sum, with costs, plaintiff asks judgment." There is no count upon a *quantum meruit.* The plaintiff pleaded a special contract that he should receive $50 as compensation for finding a purchaser and making a sale, and the court did not err in refusing to permit the jury to base its verdict upon a *quantum meruit,* which was the effect of refusing the instructions as asked. Most of the cases cited do not tend to support the plaintiff's contention that he was entitled to recover on a *quantum meruit* under the pleadings. Nearly all the cases cited by him state only the rule determining the broker's right to recover. No question of pleading was presented in those cases, and the petition, where its nature is disclosed, was upon a *quantum meruit.* In *Gregg v. Loomis,* 22 Neb., 174, it is intimated that the evidence introduced to show that the broker had procured a purchaser who had thereafter effected a purchase from the owner directly was not admissible under the pleadings; but even in that case the opinion discloses that the petition counted on a *quantum meruit.* In *West v. Van Pelt,* 34 Neb., 63, a broker to procure a donation of land was permitted to recover on a *quantum meruit,* under a petition alleging merely a special contract; but this was because the court considered that the pleadings contained sufficient averments of a waiver of full performance to justify a submission to the jury. In no case has the court held that where the pleadings allege a special contract only, the plaintiff can recover without showing performance upon his part. To recover upon a part performance, or to recover on a *quantum meruit,* facts justifying such recovery must be pleaded. (*Powder River Live Stock Co. v. Lamb,* 38 Neb., 339.)

The defendant denied the employment of plaintiff, but admitted that after the sale was effected he promised to give

the plaintiff a suit of clothes. He then pleaded that he had offered him the suit of clothes, and that he tendered it in court. The plaintiff asked the court to instruct the jury, in effect, that if the agreement was to pay the plaintiff in goods, and if the defendant had failed to do so, then the plaintiff would be entitled to recover the value of the goods in money. The refusal of this instruction is assigned as error. The evidence was undisputed that the defendant tendered a suit of clothes to the plaintiff. The plaintiff swears that he refused it because defendant promised him a tailor-made suit worth $50, and he was tendered a ready-made suit worth much less. It may be that if the plaintiff had requested an instruction submitting to the jury this issue, he would have been entitled to it; that is, that if defendant had agreed to supply the plaintiff with a tailor-made suit worth $50, and had tendered a less valuable ready-made suit, this would be a failure to deliver the goods according to the contract, and would entitle the plaintiff to recover in money the value of the suit which should have been delivered. But the instruction asked did not so submit the question. Under the instruction, as requested, the jury would have been required to find for the plaintiff for the value of the suit in money, although they found the agreement to be as the defendant contended, to deliver a ready-made suit such as the defendant tendered, and which, if necessary to avoid error, we must assume to have been tendered in court in accordance with the answer. It is clear that if the defendant only agreed to give such a suit as he offered to the plaintiff, and if on the trial he tendered that suit anew, the plaintiff would not be entitled to recover.

It is assigned that the verdict is not sustained by the evidence. We have examined the evidence and find it sufficient.

JUDGMENT AFFIRMED.

CLARENCE A. POWELL v. LUEVA YEAZEL, ADMINISTRATRIX OF ABRAHAM YEAZEL, DECEASED, ET AL.

FILED OCTOBER 15, 1895. No. 5469.

1. **Fraudulent Conveyances**: EVIDENCE OF GOOD FAITH: INSTRUCTIONS. In a contest between a vendee of chattels and creditors of one under whom he claims title the evidence tended to show a purchase for value and in good faith. *Held*, Error for the trial court in the instructions to characterize the sale as a "pretended sale."

2. **Sales**: POSSESSION OF GOODS: BURDEN OF PROOF. The failure of a vendee of chattels to take possession thereof does not render the sale conclusively void as against creditors. It merely casts upon the vendee the burden of proving his good faith.

3. ———: ———: REPLEVIN: ATTACHMENT: INSTRUCTIONS. Therefore it is error to instruct the jury that such a vendee cannot recover in replevin from an officer attaching the goods as the property of the vendor if the vendee did not obtain possession before the levy of the writ, although he had no notice of the vendor's fraudulent intent.

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

Capps & Stevens, for plaintiff in error.

Batty & Dungan, contra.

IRVINE, C.

This action was one in replevin by Powell against Yeazel, R. A. Boyd, Fred Einspahr, and George Crane. It was begun before a justice of the peace, and the property involved being appraised at an amount beyond the jurisdiction of the justice, the case was certified to the district court. After a verdict there for the plaintiff, a motion for a new trial having been sustained, amended pleadings were filed and the case again tried, resulting in a verdict and judg-

ment for the defendants. The property in controversy consisted of forty-four hogs and about twenty head of cattle. The plaintiff claimed this stock by purchase from Anna D. Einspahr. Crane was the sheriff of Adams county and Boyd his deputy. They justified under a writ of attachment sued out by Yeazel against Herman D. Einspahr, the husband of Anna D. Einspahr, claiming to have levied upon the stock by virtue of that writ. The relation of Fred Einspahr to the case seems to be that it was claimed that he had been made custodian of the stock by the deputy sheriff at the time of the levy. The evidence tends to show that the property, prior to January, 1890, belonged to Herman D. Einspahr; that the latter part of January, Einspahr, by bill of sale, conveyed it to his wife. On the one side it is contended that this attempted conveyance was in fraud of Einspahr's creditors. On the other side it is contended that Einspahr being indebted to the Exchange National Bank of Hastings in a large amount and also to Yeazel, its cashier, Yeazel, for the bank and himself, was endeavoring to obtain security for this indebtedness. There is evidence tending to show that certain security was already held, but the details as to this feature are not important, because the effort was being made to obtain a change in the form of the security and also additional security. The security desired was a mortgage on the real estate of Einspahr, including his homestead. In order to procure Mrs. Einspahr's execution of this mortgage, and in consideration of her executing the same, a large amount of personal property, including the live stock in controversy, was transferred to her, and this, it was claimed, was done with the knowledge and consent of Yeazel. It was further contended that on the 6th day of February, 1890, the plaintiff agreed to purchase the live stock in controversy, dealing with Einspahr, and at that time not knowing of Mrs. Einspahr's claim to the property. No sale was then consummated sufficient to answer the re-

quirements of the statute of frauds; but on the following day, February 7, the sale was perfected by the plaintiff's drawing and delivering to Mrs. Einspahr his check for $940, the contract price. The check was delivered between 5 and 6 o'clock of the afternoon of February 7, and was subsequently paid to Mrs. Einspahr. On the 8th most of the hogs were taken into possession by the plaintiff and driven to Kenesaw. At 3 o'clock in the afternoon of the 7th, as shown by the return of the order of attachment, the sheriff attempted to make a levy on the property. The stock was then on the farm of Einspahr. There is evidence tending to show that the levy was regularly declared, but the stock was not moved off the place. Fred Einspahr, who lived on an adjoining farm, was requested by the deputy to take charge of the stock. He objected on the ground that his father was lying ill at his home, and he could not leave; but he was told, as his place was near the stock, he could "keep an eye on it," and prevent others from intermeddling. Herman Einspahr's employes were at the same time directed to feed the stock. On the 8th the sheriff caused the hogs to be returned from Kenesaw to Einspahr's place. On that day the plaintiff was driving the cattle toward Kenesaw when he met the sheriff, who took them out of his possession. There is no evidence that the plaintiff had any actual knowledge of the levy until on the 8th, on his way to take the property into his possession, he was informed by Fred Einspahr that a levy had been made the previous day.

It will be observed that the salient questions in the case are, first, the validity of the levy; second, the *bona fides* of the conveyance from Einspahr to his wife, and third, the *bona fides* of the sale by Mrs. Einspahr to the plaintiff. There was undoubtedly evidence sufficient to go to the jury on the last two issues. It is contended by the plaintiff that the evidence was insufficient to establish a valid levy of an attachment. The record before us does not con-

tain all the instruments which the bill of exceptions shows were offered in evidence, and as the judgment must on other grounds be reversed, we pass this question, simply remarking that this court has held that where an officer attaches property found in the possession of a stranger claiming title, in an action of replevin therefor by such stranger the officer, in order to justify, must not only prove that the attachment defendant was indebted to the attachment plaintiff, but that the attachment was regularly issued (*Williams v. Eikenbery*, 25 Neb., 721; *Paxton v. Moravek*, 31 Neb., 305), and also that 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. (*Grand Island Banking Co. v. Costello*, 45 Neb., 119.)

At the request of the defendants the following instruction was given: "You are instructed as a matter of law that if from the evidence you will find that at the time of the pretended sale of the property in controversy by Herman Einspahr to Anna Einspahr and by her to this plaintiff, there was no immediate delivery to either of them followed by an actual and continued change of possession, and you find that said pretended sale was made with the intention on the part of Herman Einspahr and Anna Einspahr to defraud the creditors of Herman Einspahr, though said fraudulent intent was not known to or participated in by the plaintiff herein, the sale is void as to creditors and you must find for the defendant, unless you further find that plaintiff purchased said property and received possession then or prior to the levy of the attachment, or unless you find that Abraham Yeazel consented to and agreed that such sale and transfer should be made in consideration of Anna D. Einspahr's executing the conveyances referred to in these instructions." We think the learned district judge gave this instruction without sufficiently observing the language

in which it is couched. It is, we think, in two respects erroneous to the prejudice of the plaintiff. It twice characterizes the sales from Einspahr to his wife and from her to the plaintiff as "pretended" sales. The word "pretended," used in such a connection, signifies something falsely assumed; something claimed contrary to the truth of the matter. The jury could not have understood it in any other sense. As we have said, there was evidence justifying the jury in finding that both sales were *bona fide*, and the court should not have used language importing an assumption that they were not so. In the next place the jury was told that if the sale was made with the intention on the part of either Einspahr or wife to defraud the creditors of Einspahr, the plaintiff could not recover even though he did not know and did not participate in such intent, unless he actually received possession of the property before the levy was made. We take it that the levy of an attachment upon personal property, like a levy upon real estate, attaches only to the debtor's interest therein. A sale of personal property may be effectual even when over the value of $50, not only by the delivery of possession of the property, but by payment of the purchase money or some portion thereof, or by a memorandum in writing. The evidence raises some doubt as to the priority in time between plaintiff's payment for the stock and the levy of the attachment. Assuming a levy to have been made, the fact that plaintiff did not receive possession until later would not necessarily defeat his right. The failure of the plaintiff to obtain possession would in a contest between him and creditors of the vendor affect only the burden of proof. (*Fitzgerald v. Meyer*, 25 Neb., 77.) A sale unaccompanied by a change of possession is not conclusively void as against creditors of the vendor. It only casts upon the vendee the burden of proving his good faith, and Powell might be a purchaser in good faith and entitled to the property as against creditors of Einspahr even if the transfer from

Einspahr to his wife were voidable, and although he did not obtain possession of the property before the levy was made.

REVERSED AND REMANDED.

JOHN SMITH V. ELIZA BROWN.

FILED OCTOBER 15, 1895. No. 5404.

1. **Admission of Evidence:** ESTOPPEL. A party who asks his adversary to offer in evidence a written instrument of doubtful competency cannot be heard to urge in this court, when the instrument was immediately offered, that it should have been excluded as incompetent.
2. **Sales:** CONTRACT FOR MEASUREMENT OF PROPERTY: EVIDENCE OF WEIGHT. Where hay was sold with the understanding that 420 cubic feet were to be computed as a ton, evidence to show that the actual weight of such a volume of hay was less than a ton was properly excluded.
3. **Instructions.** Certain rulings of the court in giving and refusing instructions presenting no legal questions of general interest examined, and *held* not erroneous.

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

Ricketts & Wilson, for plaintiff in error.

Charles E. Magoon, contra.

IRVINE, C.

Eliza Brown sued John Smith to recover $84 as the purchase price of five stacks of hay which she alleged she had sold and delivered to Smith on a special contract that he should pay therefor that price. Smith defended on the ground that he had bought three of the stacks by the ton;

that two small stacks he bought in bulk for the price of $9, and that he had taken half a ton, in value $2, from one of the larger stacks; that Mrs. Brown had falsely represented to him that the largest stack contained fourteen tons and the other two not purchased in bulk, eight each, whereas in fact the said three stacks really contained but eighteen tons; that after discovering the falsity of the representations he had tendered Mrs. Brown $11 for the hay received and had refused to take the remainder. The reply was a general denial. There was a verdict for the plaintiff for the full amount claimed.

F. M. Glenn was called as a witness to prove the quantity of hay. After testifying that prior to the sale to Smith he and another had measured the hay in the stacks, he was interrogated as to the method pursued in making the measurement. He produced certain memoranda which he testified were made at the time the measurements were taken. These were offered in evidence and their admission is assigned as error on the ground that they were not such accounts as are admissible under the statute. This is true. Their office was only as memoranda for the purpose of refreshing the witness' memory. We need not inquire whether or not there was a proper foundation for the admission of the memoranda themselves, because immediately before they were offered in evidence the witness was interrogated in such a manner as to call upon him to testify in regard to the facts. Whereupon, to quote the bill of exceptions, "Counsel for the defendant here asks that the memorandum shall be introduced in evidence and not the witness' statement of what it shows, because the method of arriving at it is the material thing." The plaintiff then offered in evidence the memoranda. The defendant objected to their admission. The objection did not go to any particular features disclosed by the memoranda themselves, but to the general question of their competency as evidence. As they were offered at the suggestion and upon the re-

quest of defendant he cannot be heard to object to their introduction.

An effort was made, after proving that the hay to which the controversy related was a portion of a crop of hay grown on the land where it was stacked, and stacked in a number of different stacks of the same general contour, to show that other stacks of this character had been purchased by another witness, and that when the hay contained therein was weighed it did not weigh as much as indicated by Mrs. Brown's measurements, under which both sales had been made. The exclusion of this evidence is assigned as error. Disregarding the tendency of this evidence if admitted to introduce into the action the trial of collateral issues, it was properly rejected on another ground. It is undisputed that both parties contemplated a sale, not by actual weight, but by measurement, and about the only fact on which all witnesses substantially agreed is that in the purchase of hay in this manner 420 or 421 cubic feet are calculated as constituting a ton. It was by the ton as so measured, and not by weight, that this hay was sold, and the evidence shows that the actual weight of 420 cubic feet of hay differs according to the season, quality, and other conditions. It was, therefore, wholly immaterial whether the hay weighed as many tons as the stacks by measurement were calculated to contain. There is no statute fixing the volume of a ton of hay. There is a statute fixing the weight of certain articles measured by bushels. (Compiled Statutes, 1895, sec. 5, ch. 94.) "A bushel of each of the articles enumerated in this section shall consist of the number of pounds respectively affixed to each, viz.:" Then follows a list of articles, and in that list we find "hay, per ton, 2,000 pounds." There is nothing here to establish any standard of comparison between the volume and the weight of hay, and we know no reason why the parties may not conventionally, either by express agreement or by established custom, deal in hay according to any arbitrary calculation of

the volume requisite to constitute a ton, regardless of the actual weight. This is what was here done.

The defendant in error requested the following instruction: "The parties to this action agree that 420 cubic feet of hay constitute a ton by measurement, and you are instructed that the rule adopted by plaintiff and her son of multiplying the length and width of stack together and this product by one-third of the length of a line from the bottom of a stack on one side over the top and to the bottom of the stack on the other side does not give the cubic contents of such stack, and hence would not form a correct dividend to divide by 420 cubic feet, the contents of a single ton. This being the rule employed by plaintiff in the measurement of this hay you are instructed that such measurement was erroneous." Its refusal is assigned as error. The court of its own motion gave this instruction: "The evidence shows that it was the intention of the parties to this action at the time they entered into the contract in relation to the hay in question, that 420 cubic feet of hay would constitute a ton by measurement. You are instructed that the rule adopted by the plaintiff and her son of multiplying the length and width of the stack together and this product by one-third of the length of a line from the bottom of the stack on one side over the top and to the bottom of the stack on the other side, would not in all cases give the cubic contents of a stack of hay, and whether or not it would give the true contents of the stack in cubic feet in this particular instance is for you to determine." The difference in these instructions is only that by that requested the jury was positively instructed that the method of measurement resorted to was incorrect, while by that given the jury was cautioned that it would not be in all cases correct and that they should determine whether or not it was correct in this case. It is clear that the cubic contents of the stack would not be accurately ascertained by that method unless its cross-section was a perfect square. There is in the evi-

dence nothing to show the contour of the stacks in question, the nearest approach to testimony on this subject being that of a witness for the plaintiff in error who testified that one of the stacks was ten feet wide and "squared five feet high." But it further appears from his testimony that the section of the stack was not rectangular and that his statement that it would square five feet high was based merely on a rough estimate obtained by observation assisted by rude measurements. The remainder of this witness' testimony was not of a character calculated to impress one with his accuracy as a mathematician, although his father testified that the witness referred to was relied on to make the estimate, stating, as a reason, that he "was accurater at figures than I was,"—proof as to the competency of this witness as an expert which was somewhat weakened by the father's further testimony, that "I ain't so accurate in figures as some men." Indeed the great difficulty which counsel seem to have had in the trial of the case was with the testimony of some of these expert geometers, the testimony of one of whom discloses that he was firmly convinced that the proper method to ascertain the area of a semicircle was to multiply the diameter by a third of the circumference. Speaking more seriously, there is absolutely no evidence in the record from which the actual cubic contents of the hay stacks can be ascertained with any degree of accuracy. In view of the pleadings and the evidence as to the contract between the parties the burden of proof devolved upon the plaintiff in error to show that the stacks contained less than was represented. Under this condition of the record we do not think that the plaintiff in error can complain because the court left the whole matter to the jury.

It is also contended that the court erred in giving to the jury an instruction to the effect that fraud is never presumed, but must be established by proof, like any other fact. The criticism of this instruction is that it implied that the plaintiff must recover, unless an actual design on the part of de-

fendant was shown to deceive the plaintiff. In at least three other instructions the jury was told in effect that if the representations were made under circumstances entitling the defendant to rely thereon, and if they were in fact false, the plaintiff could not recover. These instructions were certainly of such a character that the jury could not have inferred that an actual intent to deceive was necessary.

Complaint was made of another instruction, whereby the jury was told that if the defendant purchased the hay with full knowledge of the manner in which it had been measured, then he would be bound by the measurement, even though it might be incorrect. This was coupled with an instruction to the effect that if the defendant was ignorant of the business concerning which he contracted and was not acquainted with the measurement of hay in the stack, then plaintiff must answer for her failure to impart any special knowledge which she possessed. Taking these two instructions together we think they fairly stated the law. If both parties were equally conversant or equally ignorant of the method employed in the measurement of hay stacks and contracted for the purchase and sale of the hay, as measured according to a particular method, the method pursued being known to both, then the contract amounted to nothing more than an agreement to take the hay as so estimated, without regard to the accuracy of the estimate. Under such circumstances neither party could rescind on ascertaining that the method pursued was not accurate. This and another instruction are also objected to on the ground that they were not applicable to the evidence. An examination of the evidence convinces us that this objection is not well taken.

JUDGMENT AFFIRMED.

JOSEPH LAMMA V. STATE OF NEBRASKA.

FILED NOVEMBER 6, 1895. NO. 6288.

1. **Arrest and Detention of Felons: HOMICIDE: DUTY OF SHERIFF.** A sheriff or other police officer, in arresting or preventing the escape of a felon, may use such force as is reasonably necessary, even to the taking of life; but if the felon can be taken, or his escape prevented, without killing the offender, and he be slain, the officer is guilty of at least manslaughter.
2. ——: ——: EVIDENCE. *Held*, That a conviction of manslaughter is sustained by the evidence.

ERROR to the district court for Buffalo county. Tried below before HOLCOMB, J.

The facts are stated in the opinion.

C. W. McNamar, for plaintiff in error, in support of an argument that the evidence is insufficient to sustain the verdict, cited the following authorities: *Bruner v. State*, 58 Ind., 159; *Dressen v. State*, 38 Neb., 375; *State v. Dierberger*, 96 Mo., 667; *Jackson v. State*, 5 So. Rep. [Miss.], 690; Wharton, Criminal Law, sec. 933; *State v. Sloan*, 47 Mo., 604.

F. G. Hamer and *H. M. Sinclair*, also for plaintiff in error.

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

The facts do not present a case of justifiable homicide. Under the evidence the plaintiff in error is at least guilty of manslaughter. (Wharton, Criminal Evidence, sec. 836; *United States v. Ross*, 92 U. S., 283; *Head v. Martin*, 3 S. W. Rep. [Ky.], 623; 2 Bishop, Criminal Law, 662, 663; *Commonwealth v. York*, 50 Mass., 93; *Clements v.*

State, 50 Ala., 117; *State v. Bland*, 97 N. Car., 438; *State v. McNinch*, 90 N. Car., 696.)

NORVAL, C. J.

An information in due form was filed in the district court of Dawson county by the county attorney, charging Joseph Lamma, the plaintiff in error, with murder in the first degree, for the killing of one George Rogers on the 1st day of November, 1892. To the charge the accused entered a plea of not guilty. A trial was had, and the jury being unable to agree they were discharged. Subsequently the place of trial was changed, on application of the prisoner, to Buffalo county. The accused was again placed upon trial in the last named county, which resulted in a conviction of manslaughter. The court overruled a motion for a new trial, and sentenced the prisoner to imprisonment in the state penitentiary for the period of eighteen months. He has prosecuted a petition in error to this court to obtain a review and reversal of this judgment. The petition in error contains eighteen assignments, but two of which are relied upon in the briefs for a reversal, which we will proceed to examine.

In the outset it should be stated that the killing is admitted. The defense interposed is justifiable homicide. It is argued that the court erred in failing to instruct the jury that the burden of proof was upon the state to establish that the homicide was not justifiable. There are two answers to this contention. In the first place, no request to charge the jury was submitted by counsel for the accused. Had such an instruction been tendered and refused, then the action of the trial court could have been reviewed. The question discussed is not presented by the record. Again, the court in its charge, after fully and fairly stating the rule of justifiable homicide as applicable to the facts disclosed by the evidence, told the jury if from the evidence they entertained a reasonable doubt of the

guilt of the defendant of either of the offenses charged in the information, it was their duty to return a verdict of acquittal, which direction was, in effect, that the burden was upon the state to prove that the killing was not justifiable, not by a preponderance of the evidence merely, but beyond a reasonable doubt. The instructions given fully covered the point.

The other assignment relied upon in the brief is that the evidence is insufficient to sustain the verdict. The record shows that the plaintiff in error at the time of the homicide was the deputy sheriff of Dawson county, and was in charge of four persons confined in the county jail. George Rogers, the deceased, was an inmate of the jail, awaiting trial on the charge of horse stealing. Joseph Smith was janitor at the court house, one of his duties being to carry the meals to the prisoners in the jail, which is in the basement of the court house. On the evening of the 1st of November, 1892, Smith carried to the jail the suppers for the prisoners, unlocked the door to the outside entrance to the jail, passed through the same and down a hall through a doorway to the right into a room about 14x17 feet, and from here to a grated door between this room and a large room termed the "cell room," where the prisoners were confined. The buckets containing the evening meals were set upon the floor near the side of this door, and Smith thereupon unlocked and opened the iron-grated door. Rummel, one of the prisoners, then came forward, and stooped down to get the meals, whereupon, Rogers, the deceased, jumped over Rummel, knocked Smith back against the wall, and ran towards the outside door, Smith crying, "Help! Help! Murder!" About the same instant Lamma reached the outside entrance to the jail from the street, and, observing Rogers coming, said "Halt! Halt!" and shot the deceased, the ball entering the left breast a little to the right and about two inches below the left nipple and lodging between the spine and the shoulder blade. From the effects of the

wound Rogers expired in a very few moments. The state introduced testimony tending to show that the prisoner Rummel, some hours before the killing, told the accused to keep a better watch upon Rogers as he was going to try to get away, and to this Lamma replied: "Let the son of a bitch come on. I want a shot at him." The only question presented is whether, under the foregoing facts, the plaintiff in error was justified in taking life in order to prevent the escape of the deceased.

The law governing the taking of human life by officers of justice is thus stated by Carlton, Homicide, section 528: "In cases of felony the killing is justifiable before an actual arrest is made, where in no other way the escaping felon can be taken. In such cases, that is to say in cases of felony, if the felon flees from justice, or if a dangerous wound be given, it is the duty of every man to use his best endeavors for preventing an escape; and if in the pursuit the felon be killed, when he cannot otherwise be taken, the homicide is justifiable; and the same rule holds if the felon, after being legally arrested, break away and escape. But if he may be taken in any case, without such severity, it is at least manslaughter in him who kills him; and the jury ought to inquire whether it was done of necessity or not." In *State v. Bland*, 97 N. Car., 438, the court say: "The law does not clothe an officer with the authority to judge arbitrarily of the necessity of killing a prisoner to secure him, or of killing a person to prevent a rescue of a prisoner. He cannot kill unless there is a necessity for it, and the jury must determine from the testimony the existence or absence of the necessity." (See, also, *Jackson v. State*, 66 Miss., 89; *Jackson v. State*, 76 Ga., 473; Crocker, Sheriffs, secs. 940, 941; Murfree, Sheriffs, secs. 11–64.) The rule deducible from the authorities is that a sheriff or other officer, in arresting or preventing the escape of a person charged with a felony, may use such force as is reasonably necessary, even to the taking of life;

but if the felon can be taken, or his escape prevented, without killing the offender, and he be slain, the officer is guilty of at least manslaughter. Applying this doctrine to the case at bar, can there be any room for doubt that the killing of Rogers was inexcusable? We think not. The deceased was within the walls of the jail and, so far as the evidence shows, was unarmed. His escape could have been prevented by Lamma by the closing of the outside door. While the deceased was called to "halt," the record fails to show that he did not comply with the request. For aught that appears in the testimony the fatal shot may have been fired after the deceased had stopped. It is also undenied that the accused had been apprised that Rogers was contemplating an escape. Lamma could have taken steps to have prevented his doing so by putting him in a cell, or otherwise securing him; but he did nothing of the kind. He should have exhausted every resource at his command to prevent the escape before taking human life. Upon this record we are fully satisfied that the jury were warranted in finding that the killing of Rogers was not justifiable. The judgment is

AFFIRMED.

CHARLES H. OLSEN, ADMINISTRATOR, v. MAX MEYER.

FILED NOVEMBER 6, 1895. No. 5416.

1. **Negligence**: DEATH CAUSED BY FALLING WALL: EVIDENCE OF SEVERITY OF STORM. In an action for negligently permitting a brick wall to remain unsupported, in consequence of which it fell upon and killed the plaintiff's intestate, the defense alleged being that the falling of said wall was occasioned by a wind storm of such unusual force and severity as to be denominated as the act of God, *held* not error to permit the introduction by the defendant of evidence tending to prove that there

had been since the date in question (two years, three months, and twenty-three days) no storm of equal severity.

2. ———: ———: ———. Evidence examined, and *held* to sustain the judgment of the district court.

3. **Measure of Damages:** INSTRUCTIONS: REVIEW. This court will not consider objections by the plaintiff below to instructions relating to the measure of damage where he has failed to recover on the cause of action alleged.

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

Schomp & Corson, for plaintiff in error.

W. J. Connell, Charles Ogden, and *J. W. West, contra.*

POST, J.

This was an action in the district court for Douglas county by the plaintiff in error, as administrator of the estate of Edward Olsen, deceased, to recover from the defendant in error, Max Meyer, on account of the negligence of the latter which caused the death of the plaintiff's intestate. A trial was had resulting in a verdict and judgment for the defendant below, which has been removed into this court for review upon allegations of error by the plaintiff.

It is in the petition, in substance, alleged that the defendant Meyer is the owner of a lot at or near the intersection of Eleventh and Farnam streets in the city of Omaha, on which was situated a large, three-story brick building, adjacent to which was a one-story wooden building owned and occupied by the deceased as a business house. On the 10th day of January, 1889, the interior of the defendant's building was destroyed by fire, leaving the walls thereof unsupported, in which condition they were exceedingly dangerous and a constant menace to the lives and property of people in the immediate neighborhood thereof. On the 4th day of February, following, one of said walls,

which the defendant had negligently permitted to remain in its aforesaid dangerous condition, fell outward upon the wooden building above mentioned, crushing it to the earth and instantly killing the plaintiff's said intestate. The answer admits ownership by the defendant of the building in question and the death of the said Edward Olsen, but denies the allegation of negligence and charges that the falling of the wall aforesaid was caused by a storm of such unusual force and severity as to be denominated the act of God, and that the defendant is in nowise answerable for the fatal consequence thereof. The reply is in effect a general denial.

At the trial below, on the 27th day of May, 1891, the defendant, to sustain the allegations of his answer respecting the character of the storm which resulted in the death of the plaintiff's intestate, was permitted to prove by witnesses called for that purpose that the city of Omaha and vicinity had not since the time in question, to-wit, February 4, 1889, been visited by a wind storm of equal force and violence. To the introduction of such evidence exception was taken on the ground that the character of storms occurring subsequent to that which produced the fatal result above stated cannot be taken as a basis of comparison for the purpose of the defense alleged, or, to state the objection in the language of plaintiff's counsel, "The character of the wind or of wind storms that occurred after that date could have no bearing whatever upon this case, and were clearly irrelevant and immaterial." We are unable to perceive the force of the objection urged. It was, as stated in the charge of the court, the duty of the defendant "to take into consideration the effect of such winds and other natural phenomena as are ordinarily liable to occur, having due regard for the condition of the building and the season of the year, but he was not required to guard against an extraordinary manifestation of nature, the occurrence of which could not reasonably have been antici-

pated or foreseen." According to the modern understanding of the law, we are not required to seek for a precise definition of the term "act of God," but rather to ascertain the kind or character of events which are within the contemplation of the parties, or which may be reasonably anticipated to occur (Pollock, Contracts, p. 366*), and in the determination of that question it is certainly proper to avail ourselves of human observation and experience both prior and subsequent to the particular event involved, the weight or probative force of such evidence depending upon the length of time to which the comparison applies. Evidence of the character objected to is not admissible merely, but must, for obvious reasons, become in course of time the necessary and only basis of comparison. The objection is not directed to the length of time intervening between the falling of the wall and the date of the trial—two years, three months, and twenty-three days—but to any period subsequent to the fatal accident for the purpose of the comparison. It follows that the objection was rightly overruled.

It is next urged that the verdict is against the decided weight of the evidence and should have been set aside upon that ground. We observe from the record that on the day succeeding the fire the defendant consulted Mr. Mendelsohn, a competent and experienced architect, with regard to the repairing of the building mentioned, and was advised by the latter, after an examination of the walls, that they were not damaged, that they might be used for the purpose of rebuilding, and that they were perfectly safe as they then stood. Said architect was instructed to prepare plans and specifications for the necessary repairs, in which he was employed at the time of the accident. The defendant, according to his own testimony, acted in good faith, relying upon the advice thus promptly sought and given, in which he is fully corroborated by Mr. Mendelsohn. We cannot on this record say that the jury were not warranted in find-

ing for the defendant upon the issue of negligence, the vital question of the case.

Exception was taken to the refusal of certain instructions asked by the plaintiff, but as they relate to the question of the measure of damage, they will not be examined, since their refusal could in no event amount to prejudicial error. The judgment of the district court is

AFFIRMED.

IRVINE, C., not sitting.

ARTHUR BRYANT V. RICHARD THESING.

FILED NOVEMBER 6, 1895. NO. 5518.

1. **Written Contracts to Purchase:** PAROL AGREEMENTS TO RELEASE PURCHASER. A party who has contracted for the purchase of property may be released from the obligations of the contract at any time while it remains wholly executory, by a subsequent parol agreement to that effect.
2. ———: ———: CONSIDERATION. The mutual waiver of the rights of the parties to a contract of sale of personal property is sufficient consideration for a cancellation of the contract, to release the parties from their obligations thereunder.
3. **Sales:** ACTIONS FOR PURCHASE PRICE: QUALITY OF STOCK. Where a seller of nursery stock institutes an action to recover the purchase price thereof the defendant may show that the stock was not of the kind and quality ordered, although he did not refuse to receive it for that reason when it was tendered to him at time of delivery, but based his refusal upon a cancellation or discharge of the order of purchase.
4. ———: ———: ———. An order for nursery stock of a certain kind or quality, the price for the whole being stated in the order in a lump sum, is not severable, but entire, and the maker of the order is not obliged to receive the stock if in whole or in a substantial or material portion it is not of the kind or quality ordered.

5. ———: WRITTEN ORDERS FOR GOODS: PAROL EVIDENCE. A representation or promise by which a party was induced to sign a written order of purchase of property may be proved by parol.

6. **Instructions:** OBJECTIONS: REVIEW. Objections to instructions examined, and *held* not tenable as to some, and in regard to others the errors complained of were not prejudicial.

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

See opinion for statement of the case.

Harlan & Harlan, for plaintiff in error:

The contracts and orders were in writing and should control. They cannot be contradicted by oral testimony. (*Zucker v. Karpeles*, 50 N. W. Rep. [Mich.], 373; *Strange v. Wilson*, 17 Mich., 341; *Clark v. Tennant*, 5 Neb., 549; *Western Ins. Co. v. Putnam*, 20 Neb., 331; Addison, Contracts [Morgan's ed.], secs. 359–363; *Swain v. Semens*, 9 Wall. [U. S.], 272; Benjamin, Sales [4th Am. ed.], 216; *Schultz v. Bradley*, 57 N. Y., 646.)

Sedgwick & Power, contra.

HARRISON, J.

The plaintiff declared, in the petition filed in the district court of York county, upon two orders for nursery stock, including quite a number of apple and other fruit trees, alleging sale and delivery, and also that the prices charged were the reasonable prices and values of the trees, etc. The amount claimed was $105 and interest. The defendant answered and admitted signing the orders for the nursery stock, and except such admission denied each and every allegation contained in the petition, and further stated as follows: "And for further answer herein defendant alleges that prior to and at the time of the signing of the aforesaid orders, the plaintiff represented and stated to the de-

fendant that the plaintiff dealt in budded nursery stock only, and that the plaintiff had and sold no other fruit trees, bushes, vines, etc., except budded stock, and agreed and represented that the stock that should be delivered to defendant under the said orders should be budded stock as aforesaid, and the defendant relied upon the said representations and so signed the aforesaid orders, which otherwise he would not have done. And defendant says that the said representations were wholly false and fraudulent, as the said plaintiff was not then dealing in budded stock, but was dealing in inferior kinds of grafted and common stock, and the stock which the plaintiff was to deliver to the defendant, as hereinafter set forth, was not budded stock and was of no value to the defendant whatever." That he was not notified of the arrival of the trees, etc., at York, and they were allowed to remain there in such a situation and condition that they were so injured as to be entirely worthless; and for further answer alleged that subsequent to the signing of the orders, and before the time of delivery of the stock was attempted, the plaintiff released and discharged defendant from any obligation to receive the nursery stock and it was agreed the orders should be canceled and annulled. The plaintiff in reply denied each and every allegation of new matter contained in the answer and alleged due and timely notice to defendant of the arrival of the nursery stock at York. A trial to the court and a jury resulted in a verdict and judgment in favor of defendant.

It is claimed by counsel for plaintiff that the orders were in writing and could not be released or discharged by a subquent parol agreement, and that if they could, conceding it to have been proven, no consideration was shown for an agreement withdrawing the orders, other than the mutual waiver of the rights of the parties which had arisen by virtue of the execution and delivery of the orders. The testimony was of a nature to justify a conclusion that at

some date subsequent to making the orders, and prior to the time for delivery of the articles ordered, it was agreed by and between the agent for the plaintiff who took the orders and had charge of the delivery of the nursery stock for plaintiff, including these orders and others forwarded at the same time and to the place, that these orders were canceled and discharged. This was sufficient to release the parties from their obligations. (Clark, Contracts, pp. 609, 620; *McCreery v. Day*, 6 L. R. A. [N. Y.], 503; *Dignan v. Spurr*, 28 Pac. Rep. [Wash.], 529.)

It is contended by counsel for plaintiff that under the general rule that parol evidence will not be received to contradict, vary, or modify the terms of a written agreement, no parol testimony should have been allowed on the branch of the case in relation to representations alleged to have been made by the agent who effected the sale, respecting the nursery stock, that it was to be "budded stock." The orders in question were signed by defendant, but not by plaintiff, and each of them was but a memorandum, or succinct statement, of some of the most important items of the contract, and we have no doubt that the representation or promise that the nursery stock to be delivered would be "budded," was material to the subject-matter of the contract embodied in the orders, and that it was competent as a defense, and parol testimony was competent to show that the representation was made, that the defendant was induced thereby to sign the orders, and that the representation or promise was untrue, or not performed. (*Barnett v. Pratt*, 37 Neb., 349; *Peck v. Jenison*, 58 N. W. Rep. [Mich.], 312; *Cullmans v. Lindsay*, 6 Atl. Rep. [Pa.], 332.)

It is further urged in this connection that the evidence discloses that the defendant did not refuse to take the nursery stock because the trees were not "budded," but assigned as a reason for his refusal to receive it his discharge from any obligations assumed by the orders by subsequent

oral agreement; that the defense under consideration was incompetent and should have been rejected. The testimony clearly proved that the promise in regard to the quality of the stock was made, and that a considerable portion of what was attempted to be delivered did not fulfill the promise. Neither of the orders was for any specific tree or vine named in it, nor were prices stated for each or any particular one, but on each order the money consideration was given in a lump sum or total amount. In other words, the orders were not, as shown by their terms and conditions, severable. The plaintiff had pleaded the orders, which were admitted by defendant, and also alleged and proved an attempted delivery of what he claimed satisfied the demands of the orders. It was entirely proper then to prove that the stock tendered was not in whole or in part as ordered. One sum was stated in each contract as the price. The nursery stock designated in each order was an entire lot, and all the trees to be of the same quality. The plaintiff claimed to have fulfilled the terms of the orders in respect to delivering the trees and of the kind and quality, and it was certainly competent for the defendant to prove the contrary, or to show that plaintiff had not done so. Where the order for goods is for an entire lot and the price stated in a lump sum, the order or contract is not severable, and if of the goods tendered for delivery a considerable number differ in quality from those ordered, the buyer is not required to receive the goods or any part of them, but may reject the whole. (*Sidney School Furniture Co. v. School District of Warsaw Township*, 27 Atl. Rep. [Pa.], 856.)

It is urged that the court erred in an instruction to the jury whereby it was stated that it devolved upon the plaintiff to prove every material allegation of his petition, and unless he had done so, or if the evidence as to such allegations was evenly balanced, the verdict should be in favor of defendant; that, inasmuch as the defendant, in his an-

swer, admitted the execution of the orders, there was no portion of the issues, the burden of proving which was on the plaintiff; that the trees, etc., were delivered, was alleged in the petition and denied in the answer, and it was the duty of the plaintiff to prove it. The issues in the case and their conditions as presented by the pleadings had been fully stated and outlined to the jury in instructions given prior to the one in question, and, in view of the relative rights of the parties as developed and established by the evidence introduced, we are unable to discover wherein the plaintiff was or could have been prejudiced by this instruction. Furthermore, as to the affirmative allegations and defenses of the answer, the jury were instructed that the defendant must furnish proof of them.

Error was properly assigned in regard to instructions on the branch of the case in relation to the alleged discharge or release of the orders by parol. Agreeably to our views on this portion of the action, the instructions were proper and correct.

The court instructed the jury that if it was shown by the evidence that the plaintiff's agent represented or promised that the nursery stock ordered would be of a particular kind or quality, and the defendant was thereby induced to sign the orders and the stock tendered or offered to be delivered or any considerable or material portion of it was not of the kind or quality promised, the defendant was under no obligation to accept, but could refuse it. It is alleged that these instructions were erroneous, in assignments properly made. The instructions on these points in the case contained a correct statement of the rule, but were not entirely applicable to the facts in this case. It appears from the evidence that the defendant did not refuse to receive the stock because not of the kind ordered, but, when the jury had determined from the evidence that the trees, etc., were not of the kind ordered, as they must have done before they could conclude, as they were informed, that

defendant had a right to refuse the stock, the defendant would be entitled to a finding in his favor for the failure of the plaintiff to deliver or tender that which was ordered, hence the rights of plaintiff could in nowise be prejudiced by these instructions. The judgment of the district court is

AFFIRMED.

ALEXANDER DOBSON V. STATE OF NEBRASKA.

FILED NOVEMBER 6, 1895. NO. 6855.

Larceny: POSSESSION OF STOLEN GOODS: EVIDENCE. The effect to be given to the fact of possession recently after the larceny of personal property is a question of fact solely for the jury to determine when considered in connection with all the other facts and circumstances proved on the trial. Following *Robb v. State*, 35 Neb., 285.

ERROR to the district court for Cherry county. Tried below before KINKAID, J.

The case is stated by the commissioner.

W. H. Westover and *Reese, Gilkinson, Comstock & Reese*, for plaintiff in error:

The court below erred in giving the following instruction: "The jury are instructed by the court possession of stolen property, recently after the same has been stolen, unexplained by the circumstances attendant thereon or otherwise, constitutes *prima facie* evidence of the guilt of the party so found in the possession thereof." (*Robb v. State*, 35 Neb., 285; *Thompson v. People*, 4 Neb., 529; *Thompson v. State*, 6 Neb., 102; *Grentzinger v. State*, 31 Neb., 460; *Pollard v. State*, 26 S. W. Rep. [Tex.], 70; *Tomerlin v.*

State, 26 S. W. Rep. [Tex.], 214; *State v. Walters*, 34 Pac. Rep. [Wash.], 938; *Harper v. State*, 13 So. Rep. [Miss.], 882.)

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

RYAN, C.

The defendant was convicted of larceny in the district court of Cherry county and was sentenced to imprisonment for a term of three years in the penitentiary, etc. The property stolen consisted of two steers claimed to have been taken from the open prairie and shipped to South Omaha, and there sold by an agent of the plaintiff in error, under the direction of the party last indicated. On its own motion the court have the following instruction, to which the plaintiff in error duly excepted:

"4. The jury are instructed by the court possession of the stolen property, recently after the same had been stolen, unexplained by the circumstances attendant thereon or otherwise, constitutes *prima facie* evidence of the guilt of the party so found in the possession thereof."

In *Robb v. State*, 35 Neb., 285, it was said: "The effect to be given to the fact of possession is solely for the jury to determine when considered in connection with all the other facts and circumstances proven on the trial. [Citing] *Thompson v. People*, 4 Neb., 529; *Thompson v. State*, 6 Neb., 102; *Grentzinger v. State*, 31 Neb., 460; 2 Thompson, Trials, sec. 1894." It is perhaps true that in the case just cited there was not a direct disapproval of the use of the words "*prima facie*" in the connection in which they occur in the above copied instruction, and yet, impliedly, there was such disapproval in the language quoted. If the effect to be given the fact of possession was solely for the jury, it was improper for the court to instruct that such evidence should be deemed *prima facie* sufficient for

any purpose. Whether it was *prima facie* or conclusive was solely for the jury to determine, unaided by any suggestions of the court upon that proposition of fact. For the error pointed out the judgment of the district court is

REVERSED.

JOHN STEEN V. FRANK R. SCHEEL.

FILED NOVEMBER 6, 1895. No. 5259.

1. **Landlord and Tenant:** CONSTRUCTION OF LEASE. A lease provided that the tenant should have and hold the leased premises "from the 1st day of December, 1887, to the 1st day of December, 1889, with the refusal of leasing said property for the term of two years longer from December 1, 1889, to December 1, 1891. * * * If the tenant holds over the term of two years as above agreed, this lease shall be binding upon both parties for the next two years or until the 1st of December, 1891." *Held*, That this was a lease of the premises for two years from December 1, 1887, and an agreement on the part of the lessor that at the expiration of the term he would re-lease the premises to the tenant, in case he should desire it, on the same terms and conditions mentioned in the first lease
2. ———: ———. The tenant at no time had any communication with the lessor on the subject of renewing the lease. Before his term expired he removed his furniture and goods out of the leased building and locked it up. He occupied no part of the premises after the termination of the lease and exercised no control over them further than the retention of the key for about two months when he sent it to the lessor. *Held*, That these facts were insufficient to raise the presumption or support a finding that the relation of landlord and tenant existed between the parties after the 1st day of December, 1889.
3. ———: CONTRACT. Generally, the relation of landlord and tenant is founded upon express contract; but such relation may be presumed from the conduct of the parties in the premises.

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

J. R. Gilkeson, for plaintiff in error, cited: *Hammond v. Eckhardt*, 9 N. Y. Sup., 508.

George I. Wright, also for plaintiff in error.

George W. Simpson and *J. E. Frick, contra*, cited: *Hunter v. Silvers*, 15 Ill., 174; *Sutherland v. Goodnow*, 108 Ill., 528; *Thiebaud v. First Nat. Bank*, 42 Ind., 212; *Bradford v. Patten*, 108 Mass., 153; *Barnett v. Feary*, 101 Ind., 95; *Eichorn v. Peterson*, 16 Ill. App., 601; *Reed v. Campbell*, 4 Atl. Rep. [N. J.], 433; *Elevator Co. v. Brown*, 36 O. St., 660; *Blumenberg v. Myres*, 91 Am. Dec. [Cal.], 560; *Crommelin v. Thiess*, 70 Am. Dec. [Ala.], 499; *Schuyler v. Smith*, 51 N. Y., 309.

RAGAN, C.

On the 25th day ot October, 1887, John Steen and Frank R. Scheel entered into an agreement in writing, in and by which Steen leased to Scheel a building known as the "Killian Building," situate on block 149, in the city of Wahoo. The lease provided that Scheel was to have and hold the leased property "from the 1st day of December, 1887, to the 1st day of December, 1889, with the refusal of leasing said property for the term of two years longer from December 1, 1889, to December 1, 1891." The rent reserved in such lease was $960, payable in installments of $40 on the first day of each month, commencing on the 1st day of December, 1887. The lease further provided: "But it is further agreed that if party of the second part [tenant] holds over the term of two years as above agreed, that this lease shall be binding upon both parties for the next two years, or until the 1st of December, 1891." Scheel entered into the possession of the leased premises and paid the rent thereof up to the 1st day of November, 1889. Prior to the 1st day of December, 1889, he moved his furniture and stock of goods out of

the building into a building of his own which he had constructed during the summer of 1889. He locked up the leased building, but retained the key thereof until some time in January, 1890, when he left it at the house of Steen. Steen did not at any time notify Scheel that he could or could not renew the original lease or remain in possession of the leased property thereunder after the 1st day of December, 1889. Scheel did not renew or attempt to renew the original lease, had no communication with Steen on the subject, nor did he occupy the property or any part thereof after the said date further than to retain possession of the key. Steen brought this suit against Scheel to the district court of Saunders county to recover $120 rent for said premises for the months of November and December, 1889, and January, 1890. At the close of the evidence the jury, in obedience to an instruction of the district court, returned a verdict in favor of Steen for the sum of $40, the rent for such building for the month of November, 1889, and to reverse the judgment pronounced on this verdict Steen prosecutes to this court a petition in error.

1. What construction should be placed upon these clauses found in the lease: "With the refusal of leasing said property for the term of two years longer from December 1, 1889, to December 1, 1891;" "But it is further agreed that if the party of the second part holds over the term of two years, as above agreed, that this lease shall be binding upon both parties for the next two years or until December 1, 1891"? Was this a lease of the property to commence on the 1st day of December, 1889, and to terminate on the 1st day of December, 1891? In *Sutherland v. Goodnow*, 108 Ill., 528, the lease contained this clause: "'And it is also provided, as a part of this agreement, that the said Sutherland shall have the option to take the said premises for another year at the same price or rent, provided said first party does not sell said premises before the end of the month of April, A. D. 1881.'" The court, in

construing this provision of the lease, held: "A clause in a lease for one year giving the lessee the option, on a certain condition, to renew the lease for another year, is not a demise to take effect at the expiration of the first year. It is a mere covenant or undertaking of the lessor to let the lessee have a second term, which may be enforced on bill for specific performance or upon which an action at law may lie for a breach." (See, also, *Hunter v. Silvers*, 15 Ill., 174.) We think a proper construction of this lease is that by it Steen leased the premises to Scheel absolutely for two years and agreed that at the expiration of the original lease he would make another lease of the premises to Scheel in case he should desire it, on the same terms and conditions mentioned in the first lease. By the lease between the parties Steen did not lease the premises to Scheel for two years from the 1st day of December, 1889, but agreed in writing that he would lease the premises if Scheel should desire said lease.

2. Counsel for Steen does not seem to question this construction of the lease, but his contention is that at the expiration of the lease Scheel did not surrender possession of the leased premises to Steen; that after December 1, 1889, Scheel remained in possession of the premises and thereby exercised his option to re-lease the premises under the terms of the original lease for two years from December 1, 1889; and that by his failure to deliver the actual possession of the premises to Steen and his remaining in possession thereof after the original lease expired he became a tenant of the premises for two years from December 1, 1889. Generally, the relation of landlord and tenant is founded upon express contract; but the relation may be presumed from the conduct of the parties toward each other. Would the facts that Scheel, at the expiration of his original lease, neglected to surrender the actual possession of the leased premises to Steen, neglected to notify him that he did not desire to re-lease the premises or to

occupy them after the expiration of his original lease, and his retention of the key to the building, support a finding that the relation of landlord and tenant existed between Steen and Scheel after the 1st day of December, 1889? We think not. In *Canal Elevator & Warehouse Co. v. Brown*, 36 O. St., 660, the elevator company leased certain property to Brown from the 1st day of May, 1871 to the 1st day of September, 1879. The lease contained a provision that in case the elevator company should, during the existence of the lease, purchase the fee-simple title to the premises that the lessee at the expiration of the lease would re-lease the property for eight years on the same terms as he held it under the original lease. Before the original lease expired the elevator company notified the lessee that it had purchased the fee-simple title to the leased premises and requested the lessee to renew the lease. The lessee declined to renew the lease, and on the 2d day of September, 1879, vacated the premises and two days thereafter returned the keys to the lessor. The lessee, however, left some four hundred bushels of coal in the leased property until September 18, 1879. It was insisted by the lessor that as the lessee had occupied the premises subsequent to September, 1879, he must be regarded as having renewed the lease, and in speaking of this contention the court said: "Whether temporary and partial occupancy of premises by lessees should be regarded as consent to and in effect a renewal, under such a clause in a lease, must be determined from the circumstances, and not merely from the fact of such occupancy. Looking to the terms of the notice to renew, given by the lessor on August 30, 1879, the refusal of the lessees to renew, their removal from the premises on September 2, 1879, and the return of the keys to the office of the lessor shortly thereafter, we are led to the conclusion that there was no act of the lessees which should estop them to deny such renewal. The fact that a small quantity of coal was permitted to remain in one of the

bins until September 18, 1879, is explained in the testimony, and cannot properly lead to any other conclusion than the one already stated, for the intention not to renew had already been manifested in unmistakable form." (See to the same effect *Thiebaud v. First Nat. Bank of Vevay*, 42 Ind., 212; *Renoud v. Daskam*, 34 Conn., 512; *Bradford v. Patten*, 108 Mass., 153.) We are not called upon at this time to define what particular conduct will raise the presumption or support a finding that the relation of landlord and tenant exists between two or more parties; but the evidence in this record is insufficient to raise such presumption or support a finding that such relation existed between Steen and Scheel after the 1st day of December, 1889. If the conduct of the parties has been such as to bind Scheel for the payment of this rent to the 1st day of December, 1891, of course Steen is bound to recognize Scheel as his tenant for that time; in other words, the contract must be mutual to bind either. If this was an action of forcible detainer by Steen against Scheel for the possession of these premises, and if the provision in the lease should be treated as a continuing offer and agreement on the part of Steen to lease the premises for a further term of two years after the expiration of the original lease, still there would be an entire lack of evidence to show that Scheel accepted of said offer or agreed to lease such premises for said second term; and the fact that he locked up the building at the time that he removed his goods therefrom and retained the key without paying any rent for said premises after December 1, 1889, offering to pay any, or even requesting a lease of said premises after that time, or notifying Steen that he had elected to avail himself of the offer and agreement in the lease to occupy as tenant for two years after the first lease expired, would not defeat such action by Steen. The judgment of the district court must be and is

AFFIRMED.

THOMAS E. FARRELL ET AL., APPELLEES, V. M. REED ET AL., APPELLANTS.

FILED NOVEMBER 6, 1895. No. 5383.

1. **Vendor and Vendee:** TRUSTS: MORTGAGE FORECLOSURE: DEFICIENCY JUDGMENT AGAINST TRUSTEE. A number of persons purchased land and caused the title to be taken in the name of one of the number, who gave his notes secured by mortgage on the land for the deferred purchase money. These notes were signed "A. B., Trustee," but neither the notes nor the mortgage disclosed the nature of the trust or the names of the *cestuis que trustent*. *Held*, That on foreclosure of the mortgage the holder was entitled to a deficiency judgment against the trustee but not against the *cestuis que trustent*.
2. **Negotiable Instruments:** LIABILITY OF TRUSTEE. A negotiable instrument signed by a person who adds thereto the word "trustee," or like term, without disclosing the trust, or the name of the *cestui que trust*, is the personal obligation of the signer and not of the *cestui que trust*. The word "trustee" is in such case merely *designatio personæ*.

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

W. P. McCreary and *John M. Ragan*, for appellants.

Batty, Casto & Dungan, contra.

IRVINE, C.

This was an action of foreclosure wherein, after the mortgaged property had been sold, application was made for a deficiency judgment against the appellants. Such a judgment was rendered and the appellants contend it was erroneous. So far as the allegations of the petition affect the personal liability of appellants, they are to the effect that the appellants bought from Higinbotham and Dutton the mortgaged premises. A written contract was entered

into by appellants reciting that the land had been bought for the use and benefit of all the appellants, their several interests being stated in the contract, and that they had caused it to be conveyed to Reed in trust for himself and the other appellants; that the trustees should hold the land for the purpose of conveying the same upon sales to be made; that out of the proceeds of the sales the expenses should be paid, and thereafter the proceeds of such sales applied to the satisfaction of the mortgage on the property; that all the moneys in excess of what was requisite for that purpose should be divided among the appellants in proportion to their several interests in the land. That in pursuance of the said contract the land was conveyed to Reed as trustee for himself and the other appellants; that Reed, as trustee for himself and the other appellants, made and delivered to Higinbotham and Dutton two notes, set forth in the petition, each one signed "M. Reed, Trustee," without disclosing the nature of the trust or the names of the *cestuis que trustent;* that the mortgage was given to secure the payment of these notes; that the notes were transferred to the appellants. The decree on this question finds that the appellants are the owners of the property mortgaged, and that they caused Reed as trustee to make, execute, and deliver the notes and mortgage to secure the balance of the purchase price of the property. There is no further finding of fact affecting the right to the deficiency judgment. The court rendered a judgment against all the appellants for the full amount of the deficiency.

No extended consideration of the questions presented is necessary. It is well settled that where an agent or a trustee or an executor signs a negotiable instrument in his own name without disclosing on the face of the instrument the fact that he is acting as agent or in a fiduciary capacity, and also the name of his principal or *cestui que trust,* the agent, trustee, or executor is personally liable on the instrument and the principal, *cestui que trust* or estate, is not

liable. Parol evidence is inadmissible to show a different liability. In such case the words "agent," "trustee," and "executor" are merely *descriptio personarum.* (*Brown v. Parker*, 7 Allen [Mass.], 337; *French v. Price*, 24 Pick. [Mass.], 13; *Bartlett v. Hawley*, 120 Mass., 92; *Hancock v. Fairfield*, 30 Me., 299; *Hall v. Bradbury*, 40 Conn., 32; *Pentz v. Stanton*, 10 Wend. [N. Y.], 271; *Conn v. Scruggs*, 5 Bax. [Tenn.], 567; *Graham v. Campbell*, 56 Ga., 258; *Village of Cahokia v. Rautenberg*, 88 Ill., 219; *Anderton v. Shoup*, 17 O. St., 126; *Ohio Nat. Bank v. Cook*, 38 O. St., 442.) Therefore the case falls precisely within the rule of *Reeves v. Wilcox*, 35 Neb., 779, followed by *Reynolds v. Dietz*, 39 Neb., 180. The petition did not state facts sufficient to establish a personal liability against any of the appellants except Reed. Reed was clearly liable. The judgment against Reed is affirmed and the personal judgment against the other appellants is reversed and the application for personal judgment against them denied.

JUDGMENT ACCORDINGLY.

WILLIAM J. M. KENNEDY, APPELLEE, V. H. J. MERRICK, EXECUTOR, APPELLANT.

FILED NOVEMBER 7, 1895. NO. 6218.

Executors and Administrators: CONSTRUCTION OF WILL. The court will not construe the clause of a will devising certain real estate, in a suit brought for that purpose by an heir and devisee of the testatrix against the executor, as such, where it appears the latter has no interest whatever in the adjudication of the matter by the court, and that a judicial interpretation of the will could be of no aid or assistance to the executor in administering the estate.

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

S. P. Davidson, for appellant.

J. Hall Hitchcock and *T. Appelget, contra.*

NORVAL, C. J.

This suit was brought in the court below to obtain a judicial construction of a clause in the last will and testament of Harriet L. Kennedy, who died in Johnson county on or about the 21st day of June, 1891. The defendant, H. J. Merrick, was appointed executor of the will, which was duly probated, and as executor he is sued. The clause of the will which the court is asked to interpret reads as follows: "I give, devise, and bequeath to my beloved son, William J. M. Kennedy, and his children forever, as an annuity, the use and annual income of the following estate, to-wit: The southeast quarter of section fifteen (15), in township six (6), of range eight (8) east, in Gage county, state of Nebraska, together with the buildings and appurtenances thereof." The plaintiff is William J. M. Kennedy, the sole heir and one of the devisees and legatees of the testatrix, his deceased mother.

The contention of the plaintiff was, and is, that, under the will, he took a fee-simple title to the land above described, while the defendant insists that the clause above quoted, when taken in connection with the other provisions of the will, should be construed as granting and bequeathing unto the plaintiff and his children the use and annual income of the premises therein mentioned, and not as devising unto him or them the title in fee-simple to said tract. Upon the hearing, the district court entered its finding and decree as follows:

"Now, on this 9th day of December, 1892, this cause came on further to be heard, and the court, having been fully advised in the premises on a former day of this term, does find that Harriet L. Kennedy, deceased, on September

17, 1889, made her last will and testament, and that it was the intention of said testator to give her son, William J. M. Kennedy, and his children forever, as shown by said will, the use and annual income of the property mentioned in the petition, to-wit, the southeast quarter of section fifteen (15), township six (6), range eight (8), in Gage county, Nebraska.

"The court further finds that the intention of said testator as to the use and annual income of the property mentioned in said will is inconsistent with the established rules of law, and therefore void, and the court further finds that under said will that the legatees, William J. M. Kennedy and his children, are possessed in fee-simple of said described real estate.

"It is therefore adjudged and decreed that said William J. M. Kennedy and his children, under said will, take the real estate described, to-wit, the southeast quarter (¼) of section fifteen (15), township six (6), range eight (8), in Gage county, Nebraska, not as an annuity only, but absolute, and that plaintiff pay the costs of this proceeding, to which defendant excepts and prays an appeal, and is allowed forty days to present bill of exceptions."

From this decree the executor has prosecuted an appeal.

There is considerable discussion in the briefs of counsel for the respective parties upon the propositions whether the plaintiff has the right to bring the action and whether the construction placed upon the will by the trial court is sound or not. In the view we take of the case it does not become material to determine either of these questions, and we shall not do so. We are prompted to this course by the fact that some of the parties interested in the estate, and who are made devisees by the will, namely, the children of the plaintiff, are not before the court.

It appears from the averments of the petition that the time for filing claims against the estate has expired, and that the executor has in his hands, derived from the dispo-

sition of personal property of the deceased, and from the sale of her real estate, other than above described, moneys abundantly sufficient to pay all legal claims and debts against the estate, together with the costs of administration. The record likewise discloses that the defendant is neither an heir, legatee, nor devisee of the testatrix, and that all the rents received by the executor from the premises in dispute have been paid over to the plaintiff. By the will, the executor is not made a trustee, and the will contains no provision making it his duty to hold, control, or manage the real estate or any legacy bestowed for the benefit of the devisees or legatees named therein. He has possession of the real estate, but this he is entitled to alone during the settlement of the estate. It is obvious, under the facts as they appear of record, that the plaintiff has made no case, as against the executor, for obtaining the adjudication of the court as to the meaning and legal effect of the will. As was well said by Welch, C. J., in his opinion in *Corry v. Fleming*, 29 O. St., 149: "It is only in cases where a trust is involved, or where the duty of an executor, administrator, or other trustee is of uncertain nature, requiring the guidance or direction of the court, that the court can be called upon merely to give its opinions to the true construction of a will." It is plain that the executor is in no manner interested in ascertaining whether the plaintiff alone, or he and his children together, took the lands mentioned in the decree in fee-simple, or a life estate merely. The opinion of the court as to the effect of the will upon these lands would be of no assistance to the executor in the further discharge of his duties, nor will the failure to construe the will in the slightest degree embarrass him in administering the estate. Moreover, a mere opinion of the court herein upon the construction of the will, if obtained, could be of no value to the plaintiff, inasmuch as none of the parties interested, except himself, are before the court. Counsel for appellee must have taken the same view when

they filed in this court their motion to dismiss upon the ground "that the appellant had no interest in the result of the suit as brought in the district court, and therefore not entitled to an appeal." If appellant has no such interest as would authorize him to have the decision of the lower court reviewed, it requires no argument to establish that the action was improperly brought against him in the first instance. The decision of the district court is reversed and the action dismissed.

REVERSED AND DISMISSED.

H. J. MERRICK V. WILLIAM J. M. KENNEDY.

FILED NOVEMBER 7, 1895. NO. 6367.

1. **Statutes:** CONSTRUCTION. Special provisions of a statute in regard to a particular subject control general provisions.
2. **Administration of Estates:** DISTRIBUTION: APPEAL. Under section 304, chapter 23, Compiled Statutes, the right to appeal from a final order of distribution made by a county court in the settlement of an estate of a deceased person is limited to "any person aggrieved." In order to enable a party to appeal in such case he must have been injuriously affected by the order or decree.
3. **Executors and Administrators:** DISTRIBUTION: APPEAL. The executor of an estate, as such, cannot prosecute an appeal from a final order of distribution made by the county court, where he is not pecuniarily affected by such order.
4. **County Courts:** SETTLEMENT OF ESTATES: REVIEW. A county court has power to so far open up the settlement of a former account of an executor as to correct any error or mistake therein, except as to items in dispute which have been previously heard and determined by the court.
5. ———: ———: ———. An executor may appeal from an adverse decision of the county court upon his petition to correct an error or mistake in the settlement of his former account.

6. ——: ——: WILLS. The county court may order the distribution of the personal estate remaining in the hands of an executor after the payment of all debts and charges of administration, though an action brought against him by an heir and devisee is pending in the district court for a construction of a clause in the will relating alone to the disposition of certain real estate, where it appears that the opinion and decision of the court as to the meaning and legal effect of said provision, when obtained, would not assist the executor in the discharge of the duties of his trust.

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

S. P. Davidson, for plaintiff in error.

T. Appelget and *J. Hall Hitchcock*, *contra*.

NORVAL, C. J.

Plaintiff in error, H. J. Merrick, was appointed executor of the last will and testament of Harriet L. Kennedy, deceased, by the county court of Johnson county, and duly qualified as such executor, and took upon himself the execution of the duties of his trust. Subsequently, and on the 28th day of June, 1892, a citation was issued by the county court commanding said H. J. Merrick to render an account of his doings as such executor, or show cause by a date named why he has failed so to do. On June 30, 1892, pursuant to said citation, plaintiff in error appeared before the county court and submitted, under oath, an itemized report of his receipts and disbursements as executor, the summary being as follows:

"Total amount received.....	$4,764 70
Total amount paid out.....	3,453 61
Balance due.....	$1,311 09"

On the same day the report was filed an order was made by the county court approving in all respects the said report of said executor as his final account; and on the same

day the following order of distribution was entered by the county court, viz.:

"Now, on this 30th day of June, 1894, this cause came on for hearing upon the final report of H. J. Merrick, executor, and the evidence was submitted to the court. On consideration whereof the court finds that all debts, claims, and demands against said estate have been fully paid and satisfied, and that there remains as a residue in the hands of said executor the sum of $1,311.09, and that William J. M. Kennedy is the only person entitled to said residue. It is therefore considered that said residue and all the property belonging to said estate, reserving the sum of $25, to pay the claim of $3.85 of N. Muggy, who cannot be found by the executor, and to pay the cost of these proceedings, taxed at $21.15, be paid and allowed to said William J. M. Kennedy. GEORGE B. FOSTER,

"County Judge."

Afterwards, on the 18th day of July, plaintiff in error filed a supplementary and additional report, showing that he had paid out since the last report the sum of $6.25 as expenses, and that by mistake he had stated in his report of June 30, 1892, that he had received $2,596.80 from the sale of the Lancaster farm, when, in fact, he had only received in cash $1,596.80 and a mortgage from the purchaser for $1,000, due on or before February 5, 1894, bearing seven per cent interest, and that there remained in the hands of plaintiff in error, as executor, the sum of $311.09, less the said sum of $6.25. The supplemental report further sets forth that a suit is pending against him in the district court of Johnson county, brought by William J. M. Kennedy, seeking a construction of the last will and testament of Harriet L. Kennedy, deceased, as to whether by said will she devised to said William J. M. Kennedy certain real estate belonging to said estate and now remaining unsold, absolutely in fee-simple, or only the life estate therein; that the expenses and attorneys' fees incident to

contesting said suit will, in all probability, exceed the amount of money in the executor's hands. He asks that the original report be corrected as above indicated, that the order of distribution be vacated, and that no order of distribution be entered until the termination of the suit pending in the district court. On July 21, 1892, the county court refused to correct the original report or to disturb the order of distribution theretofore made on said June 30. From which refusals, as well as from said order of distribution, the executor appealed to the district court, where, subsequently, on motion of said William J. M. Kennedy, the appeal was dismissed.

The first question to which we shall give attention is whether the executor was entitled to appeal from the order of distribution. By section 42, chapter 20, Compiled Statutes, it is provided: "In all matters of probate jurisdiction, appeals shall be allowed from any final order, judgment, or decree of the county court to the district court by any person against whom any such order, judgment, or decree may be made or who may be affected thereby." The foregoing section restricts the taking of appeals to two classes of persons, viz., those against whom a final order, judgment, or decree is entered, and also to persons affected thereby. It is probable if the section applies to orders and decisions of the county court of the character under consideration, and the language employed by the legislature is to be taken in its literal sense, it would sustain the taking of the appeal in this case; but it is believed that the section quoted is not applicable here. On the contrary, that section 304 of chapter 23 of the Compiled Statutes governs and controls. That section declares: "Any person aggrieved by an order, decree, or denial of a court in pursuance of the provisions of this subdivision may appeal therefrom as provided for in other cases." The foregoing provision is found in the subdivision of said chapter 23, entitled "Partition and Distribution of Estates." It is by

the sections comprising this subdivision of the chapter that authority is conferred upon county courts to assign or order the distribution of the residue of the estate of deceased persons in the hands of administrators and executors among the heirs, devisees, or legatees; and following the several sections relating to the assignment and distribution of estates we find section 304, already quoted, which is a special provision authorizing appeals from orders or decrees partitioning and distributing estates, by any person aggrieved by such order or decree, and no right to appeal in such matters is given to anybody else. That being a special provision on the subject, it must be held applicable, rather than said section 42. (*McCann v. McLennan*, 2 Neb., 286; *People v. Gosper*, 3 Neb., 310; *Albertson v. State*, 9 Neb., 429; *Richardson County v. Miles*, 14 Neb., 311; *Richards v. Clay County*, 40 Neb., 51.)

The next question which arises, is the executor herein, H. J. Merrick, within the meaning of said section 304, a party aggrieved, and thus had the right to appeal from the order of distribution made by the county court? The determination of this must depend upon whether the executor was in any manner injuriously affected by the order or decision from which an appeal was attempted. It appears from the final report of the executor, upon which the order distributing the estate was based, that the balance remaining in his hands, after the payment of the debts and expenses of administration, was $1,311.09. It was the above amount, the residue of the estate reported by the executor to be in his hands, less $25 reserved to pay the claim of one Muggy, for $3.85, whose whereabouts is unknown, and certain costs which were ordered paid to William J. M. Kennedy, the sole person entitled thereto. Had the executor obeyed the order and paid the money, most certainly he would have been protected by the direction of the county court, even though the money had been ordered paid to a person who by law was not entitled to the same, which is

not claimed to be the case here. This being true, the executor could not have been aggrieved or injuriously affected by the order in question, and, hence, has no such standing in the case as to authorize him to prosecute an appeal. If by an order of distribution an administrator or executor should be directed to pay out more money than he has belonging to the estate, such administrator or executor would be injured thereby, since sections 313 and 314 of said chapter 23 authorize the bringing of a suit on the bond of an executor or administrator by any heir, legatee, or other person to recover his share of the estate after an order of distribution declaring the amount due him, if the same is not paid when demanded. Leaving out of view for the present the supplemental report of the executor, we are convinced that the executor was not entitled to appeal from the order of distribution. The following authorities sustain this conclusion: *Kellett v. Rathbun*, 4 Paige Ch. [N. Y.], 102; *Hyatt v. Dusenbury*, 106 N. Y., 663; *Bryant v. Thompson*, 128 N. Y., 426; *Bates v. Ryberg*, 40 Cal., 463; *Estate of Wright*, 49 Cal., 550; *Still's Estate*, 15 O. St., 484.

It appears from the supplemental report filed by the executor that in rendering his final account of the estate he erroneously charged himself therein with having received $2,596.80 from the sale of a certain farm, whereas but $1,596.80 was paid in cash by the purchaser, and a mortgage was given for $1,000, which remains unpaid, and further, that the executor had necessarily expended since his final report $6.25 in discharging the duties of his trust. He asked to have his account corrected accordingly, which the county court declined to do, although the following paper has been filed in the case:

"IN THE MATTER OF THE SETTLEMENT OF THE ESTATE OF HARRIET L. KENNEDY, DECEASED.

"Now comes William J. M. Kennedy, one of the heirs

and residuary legatees of said estate, and hereby consents and agrees that H. J. Merrick, executor of said estate, shall retain from the funds now in his hands belonging to said estate the sum of $6.25, being the sum claimed by him in his supplemental report filed July 18, 1892, and said William J. M. Kennedy hereby agrees to accept and receipt for the note mentioned in said supplemental report for $1,000, as if he had received said amount in cash from said executor.

"Dated this 19th day of July, 1892.

"WILLIAM J. M. KENNEDY,
"By T. APPELGET &
"J. HALL HITCHCOCK,
"*His Attorneys Herein.*"

Practically this was an admission of the error claimed to have been made in the original report and account, and that the executor was entitled to an additional credit of $6.25 for moneys disbursed since June 30, 1892. It is not contended, nor could it be successfully maintained, that the court could not open up the settlement of a former account of an executor to correct errors and mistakes therein. We think the county court has such power, where the matter has not already been previously litigated. It is not suggested that there has ever been a previous hearing and determination of the county court upon the matter of the mistake in the executor's account or of his being entitled to a credit for the $6.25, but it is insisted that the filing of the above agreement of William J. M. Kennedy obviated the necessity of the court opening up the settlement of the executor's account of date of June 30. To this proposition we cannot agree. If a mistake had been made it should have been adjudicated by the county court and the order of distribution modified accordingly. As the order now stands, conceding that only $1,596.80 was received in money on the sale of the farm, the executor is required to pay to the distributee over $1,000 more money than re-

mains in his hands belonging to the estate. As we have seen, suit may be brought on the executor's bond by Kennedy to recover the full amount found by the county court to be due him. The executor was, within the meaning of the statute, "aggrieved" or pecuniarily affected by the order of July 21, and therefore he has the right to appeal therefrom.

Plaintiff in error insists the order of distribution should have been vacated because the supplemental report disclosed that a suit was pending against him in the district court seeking the construction of the will. It fully appears, and we have so held in the case of *Kennedy v. Merrick*, 46 Neb., 260, that the executor is not interested in procuring the opinion and decision of the court as to the meaning, and the legal effect, of the will in this case, and that a proper construction thereof would be of no assistance to the executor in the settlement of the estate. That provision of the will upon which a construction is desired relates to a bequest of real estate, and the opinion of the court thereon, if obtained, could not in the least affect the distribution of the personalty of the testatrix in his hands, in accordance with other provisions of the will. Distribution should not be delayed on account of the pending of the suit above mentioned. (*In re Scheidler's Estate*, 27 N. Y. Sup., 7.) For the reason stated, the judgment of the district court dismissing the appeal is reversed and the cause is remanded to that court for further proceedings in consonance with this opinion.

REVERSED AND REMANDED.

MAGGIE C. BLAKELY V. CHICAGO, KANSAS & NEBRASKA RAILWAY COMPANY.

FILED NOVEMBER 7, 1895. NO. 3607.

1. **Railroad Companies:** RIGHT OF WAY: EASEMENTS. A grant of a strip of land to a railroad company "for right of way and for operating its railway only" gave to the grantee a mere easement in such strip.
2. ———: CONVEYANCE TO ANOTHER COMPANY OF RIGHT OF WAY: LIABILITY OF GRANTEE FOR DAMAGES. The conveyance by a railroad company of a part of its right of way in which it had but an easement expressly limited to the operation of its own road, to a distinct and independent railroad company, which built and has ever since operated its line of railroad on the land conveyed to it, was an abandonment of such part by the railroad company first referred to, and, as against that last indicated, the original proprietor, through whom both companies claim their rights, is entitled to compensation with respect to the part occupied and used by the company last indicated.

REHEARING of case reported in 34 Neb., 284.

Alfred Hazlett and *L. M. Pemberton*, for defendant in error:

By permitting the defendant's grantor, the Chicago, Kansas & Nebraska Railway Company, to enter upon the land and fully construct and operate its road thereon without objection or protest, knowing all the time just what was being done, the plaintiff is estopped to maintain ejectment. (*Omaha & N. N. R. Co. v. Redick*, 16 Neb., 313; *Pryzbylowicz v. Missouri R. R. Co.*, 3 McCrary [U. S.], 586; *Goodin v. Cincinnati & Whitewater Canal Co.*, 18 O. St., 169; *McAulay v. Western V. R. Co.*, 33 Vt., 311; *Gray v. St. Louis & S. F. R. Co.*, 81 Mo., 126; *Dodd v. St. Louis & H. R. Co.*, 18 S. W. Rep. [Mo.], 1117; *Indiana B. & W. R. Co. v. Allen*, 113 Ind., 308; *Cairo & F. R. Co. v. Turner*, 31 Ark., 494; *Provolt v. Chicago, R. I. & P. R.*

Co., 57 Mo., 256; *Pickert v. Ridgefield Park R. Co.*, 25 N. J. Eq., 316; *Curtis v. La Grande Hydraulic Water Co.*, 25 Pac. Rep. [Ore.], 378; *Martin v. Maine C. R. Co.*, 21 Atl. Rep. [Me.], 740; *Hentz v. Long Island R. Co.*, 13 Barb. [N. Y.], 646; *Lexington & O. R. Co. v. Ormsby*, 7 Dana [Ky.], 276; *Platt v. Pennylvania Co.*, 43 O. St., 241.)

By the deed to the Republican Valley Railroad Company plaintiff conveyed her interest in the land, and has now no title or interest which she can assert against defendant. (*Yates v. Van De Bogert*, 56 N. Y., 527; *Nicoll v. New York & E. R. Co.*, 12 N. Y., 121; *Page v. Heineberg*, 40 Vt., 81; *Walsh v. Barton*, 24 O. St., 28; *Crolley v. Minneapolis & St. L. R. Co.*, 30 Minn., 541; *Chicago, B. & Q. R. Co. v. Lewis*, 53 Ia., 101; *Soukup v. Topka*, 55 N. W. Rep. [Minn.], 824; *Vail v. Long Island R. Co.*, 106 N. Y., 283; *Farnham v. Thompson*, 34 Minn., 330; *Horner v. Chicago, M. & St. P. R. Co.*, 38 Wis., 165; *Wier v. Simmons*, 55 Wis., 637; *Strong v. Doty*, 32 Wis., 381; *Williams v. Western U. R. Co.*, 50 Wis., 71; *Rawson v. School District*, 7 Allen [Mass.], 125; *Greene v. O'Connor*, 25 Atl. Rep. [R. I.], 692; *Higbee v. Rodeman*, 28 N. E. Rep. [Ind.], 442; *Heaston v. Commissioners of Randolph County*, 20 Ind., 398; *Schipper v. St. Palais*, 37 Ind., 505; *Sumner v. Darnell*, 27 N. E. Rep. [Ind.], 162; *Vermilya v. Chicago, M. & St. P. R. Co.*, 24 N. W. Rep. [Ia.], 234; *Junction R. Co. v. Ruggles*, 7 O. St., 1.)

Even if it should be held that the grant was made upon condition that the grantee should use and occupy the land for right of way purposes, the condition is being substantially complied with, for it is still being used for such purpose. (*Spaulding v. Hallenbeck*, 39 Barb. [N. Y.], 79; *Chapin v. School District*, 35 N. H., 445; *Inhabitants of Hadley v. Hadley Mfg. Co.*, 4 Gray [Mass.], 140.)

Griggs, Rinaker & Bibb, for plaintiff in error:

No estoppel was pleaded by the defendant. It is neces-

sary to plead an estoppel in order to take advantage of it. (*Nebraska Mortgage Loan Co. v. Van Kloster*, 42 Neb., 746.)

In order to constitute an equitable estoppel by silence or acquiescence, it must be made to appear that the facts, upon which it is sought to make the estoppel operate, were known to the party against whom the estoppel is urged, and unknown to the party urging it. (*Nash v. Baker*, 40 Neb., 294.)

Plaintiff's deed did not convey an absolute title to the strip through her land. It merely conveyed a right of way or easement. (*Robinson v. Missisquoi R. Co.*, 59 Vt., 426; *Keeler v. Wood*, 30 Vt., 242; *Jones v. Van Bochove*, 61 N. W. Rep. [Mich.], 342; *Flaten v. City of Moorhead*, 53 N. W. Rep. [Minn.], 807; *Babcock v. Latterner*, 30 Minn., 417; *Ft. Worth & R. G. R. Co. v. Jennings*, 13 S. W. Rep. [Tex.], 270.)

RYAN, C.

An opinion was filed in this case which was reported in 34 Neb., 284. A rehearing was afterward granted, and upon reargument it is now reached for further consideration. The deed of Maggie C. Blakely to the Republican Valley Railroad Company conveyed a certain strip of land one hundred feet wide across certain lands described by government subdivisions, "to have and to hold the same unto the said railroad company, its successors and assigns." In connection with the language just quoted the controversy in the case hinges on the words following the names and description of the grantors and the acknowledgment of the receipt of $900 consideration, which words are as follows: "do hereby grant, bargain, sell, and convey unto the Republican Valley Railroad Company, its successors and assigns, for right of way and for operating its railroad only," etc. The Chicago, Burlington & Quincy Railroad Company afterwards became the successor of the grantee above

named and, as such successor, assumed the right to, and, in so far as it had power, did convey to the defendant in error forty-two and a half feet in width of the above one hundred-foot strip. Plaintiff in error insists that by this conveyance there was an abandonment of that part of the right of way which the Chicago, Burlington & Quincy Railroad Company assumed to convey to the defendant in error, and that, therefore, plaintiff is entitled in this her action of ejectment to recover the same. The judgment of the district court of Gage county in denial of this right is presented for review.

The defendant in error contends that the words "for the right of way and operating its railroad only," following the granting clause, do not create a condition subsequent, and that, therefore, this action cannot be maintained. In *Chapin v. School District*, 35 N. H., 445, the term above used is thus discussed: "A subsequent condition is one which operates upon an estate already created and vested and renders it liable to be defeated. Thus, if a man grant an estate in fee-simple, reserving to himself and his heirs a certain rent, and that if such rent be not paid at the times limited it shall be lawful for him and his heirs to re-enter and avoid the estate; in such case the grantee and his heirs have an estate upon condition subsequent, which is defeasible if the condition be not strictly performed. (Litt., sec. 325; 2 Black. Com., 154, 4 Kent's Com., 125.)" The deed of the plaintiffs in error contained no condition of the nature of that above indicated and illustrated, hence there was no condition subsequent.

Thus far we have agreed with the defendant in its contention that the deed of Maggie C. Blakely and husband contained no condition subsequent. It is assumed in argument that this much being established, the conclusion must of necessity follow that plaintiff could not insist that by the abandonment of a part of such right of way, such part would revert to Mrs. Blakely. The conveyance by

her in which her husband joined was of a certain strip of land one hundred feet wide to the Republican Valley Railroad company, "its successors and assigns, for right of way and for operating its railroad only." That the limitation, "for operating its railroad only," was confined to but one railroad requires no argument to establish. It is equally clear that this one road might be the grantee named, its successors or assigns, and it is not claimed that the defendant is a successor of the Republican Valley Railroad Company. If the right to operate a railroad upon the right of way strip conveyed by the Blakelys was, as we have seen, limited to one road, it would be impossible that defendant, under its deed, could deprive the Chicago, Burlington & Quincy Railroad Company of its right as a successor of the Republican Valley Railroad Company to operate its railroad upon the right of way granted by the Blakelys, for there was made by the Chicago, Burlington & Quincy Railroad Company no conveyance which purported to convey that portion of the right of way on which its railroad line was situated. If the defendant obtained a right to use a portion of the originally granted one hundred feet, by virtue of the deed from the Chicago, Burlington & Quincy Railroad Company of only a fraction thereof in severalty, the deed last named must be held not only to have conferred upon defendant full title to this fraction, but it must in addition be held to have destroyed the title and the right of use by the Chicago, Burlington & Quincy Railroad Company of the remaining fractional part which it never conveyed, for the Blakelys, by their deed, expressly limited the use to one company. A construction which would lead to such a result is absurd, and therefore we must construe the limitation of the sole use of the railroad in the deed of the Blakelys as not operative in favor of the defendant.

It has already been shown that the deed under consideration was one that contained no condition subsequent.

We shall now endeavor to ascertain and determine the exact nature of the title which, by virtue of the deed to it, was held by the Republican Valley Railroad Company, and which, therefore, that company was able to convey to the Chicago, Burlington & Quincy Railroad Company. In *Robinson v. Missisquoi R. Co.*, 59 Vt., 426, the clause, "for the use of a plank road," which immediately follows the description of the land conveyed, was held to limit the estate conveyed to a mere easement. In *Flaten v. City of Moorhead*, 53 N. W. Rep., 807, in a deed in the same connection as just indicated there was the clause: "Said tract of land hereby conveyed to be forever held and used as a public park." The supreme court of Minnesota, in which the above case was decided, held that the grantee did not upon the face of the instrument acquire an absolute title in fee. In *Lake Erie & W. R. Co. v. Ziebarth*, 33 N. E. Rep., 256, the appellate court of Indiana had under consideration a deed executed for a nominal consideration of a right of way one hundred feet wide. This deed provided: "The estate granted hereby is upon condition that the strip of land aforesaid shall be used for said railroad purposes only, and when the same shall, after the road is constructed, cease to be used for such purpose, the same shall revert to the grantor;" and it was held that the company did not take a fee in the strip, but a mere floating easement before the location of the grantee's line of railroad over the tract through which it was to be located. In *Reichenbach v. Washington S. L. R. Co.*, 38 Pac. Rep., 1126, the supreme court of Washington held that the conveyance of the right of way to be held "so long as the same should be used for the operation of a railroad," vested in the grantee a mere easement. The first paragraph of the syllabus of *Jones v. Van Bochove*, 61 N. W. Rep., 342, a case decided by the supreme court of Michigan, is in the following language: "A deed which, by its granting clause, conveys the right of way for a railroad, * * * and described as follows:

'A strip of land forty feet wide * * * and being nine hundred and fifty-two feet in length,' though in the usual form of a full warranty deed, conveys an easement therein only and not a fee."

The cases above cited with reference to conveyances in terms limited proceed upon the principle that, as each grant was only of a right of user in a certain manner, such grant in effect was but an accordingly defined license. Between this class of cases and that relied upon by the defendant there is a marked difference, for in the latter the conveyance was in each instance of the fee. As was said in *Coburn v. Coxeter*, 51 N. H., 158: "A conveyance of a right of way over that parcel of land would clearly pass only an easement, leaving the fee in the grantor; but here the land itself, in the broadest terms, is granted, and the restriction upon the use is entirely consistent with the passing of the fee." In the deed to the Republican Valley Railroad Company the grant of the strip of land was "for right of way and for operating its railroad only." These words were words of limitation of the rights of the grantee with respect to the strip conveyed, to a mere easement. In *Henderson v. Hunter*, 59 Pa. St., 335, there was discussed the effect of a deed in which was contained a limitation, which was "for the erection of a house or place of worship for the use of the members of the Methodist Episcopal church of the United States of America (so long as they use it for that purpose, and no longer, and then to return back to the original owner), according to the rules and discipline," etc. Agnew, J., delivering the opinion of the court, said: "The equitable estate is in the members of the church so long as they use the house as a place of worship in the manner prescribed, and no longer. This is the boundary set to their interest, and when this limit is transcended the estate expires by its own limitation and returns to its author. The words thus used have not the slightest cast of a mere condition. No estate for any fixed or de-

terminate period had been granted before these expressions were reached, and they were followed by no proviso or other indication of the condition to be annexed. 'A special limitation,' says Mr. Smith, in his work on Executory Interests, p. 12, 'is a qualification serving to mark out the bounds of an estate, so as to determine it *ipso facto* in a given event without action, entry or claim, before it would, or might otherwise expire by force of, or according to, the general limitation.' A special limitation may be created by the words 'until,' 'so long,' 'if,' 'whilst,' and 'during,' as, when land is granted to one so long as he is parson of Dale, or while he continues unmarried, or until out of the rents he shall have made £500. (2 Black., Com., 155; Smith on Exec. Int., 12; Thomas Coke, vol. 2, 120–121; Fearne on Rem., 12–13, and note p. 10.) 'In such case,' says Blackstone, 'the estate determines as soon as the contingency happens (when he ceases to be parson, marries a wife, or received the £500), and the subsequent estate which depends on such determination becomes immediately vested, without any act to be done by him who is next in expectancy.' The effect of the limitation in this case was that the estate of the trustees terminated the moment the house ceased to be used as a place of worship according to the rules and discipline of the church, by the members to whose use in that manner it had been granted; and the reversion *ipso facto* returned to Thomas Pillow, the grantor."

The case we have under consideration differs from that of *Henderson v. Hunter*, *supra*, in one respect, which should be noted, and that is, that the grant by the Blakelys was a mere easement, the legal title never having passed. There was therefore no question of the reversion of an estate involved. If the Republican Valley Railroad Company or its successor parted with the right to the use of forty-two and one-half feet in width of the hundred feet, there existed no right, title, or interest outstanding incompatible with the complete title in Mrs. Blakely and the right of possession

incidental thereto. In *Jones v. Van Bochove*, 61 N. W. Rep. [Mich.], 342, it was held that when the non-user of right of way of a railroad company was accompanied by acts which manifested an intention to abandon and which destroy the object for which the easement was created, or the means of its enjoyment, an abandonment will take place, and in support of this proposition a large number of cases were cited. In *Omaha S. R. Co. v. Beeson*, 36 Neb., 361, it was held that where a part of an ordinary highway had been vacated, the title thereto vested in the adjacent proprietors, and there exists no reason forbidding the application of this principle where the easement has been abandoned by a railroad company. It of necessity follows that the Republican Valley Railroad Company and its successor, the Chicago, Burlington & Quincy Railroad Company, must be held to have abandoned forty-two and one-half feet in width of their right of way so far as their own use of it was concerned. It is equally clear the defendant took nothing by the deed to it, for its grantor never had more than the right, itself, to use the one hundred feet strip for operating its railroad. In so far as the rights of the parties to this suit are involved, plaintiff was entitled to maintain its action against the defendant. It was stipulated in the district court that the Republican Valley Railroad Company, under its deed from plaintiffs, went into peaceable possession of the strip thereby conveyed and along its entire length built its line of road and continued its possession until the date of its sale to the Chicago, Burlington & Quincy Railroad Company; that said last named railroad company, since it became the owner of said strip, retained peaceable and uninterrupted possession of the same, except as was in said stipulation described as hereinafter indicated. It was further stipulated that before December 20, 1886, the Chicago, Kansas & Nebraska Railway Company transferred all its property, franchises, etc., to the defendant the Chicago, Kansas & Nebraska Railway

Company, which latter company thereupon, with the consent of the Chicago, Burlington & Quincy Railroad Company, took possession of the aforesaid strip, forty-two and one-half feet wide, and the line of road thereon constructed by the Chicago, Kansas & Nebraska Railway Company, and that said last named company and its successor has ever since remained in possession of said strip.

It is insisted by the defendant in argument that the plaintiff is now estopped to disturb defendant's possession of the forty-two and one-half foot strip and the line of road thereon constructed. There was presented no such claim by the pleadings, and it is clear by the proof above stated that there was no ground for estoppel shown. It may have been that there was acquiescence by silence or otherwise on the part of Mrs. Blakely in the construction of defendant's road as it was constructed, but this, if a fact, was neither pleaded nor proved. On the other hand it is perfectly consistent with the facts stipulated above, that plaintiff may have supposed that the line being built upon the forty-two and one-half foot strip was in the course of construction by the Republican Valley Railroad Company or by the Chicago, Burlington & Quincy Railroad Company. Under these circumstances we cannot say whether or not the estoppel in fact should be recognized. Certainly, in the present condition of the pleadings and evidence, this cannot be done. One thing is clear, however, and that is that over this strip forty-two and one-half feet in width there has been constructed and is now in operation a line of railroad in which the public at large is interested. As against the public, plaintiff must be deemed to have waived her right to insist that this strip shall be restored to her as though no railroad had been built or was in operation over it. As was said under somewhat similar circumstances in *Omaha & R. V. R. Co. v. Brown*, 14 Neb., 170: "But its [the railroad company's] first and highest duty was to keep open its line for the transportation of persons, prop-

erty, and the public mails." We are aware that in *Hull v. Chicago, B. & Q. R. Co.*, 21 Neb., 371, and one case therein cited, there was used language which seems to ignore the rights of the public. In neither of these cases was there any reference to the language used in *Omaha & R. V. R. Co. v. Brown, supra*, and we therefore assume that both Judge MAXWELL and Judge REESE meant only to state a general rule and did not think it necessary to note the exceptions thereto. If in any way avoidable, there should be tolerated no resort to so radical a measure as the interruption of traffic over the line of the defendant by means of an ouster from the forty-two and one-half foot strip occupied by it. We have no doubt that upon this cause being remanded to the district court there will be no difficulty found in properly making up and trying the issues really involved, and that, if plaintiff is entitled to damages, ample means of redress will be found independently of an eviction of the defendant. The judgment of the district court is reversed and the cause is remanded for further proceedings not inconsistent herewith.

REVERSED AND REMANDED.

ALFRED C. GRIFFEN V. STATE OF NEBRASKA.

FILED NOVEMBER 7, 1895. No. 6135.

1. **Criminal Law**: FORGERY: UTTERING FORGED NOTES: INFORMATION: SENTENCE. Where a verdict of guilty is responsive separately to each of two counts of an information, which counts together charge but one crime, such a verdict should, in entering judgment upon it, be treated as though both elements of the crime had been embraced in a single count.

2. ———: ERROR IN ENTERING JUDGMENT: REVIEW: PRACTICE. Where there is found no error in the record, except an irregu-

larity in entering judgment upon the verdict, a cause will be remanded to the district court with instructions to enter judgment on the verdict in the manner prescribed by law. Following *Dodge v. People*, 4 Neb., 220.

ERROR to the district court for Douglas county. Tried below before SCOTT, J.

Will F. Gurley, for plaintiff in error, cited: *Haslip v. State*, 10 Neb., 590; 1 Daniel, Negotiable Instruments [4th ed.], secs. 664, 741, 743; *State v. Snow*, 30 La. Ann., 401; Wharton, Criminal Law [9th ed.], sec. 743; *People v. Galloway*, 17 Wend. [N. Y.], 541; *Roode v. State*, 5 Neb., 174; *Commonwealth v. Dallinger*, 118 Mass., 439; *Crawford v. State*, 19 S. W. Rep. [Tex.], 766; *State v. Lincoln*, 49 N. H., 471.

A. S. Churchill, Attorney General, for the state, cited: *Commonwealth v. Ross*, 2 Mass., 372; *Commonwealth v. Ward*, 2 Mass., 397; *Commonwealth v. Adams*, 7 Met. [Mass.], 50; *Perkins v. Commonwealth*, 7 Gratt. [Va.], 651; *Simmons v. State*, 7 O. St., 116; *Langdale v. People*, 100 Ill., 263; *Hess v. State*, 5 O., 5; *Griffin v. State*, 14 O. St., 55; *Commonwealth v. Taylor*, 5 Cush. [Mass.], 605; *State v. Carr*, 5 N. H., 367; *In re Walsh*, 37 Neb., 454; *State v. Egglesht*, 41 Ia., 574; *Devere v. State*, 5 O. C. C., 509; *Anderson v. State*, 26 Neb., 387; *Charles v. State*, 27 Neb., 881; *Nelson v. State*, 33 Neb., 528.

RYAN, C.

At the May term of the district court of Douglas county the plaintiff in error was found guilty upon each of two counts, one of which charged him with making and counterfeiting a certain described promissory note, the other with its utterance. A thorough examination of the evidence leaves no room for doubt that the plaintiff in error counterfeited and uttered the note as charged. It has been

held since the above conviction and sentence that the forgery and fraudulent uttering of a promissory note constitute but one crime, and in case of conviction that but one penalty can be inflicted. (*Vide In re Walsh*, 37 Neb., 454, filed June 30, 1893.) In the case under consideration the verdict of the jury responded separately, in the affimative, to the charge contained in the first and likewise in the second count. In effect there was, therefore, but a finding of guilty on two elements, both of which, taken together, constituted but one crime. In this the accused was not prejudiced. Under the holding of this court in *Re Walsh*, *supra*, there could properly be but one sentence. In the case at bar there was a sentence imposed under the first count and there was a distinct sentence under the second count. This was irregular. As the only error found in the record was this irregularity, following *Dodge v. People*, 4 Neb., 220, the judgment of the district court is set aside and the cause remanded with directions to that court to render the proper judgment on the verdict heretofore returned.

JUDGMENT ACCORDINGLY.

DAVID HAMILTON V. STATE OF NEBRASKA.

FILED NOVEMBER 7, 1895. NO. 7269.

1. **Embezzlement: EVIDENCE: CONVERSION: PRINCIPAL AND AGENT.** That the relation of debtor and creditor exists between a principal and his agent, and that on balancing the account the agent would be found indebted to his principal, are not alone sufficient to sustain a verdict finding the agent guilty of embezzling or converting to his own use the property of his principal.

2. ———. The terms "shall embezzle" and "convert to his own use," found in section 121 of the Criminal Code, are synonymous;

but embezzlement is the fraudulent appropriation by an agent of the property of another.

3. ———: EVIDENCE: CONVERSION: INTENT. To sustain the conviction of an agent for embezzling or converting to his own use the property of his principal, the facts must warrant the conclusion that such conversion was made by the agent with a felonious intent.

ERROR to the district court for Buffalo county. Tried below before HOLCOMB, J.

F. G. Hamer, for plaintiff in error.

A. S. Churchill, Attorney General, for the state.

RAGAN, C.

David Hamilton was convicted in the district court of Buffalo county of the crime of embezzlement and sentenced to the state penitentiary for one year. To reverse this sentence and judgment he prosecutes to this court a petition in error.

1. It appears from the record that in November, 1892, there was organized in said county a corporation known as the Farmers Elevator & Commission Company, hereinafter known as the "corporation." This corporation was organized for the purpose of buying and shipping grain and other commodities. It seems to have begun business December 1, 1892, and at that time it had to its credit in a bank in the city of Kearney something like $1,400. The directors appointed Hamilton general manager at a salary of $50 per month, but the duties of Hamilton as such manager are not disclosed by the record. The corporation embarked in the purchasing and shipping of grain and other commodities, Hamilton, it appears, doing the principal part of the buying, shipping, and selling. It appears also that the accounts of the corporation were kept by a book-keeper, but no part of these books is in the record. It seems that among the accounts on the books of the corporation was

the account of Hamilton with the corporation, though this account is not in the evidence. When Hamilton bought grain for the corporation he drew the corporation's check, on the bank in which it had its funds, signing the same with the corporate name by himself as general manager. During the time Hamilton was conducting this business he sold the corporation grain to the amount of $175. He sold it also an elevator or scale-house at a price of $300, $200 of which the corporation paid him by its stock; and it seems that he served the corporation three months, or at least it is admitted that it owes him three months' salary at $50 a month. It also seems that Hamilton's account was or should have been credited with his salary, the value of the grain sold the corporation by him, and the balance of the $100 due on the purchase of the elevator. There never was any settlement or accounting between Hamilton and the corporation; that is, it was never agreed between them which one owed the other and how much, nor was the amount that Hamilton was in debt to the corporation ever established by any judgment or decree.

Hamilton was charged in the information in this case with having embezzled $500 of the funds of the corporation, and a jury found that he embezzled $409.87. We do not think this conviction can be allowed to stand. It is evident from the record, although that is in a very unsatisfactory condition, that the jury reached the conclusion that Hamilton had embezzled $409.87 of the money of the corporation after having reached another conclusion, viz., that that was the amount of money owing to the corporation by Hamilton on a settlement of the account between them. This will not do. The jury in this case was not charged with the duty of determining what was due from Hamilton to the corporation, but simply whether Hamilton, as charged in the information, had embezzled or converted to his own use $500 of money belonging to the corporation. (*Van Etten v. State*, 24 Neb., 734.) An amicable settle-

ment or an adjudication of the account existing between Hamilton and the corporation may show that Hamilton is not indebted in any sum whatever to the corporation. To sustain the conviction of an agent for embezzling the property of his principal the record must clearly and unequivocally show that the property embezzled or converted to his use by the agent was the property of the principal. It is not enough to sustain such a conviction that the relation of debtor and creditor existed between them, and that on a balance being struck of the account that the agent would be found indebted to his principal. In this case Hamilton had charge of the funds of the corporation. He had a right to check them out for property purchased for the corporation, and for the expenses of conducting its business and paying its debts. Among these debts were the ones to himself for his salary, for grain sold the corporation, and for the elevator sold; and the mere fact that he overdrew his account did not of itself, without more, make him an embezzler. The terms "shall embezzle" and "convert to his own use," found in section 121 of the Criminal Code, are synonymous. For an agent to convert to his own use is made embezzlement by this statute, but embezzlement is the fraudulent appropriation by an agent or bailee of the property of another. (*Leonard v. State*, 7 Tex. App., 417.) To sustain this conviction the record must show that Hamilton was the agent of the corporation, that he had the possession or care of its moneys, and that he converted the same to his own use with a felonious intent. (*People v. Hurst*, 41 Mich., 328; *Beaty v. State*, 82 Ind., 228.) The evidence in this record does not disclose any fraudulent or felonious intent on the part of Hamilton in his dealings with the funds of this corporation, nor is the evidence sufficient to justify a jury in inferring such fraudulent or felonious intent. As already said, the jury based its verdict of embezzlement against Hamilton solely on the conclusion reached by them that Hamilton had overdrawn his

account $409.87. This fact alone, though supported by the evidence, will not, in view of all the other facts in evidence, including the course of dealings between the parties and their method of doing business, sustain this conviction.

REVERSED AND REMANDED.

JAMES CONWAY V. J. C. GRIMES.

FILED NOVEMBER 7, 1895. No. 5176.

1. **Bill of Exceptions: TIME TO PRESENT: LACHES: SETTLEMENT: MOTION TO QUASH.** A case was tried and a verdict rendered October 9, 1891. On the 14th of the same month a motion for a new trial was overruled, judgment rendered, and forty days given defendant to reduce his exceptions to writing and present them to plaintiff. November 18, following, the proposed bill of exceptions was presented to plaintiff, who, on the 24th of the same month, returned it without suggestion of amendment. September 21, 1892, the trial judge signed the bill of exceptions, certifying that it was then first presented to him. The record did not disclose any reason for the delay, nor did it show when the term of court, at which the judgment was rendered and a motion for a new trial was overruled, adjourned *sine die*. *Held*, (1) That by virtue of section 311 of the Code of Civil Procedure and the order of the court, that the plaintiff in error was required to present his proposed bill of exceptions to the trial judge for settlement within sixty days after the adjournment *sine die* of the term of court at which the motion for a new trial was overruled and judgment rendered (*Sherwin v. O'Connor*, 23 Neb., 221, followed); (2) that the presumption would not be indulged that such term of court was not finally adjourned prior to the 23d day of July, 1892; (3) that a motion to quash the bill of exceptions because not presented to the trial judge for settlement within the time required by law should be sustained.

2. ———. When a bill of exceptions has been quashed it cannot be examined for any purpose. *Jones v. Wolfe*, 42 Neb., 272, followed.

ERROR from the district court of Johnson county. Tried below before BROADY, J.

A. M. Appelget and *T. Appelget*, for plaintiff in error.

L. C. Chapman, contra.

RAGAN, C.

J. C. Grimes brought this suit, an action in replevin, in the district court of Johnson county against James Conway. Grimes had a verdict and judgment, and Conway prosecutes to this court a proceeding in error.

The defendant in error has filed a motion to quash the bill of exceptions on the ground that the bill was not presented to and signed by the trial judge within the time required by the statute. The case was tried without a jury on the 9th day of October, 1891, and on the 14th of the same month Conway's motion for a new trial was overruled and judgment rendered in favor of Grimes. At the same time the court gave Conway forty days from the adjournment of that term of court *sine die* to reduce his exceptions to writing and present them to the opposite party. Conway reduced his exceptions to writing and presented them to Grimes' counsel on the 18th of November, 1891. On the 24th of said month counsel for Grimes returned the proposed bill of exceptions without suggestion of amendment. The record does not show when the term of court, at which the motion for a new trial was ruled upon and judgment rendered, adjourned *sine die*. The trial judge signed and allowed the bill of exceptions on the 24th day of September, 1892, and certifies that it was then presented to him for the first time. There is no showing in the record why the plaintiff in error delayed the presentation of this bill of exceptions to the trial judge for settlement for such a length of time.

Section 311, Code Civil Procedure, as it existed prior to

its amendment in 1895, provided: "When the decision is not entered on the record, or the grounds of objection do not sufficiently appear in the entry, the party excepting must reduce his exceptions to writing within fifteen (15) days, or in such time as the court may direct, not exceeding forty (40) days from the adjournment of the court *sine die*, and submit the same to the adverse party or his attorney of record for examination and amendment if desired. Such draft must contain all the exceptions taken upon which the party relies. Within ten days after such submission the adverse party may propose amendments thereto and shall return said bill with his proposed amendments to the other party, or his attorney of record. The bill and proposed amendments must, within ten days thereafter, be presented by the party seeking the settlement of the bill to the judge who heard or tried the case, upon five (5) days' notice to the adverse party, or his attorney of record, at which time the judge shall settle the bill of exceptions." By virtue of this section of the Code and the order of the court made in this case plaintiff in error was required to present his proposed bill of exceptions to the trial judge for settlement and allowance within sixty days after the adjournment *sine die* of the term of court at which his motion for a new trial was denied and judgment rendered against him. (*Sherwin v. O'Connor*, 23 Neb., 221.) As already stated, the record does not show when that term of the court adjourned without day. In order to sustain this bill of exceptions we would be required to presume that that term of court was not finally adjourned prior to the 23d day of July, 1892. We do not think we should indulge such a presumption, in view of the fact that section 42, chapter 19, Compiled Statutes (section 2435), provides: "The judges of the district court shall, on the first day of January of each year, fix the time of holding terms of court in the counties composing their respective districts, during the ensuing year." We do not decide that a term of court

comes to an end by operation of law on the last of December in any year; nor that a term of court convened in one year may not continue into another; but what we do decide is that where a judgment is rendered on the 14th of October in one year we will not presume that the term of court at which such judgment was rendered was not finally adjourned until the 23d of July of the succeeding year. The motion to quash the bill of exceptions is sustained.

2. There are three assignments of error in the petition in error filed here. Two of these relate to the sufficiency of the evidence to support the verdict and judgment rendered in the district court, and since the bill of exceptions has been quashed we cannot review the evidence for the purpose of ascertaining whether these assignments of error should be sustained. (*Jones v. Wolfe*, 42 Neb., 272.) The other assignment of error is that the court erred in overruling the motion of plaintiff in error for a new trial. The motion for a new trial contains four distinct grounds. In *Glaze v. Parcel*, 40 Neb., 732, it was held: "An assignment of error in a petition in error that 'the court erred in overruling the motion for a new trial,' such motion containing five separate and distinct grounds, is too general, since it does not point out or suggest wherein the verdict and judgment were erroneous." (See, also, *Sigler v. McConnell*, 45 Neb., 598; *Pearce v. McKay*, 45 Neb., 296; *Moore v. Hubbard*, 45 Neb., 612; *Wax v. State*, 43 Neb., 19; *City of Chadron v. Glover*, 43 Neb., 733.) The judgment of the district court must therefore be and is

AFFIRMED.

WILLIAM A. WOLFE V. ROBERT KYD.

FILED NOVEMBER 7, 1895. NO. 7445.

Sheriffs and Deputy Sheriffs: FEES: COUNTIES: PLEADING. Section 42, chapter 28, Compiled Statutes, in relation to compensation of certain county officers and their deputies, construed, and *held*, (1) to provide that in counties having over 25,000 inhabitants there shall be one deputy sheriff whose salary shall be $900 per year, and that there may be additional deputies in such counties, but only when found necessary by the county board, and in such case the county board shall fix the number, the time of employment and compensation of such additional deputies, not to exceed $700 per year; (2) that the principal is not liable absolutely for the payment of his deputies' salaries. Such salaries are to be paid out of the fees earned and collected.

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

George A. Murphy and *William C. Le Hane*, for plaintiff in error, cited: *Minis v. United States*, 15 Pet. [U. S.], 423; *Wayman v. Southard*, 10 Wheat. [U. S.], 30; *Ryan v. Carter*, 93 U. S., 83; *Hagenbuck v. Reed*, 3 Neb., 18; *McCann v. McLennan*, 2 Neb., 286; *State v. Babcock*, 21 Neb., 599; *Washington Market Co. v. Hoffman*, 101 U. S., 112; *State v. Maccuaig*, 8 Neb., 215; *Brown v. County Commissioners*, 21 Pa. St., 37; *White v. Blum*, 4 Neb., 555; *Hawkeye Ins. Co. v. Brainard*, 72 Ia., 130; *Gilman v. Des Moines V. R. Co.*, 40 Ia., 20; *Hatch v. Mann*, 15 Wend. [N. Y.], 45.

L. M. Pemberton, contra, cited: *Gage County v. Wilson*, 38 Neb., 168; *Gage County v. Wilson*, 38 Neb., 165.

IRVINE, C.

Kyd was the sheriff of Gage county. He appointed Ed. J. Wilson as his deputy, and the latter having served

in that capacity ten months, filed his claim against Gage county for salary at the rate of $75 per month. The county board rejected the claim. The district court, on appeal, allowed it. This court, on error from the district court, reversed the judgment of the district court and affirmed the order of the county board. (*Gage County v. Wilson*, 38 Neb., 168.) This court held that the county was not liable for the payment of the deputy sheriff's salary. Wilson having assigned his claim to Wolfe, the latter brought the present action against the sheriff, to recover the same claim. The case was tried to a jury in the district court and there was a verdict and judgment for the defendant.

This case, like *Gage County v. Wilson*, depends for its solution on the construction of section 42, chapter 28, Compiled Statutes, being section 3043, Consolidated Statutes. The section, as it now stands, is as follows:

"That every county judge, county clerk, county treasurer, and sheriff of each county, whose fees shall in the aggregate exceed the sum of fifteen hundred ($1,500) dollars each for the county judge and county clerk, and two thousand ($2,000) dollars each for sheriffs and county treasurer per annum, shall pay such excess into the treasury of the county in which they hold their respective offices; *Provided, however*, That in counties having over 25,000 inhabitants the county treasurer shall receive the sum of three thousand ($3,000) per annum, and shall be furnished by the county commissioners the necessary clerks or assistants whose combined salary shall not exceed the sum of two thousand four hundred ($2,400) dollars per annum. The sheriff shall receive the sum of two thousand five hundred ($2,500) dollars per annum, also the necessary jail guard and one deputy, and the salary of such deputy shall be nine hundred ($900) dollars per annum. The county clerks of such counties shall receive the sum of two thousand five hundred ($2,500) dollars per annum; and he

shall have one deputy whose salary shall be one thousand ($1,000) dollars per annum. The county judges of such counties shall receive the fees of such office, not to exceed the sum of two thousand ($2,000) dollars per annum, and shall be provided by the county commissioners with the necessary clerks or assistants, whose combined salaries shall not exceed the sum of one thousand ($1,000) dollars per annum; *And provided further*, That if the duties of any of the officers above named in any county of this state shall be such as to require one or more assistants or deputies, then such officers may retain an amount necessary to pay for such assistants or deputies not exceeding the sum of seven hundred ($700) dollars per year for each of such deputies or assistants, except in counties having over seventy thousand (70,000) inhabitants, in which case such officer may retain such amount as may be necessary to pay the salaries of such deputies or assistants as the same shall be fixed by the board; but in no instance shall such officers receive more than the fees by them respectively and actually collected, nor shall any money be retained for deputy service unless the same be actually paid to such deputy for his services; *And provided further*, That neither of the officers above named shall have any deputy or assistants unless the board of county commissioners shall, upon application, have found the same to be necessary, and the board of county commissioners shall in all cases prescribe the number of deputies or assistants, the time for which they may be employed, and the compensation they are to receive."

When one reads this section one is not surprised that it has given rise to litigation. Its construction is surrounded with difficulty. The plaintiff contends that its proper effect is that in counties having over 25,000 inhabitants (Gage county being of this class) the salary of the deputy is fixed absolutely at $900 per year, and that the subsequent provisos of the section do not apply; that if the county is not liable for the salary, as held in *Gage County*

v. Wilson, then, necessarily, the sheriff must be personally liable. On the other hand, the defendant contends that the later provisos of the section are applicable; that no deputy is properly appointed or entitled to compensation unless the county board shall have found the appointment necessary, prescribed the number of deputies, the time for which they are to be employed, and their compensation not to exceed the sum of $700 per year, and that such compensation is to be paid out of fees collected only. As the section stands now, it would certainly be a reasonable construction to say that in counties of over 25,000 inhabitants the deputy's salary is fixed at $900, and that the last proviso, in regard to the necessity for action by the county board, applies only to counties having over 70,000 inhabitants, but if to others, it does not to counties having between 25,000 and 70,000; but the history of the section renders such a construction untenable. The section, in its substance, was enacted as a part of an act "to regulate the fees of county judges, county clerks, sheriffs, and county treasurers." (Session Laws, 1877, p. 215.) As first enacted, the section was as follows:

"That every county judge, county clerk, county treasurer, and the sheriff of each county, whose fees shall in the aggregate exceed the sum of fifteen hundred dollars each for county judge and county clerk, and two thousand dollars each for sheriffs and county treasurers per year, shall pay such excess into the treasury of the county in which they hold their respective offices; *Provided however*, That in counties having over twenty-five thousand inhabitants the county treasurer shall receive the sum of three thousand dollars per annum, and shall be furnished by the county commissioners the necessary clerks or assistants, whose combined salary shall not exceed the sum of twenty-four hundred dollars per annum. The sheriff shall receive the sum of twenty-five hundred dollars per annum, also the necessary jail guard and one deputy, and the salary of such deputy

shall be nine hundred dollars per annum. The county clerks of such counties shall receive the sum of twenty-five hundred dollars per annum, and he shall have one deputy whose salary shall be one thousand dollars per annum; *And provided further*, That [if] the duties of any of the officers above named in any county of this state shall be such as to require one or more assistants, or deputies, then such officers may retain an amount necessary to pay for such assistants or deputies, not exceeding the sum of seven hundred dollars per year, except as above provided in counties having over twenty-five thousand inhabitants, for each of such deputies or assistants, but in no instance shall such officers receive more than the fees by them respectively and actually collected, nor shall any money be retained for deputy service unless the same be actually paid to such deputy for his service; *And provided further*, That neither of the officers above named shall have any deputy or assistants unless the board of county commissioners shall, upon application, have found the same to be necessary, and the board of county commissioners shall in all cases prescribe the number of deputies or assistants, the time for which they may be employed, and the compensation they are to receive."

It will be observed that as first enacted there was no provision for counties having more than 70,000 inhabitants, but that the last proviso was in the original act, showing that it should be applied generally. The proviso limiting the pay of the deputies to $700 per year originally contained an exception of counties having over 25,000 inhabitants. By Session Laws of 1885, chapter 51, the section was amended, retaining this exception and inserting the provision now found for county judges and their assistants in counties having over 25,000. By Session Laws of 1887, chapter 44, the section was again amended by reducing it to its present form and striking out the exception of counties having over 25,000 inhabitants from the clause limiting

salaries to $700 per year. We must assume that this exception was deliberately stricken out and that the legislature by striking it out meant to make the $700 limitation and the other features of that proviso applicable to counties having over 25,000 inhabitants as well as to other counties. But we do not think that the legislative intent was thereby to abrogate the provision fixing the salary of a deputy in counties of over 25,000 at $900. If this had been the object that clause would have been stricken out also. The same force must be given to the fact that it was retained as is given to the fact that the exception was stricken out. Bearing this in view we must conclude that the mischief which the legislature sought to remedy grew out of the fact that while in the smaller counties, as the law then stood the county boards might provide any necessary number of deputies subject to the $700 limitation, power to do so was by the exception restricted to counties of less than 25,000, and therefore the larger counties were compelled to do with one deputy regardless of their necessities. If we are correct so far, it follows that for counties having over 25,000 inhabitants one deputy is absolutely provided for at a salary of $900 per year, and when required and when found necessary by the county board and when the time of employment and compensation not to exceed $700 per year have been fixed by the county board, additional deputies may be appointed. But it is clearly contemplated by the section that the principal is not liable personally and absolutely for the payment of this salary. The section provides, as said in *Gage County v. Wilson*, 38 Neb., 165, not for making salaried offices, but for fixing a limit beyond which fees received must be paid into the county treasury. Its effect is to authorize the officer to pay from the fees by him received the compensation fixed by statute or by the board of commissioners for his deputies and assistants; in addition to this to retain for himself the sum fixed by the statute as his own compensation, and to require

him to pay the excess into the treasury. It is expressly provided that "in no instance shall such officers receive more than the fees by them respectively and actually collected, nor shall any money be retained for deputy service unless the same be actually paid to such deputy for his services." Therefore, we think that the salary is not an absolute personal charge against the principal, but is to be paid only out of fees collected. This is the construction which the court has in former cases given the act. (*Gage County v. Wilson*, 38 Neb., 165; *Gage County v. Wilson*, 38 Neb., 168.) The petition in this case merely alleges the official capacity of defendant, his appointment of Wilson, that Wilson performed the duties of his office for ten months, and that his claim had been assigned to the plaintiff. It does not allege that fees to the extent of $750 were earned or collected during the period, nor that any fees were earned or collected. It is true that on the trial evidence was introduced on this subject; but its admission was objected to on the ground of irrelevancy. It was irrelevant under the pleadings, although such facts should have been pleaded. For want of such allegations the petition did not state a cause of action and the judgment of the district court in favor of the defendant being therefore the only judgment which could be rendered under the pleadings, it must be affirmed without examining the specific assignments of error.

JUDGMENT AFFIRMED.

ARTHUR J. DIXON V. STATE OF NEBRASKA.

FILED NOVEMBER 7, 1895. NO. 6826.

1. **Criminal Law: CONVICTION ON CIRCUMSTANTIAL EVIDENCE.** In criminal cases, as in civil, facts may be established by circumstances as well as by direct evidence, and a verdict of guilty

is supported by the evidence when the circumstances proved lead beyond a reasonable doubt to inferences of the facts essential to establish the defendant's guilt.

2. **Witnesses**: CREDIBILITY. The fact that a witness testified differently in the preliminary examination and on the trial does not require that her testimony on the trial shall be rejected. Her credibility is for the jury.

3. **Accessories.** Sections 1 and 2 of the Criminal Code, so far as they define accessories, are declaratory of the common law. One who is present when the crime is committed, aiding and assisting therein, is, notwithstanding these sections, a principal, although his hand was not the instrument through which the crime was perpetrated.

4. **Abortionists**: EVIDENCE. A defendant in a prosecution for producing an abortion having testified in chief that his acquaintance with the woman on whom the operation was performed was not intimate, it was material and proper cross-examination to show by him that he had been criminally intimate with her.

5. **Criminal Law**: INSTRUCTIONS. While it is the better practice in a criminal case for the trial court to charge the jury in concise and informal language what facts are essential to warrant a conviction, the defendant cannot complain if the court charges the jury in the language of the information that all the allegations thereof are material, no technical or ambiguous language being used.

6. ———: ———: REPETITIONS: HARMLESS ERROR. The repetition of a proposition of law in instructions is not reversible error where it has not been of such a character as to prejudice the rights of the accused.

7. **Right of Prosecuting Attorney to Request Instructions.** A prosecuting attorney has the same right as counsel in a civil action to request instructions, and instructions given at the request of counsel are entitled to the same weight as instructions given by the court of its own motion.

8. **Continuance.** Where a continuance is asked for the purpose of meeting evidence unexpectedly adduced by the other party, it must, among other things, be shown that the party seeking the continuance expects to procure evidence to meet the new features, and the nature of such evidence.

9. **Arguments of Counsel**: LIMITATION BY COURT: REVIEW. It is within the discretion of the trial court to limit the time for arguments to the jury, and an order so limiting time presents

no question for review, unless it is made to appear that the arguments were thereby unduly restricted and that the time allotted to the complaining party was consumed.

ERROR to the district court for York county. Tried below before BATES, J.

George B. France and *Charles H. Sloan*, for plaintiff in error.

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

IRVINE, C.

The plaintiff in error was convicted on an information charging him under section 6, Criminal Code, of having in York county on the 22d day of June, 1893, employed in and upon the body and womb of a woman named in the information a certain instrument with intent unlawfully, willfully, and feloniously to destroy a vitalized embryo—in other words, of producing an abortion. Several of the assignments of error go in effect to the sufficiency of the evidence, and by considering this question here a detailed consideration of some other assignments will be rendered unnecessary. The statute under which the information was drawn is as follows:

"Section 6. Any physician or other person who shall administer, or advise to be administered, to any pregnant woman with a vitalized embryo, or fœtus, at any stage of utero-gestation, any medicine, drug, or substance whatever, or who shall use or employ, or advise to be used or employed, any instrument or other means with intent thereby to destroy such vitalized embryo, or fœtus, unless the same shall have been necessary to preserve the life of the mother or shall have been advised by two physicians to be necessary for such purpose, shall in case of the death of such vitalized embryo, or foetus, or mother, in consequence thereof,

shall be imprisoned in the penitentiary not less than one nor more than ten years."

It is contended that the evidence was insufficient to prove that the embryo was vitalized; that the operation was not necessary to save the life of the mother, or that it was not advised by two physicians to be necessary for that purpose; and further, that there was no evidence that the defendant committed the act.

The first two objections may be considered together. The evidence tended to show that the mother had been criminally intimate with the defendant; that she became pregnant and informed the defendant of that fact; that he had endeavored to induce her to take drugs for the purpose of producing an abortion, and at one time, at least, left with her an instrument which he endeavored to have her use for that purpose; that she had until after the occurrence of this incident been employed at a hotel in Lushton. She left that employment and went to the home of her mother and step-father, where on the night of June 21 she was visited by the defendant, who then informed her that he had procured a physician to perform an operation for the purpose of producing an abortion, and arranged with her to take her out on the following evening, ostensibly to a dance but really for the purpose of having the operation performed. The following evening he came between 8 and 9 o'clock, and it was announced to the girl's mother that on account of the lateness of the hour they would not go to the dance, but would go driving together. They drove away together in a buggy, entered the town of Lushton, drove to the house of the physician, who joined them in the buggy, and the three drove into the country to a point along the railway track where they stopped and dismounted. The defendant took the horses and buggy across the railroad track, and stood there, having declared it his intention to keep a lookout against interruption, while the physician introduced the instrument for the purpose of producing an

abortion, and which did have that effect. The girl's health had to this time been good and there was evidence tending to show that the fœtus, when born, was well developed. This was sufficient to justify a finding that it was alive, or vitalized, especially in view of the expert testimony which was introduced. There is no occasion in the case to enter into a discussion of the burden of proof of the exceptions of the statute. The information charged that this act was not within the exceptions. Assuming under the general rule of criminal procedure that the burden was upon the state to establish every element of the offense beyond a reasonable doubt, and beyond a reasonable doubt to exclude these exceptions, there was evidence sufficient to exclude them. Such evidence was not necessarily by direct testimony *in totidem verbis* of the fact that the operation was not necessary to save the life of the mother, and that it had not been advised by two physicians as necessary for that purpose. In the contemplation of law jurors are sane men capable of drawing inferences while sitting as jurors such as sane and reasonable men draw under other circumstances. They must believe as jurors what they believe as men, and they cannot disbelieve as jurors what as men they believe. The only distinction arising from their position is that as jurors their inferences must be drawn from the evidence in the case and not from extraneous circumstances beyond the evidence. There is affirmative evidence in this case that the woman in question had never been advised that such an act was necessary to preserve her life. There is evidence that down to the time of this event she was a woman of at least ordinarily good health. From these facts and from the other circumstances which the evidence tended to prove, if the direct evidence was to be believed, it was not only a fair inference but it was an absolutely necessary inference that the mother's life was not in danger and that the object of performing the operation was not to save her life but to pre-

vent the birth of a child and to avoid disgrace. The inference was equally strong that no such operation had been advised by physicians in any number as necessary to save her life.

On the question as to whether the defendant performed the operation there are presented for consideration matters both of fact and of law. It appears from the evidence that on the preliminary examination of the defendant the girl had testified that the defendant himself had introduced the instrument and committed the act complained of. On the trial she testified, as heretofore outlined, that the physician had manipulated the instrument, the defendant withdrawing across the railroad track and keeping a lookout. It is argued that under the circumstances her testimony was not entitled to credence. This was a question for the jury. She gave as a reason for changing her testimony that on the way from Lushton to the place where the act was committed she had been cautioned by the defendant, in the physician's presence, that the defendant had agreed to shield the physician, and that if anything happened the whole responsibility was to be placed upon the defendant, and the physician's connection with the case concealed. She thus accounted for her testimony on the preliminary examination, but claimed that she was induced to testify otherwise on the trial by the reproaches of her own conscience and the advice of counsel for the state. Considering the difficulty of her situation this was a plausible explanation. The district judge carefully instructed the jury as to the caution required in weighing her testimony under the circumstances, and the necessity of corroboration. It was for the jury and not for the district judge or for this court to determine whether her testimony on the trial was entitled to belief, and under the circumstances the jury was justified in believing it. As to the matter of law, it is here argued that under an information charging the defendant himself with performing the operation a conviction can

not be sustained upon the evidence of the mother at the trial—that is, that the state, to prove the offense charged in the information, must show that the defendant himself performed the act. Section 1 of the Criminal Code provides that if any person shall aid, abet, or procure another person to commit a felony, the person offending shall be punished in like manner as the principal; and section 2 defines an accessory after the fact as one who, "after full knowledge that a felony has been committed, conceals it from the magistrate, or harbors and protects the person charged with or found guilty of the crime." These sections, so far as defining offenses are concerned, are but declaratory of the common law, and do not refer to one who is present when the crime is committed, aiding and abetting the commission thereof. Such a person, at common law and under the Code, is a principal and may be indicted and convicted as such under evidence proving his presence aiding the commission of the crime, although his hand was not the instrument of its perpetration. (*Hill v. State*, 42 Neb., 503; *Walrath v. State*, 8 Neb., 80.)

It is contended in the briefs that several rulings on the admission of evidence were erroneous. Only one is assigned in the petition in error. On the cross-examination of the defendant the state was permitted to prove that a short time before the offense was committed, and well within the period of gestation, defendant had had sexual intercourse with the mother. It is argued that this evidence was incompetent and not proper cross-examination. It was competent, and material at least to show a motive. We need not enlarge on this. It was proper cross-examination, if for no other reason, because in the direct examination the defendant had testified that he had become acquainted with the girl and taken her to a few parties. The evident effect of the direct examination was to show that the acquaintanceship was not very intimate and rather casual. Under such relations the commission of the offense

would be much less probable than under relations of criminal intimacy, and it was entirely relevant to the direct examination to establish the latter fact.

The court in the first instruction given said: "The jury are instructed that the defendant is informed against as required by law, and that the material allegations of the information are as follows;" then, as a part of the same instruction, quoted the whole information, omitting merely the formal commencement and conclusion. This is substantially repeated in the sixth instruction, and the giving of each instruction is assigned as error on the ground that it was the duty of the court to instruct the jury concisely what the material allegations were, or, in other words, what elements it was essential that the state should prove. Where informations involve technical language, or where they contain immaterial allegations, it is no doubt better for the court to eliminate what is immaterial and to avoid technicalities by stating to the jury in concise and unambiguous language the elements necessary to constitute the offense; but this information involved no technical or ambiguous language, and the defendant certainly has nothing to complain of in the fact that the court in effect told the jury that every allegation was material and must be proved by the state. The instruction which was given not only contained within itself every element necessary to the offense, but by plain inference at least it told the jury what the instruction on this subject requested by the defendant omitted—that the state must also prove that the operation was not necessary to save the life of the mother, and that it had not been advised as necessary for that purpose by two physicians.

The fifth instruction given by the court is attacked solely for the reason that it repeated a caution that the jury in weighing the credibility of the witnesses should consider the interest of the defendant in the prosecution. The question thus presented has been several times recently

considered, and it has been held, following prior decisions, that where such repetition has not been of such a character as to prejudice the rights of the accused, it is not reversible error. (*Hill v. State*, 42 Neb., 503; *Carleton v. State*, 43 Neb., 373.) This case falls within the rule stated.

At the request of the state the court charged the jury that if the act complained of had been committed in pursuance of a previous arrangement and agreement between the defendant and the physician that the same should be committed and the physician, in pursuance of such agreement and arrangement, employed the instrument, and Dixon was then and there present watching to prevent surprise, or in any other way to assist in the commission of the act, then he would be responsible as though he himself had used the instrument. So far as this instruction involves a question of law, it has already been considered in connection with the sufficiency of the evidence. But it is also argued that there was no evidence whereon to found it. There was, however, evidence tending to show that the defendant told the girl the evening before the crime that he had arranged to have this particular physician commit it; that he drove the girl into town and the physician entered the buggy with them; that on the way to the place where the crime was committed the matter was talked over among them, the conversation indicating that there was an understanding between defendant and the physician on the subject. This was certainly sufficient foundation in the evidence for the instruction.

The court gave the following instruction: "Instructions asked and given by the court upon the motion of the state, or upon the motion or request of the defendant, should have the same weight with the jury, and the jury should be guided thereby just the same as if given by the court." It is argued that in a criminal case the prosecuting attorney has no right to request instructions, and that, therefore, this instruction should not have been given. We know

no principle of law, of no statute, and of no consideration of policy which prevents the prosecuting attorney in a criminal case from submitting to the court a request for any instruction which he thinks well founded in law and applicable to the evidence. A prosecuting attorney, with proper sense of his duty, stands, of course, not entirely in the attitude of counsel in a civil action. It is his duty to enforce the criminal law. It is not his duty to procure a wrong determination of questions of criminal law or to urge a wrongful conviction. It is not the duty of counsel even in civil cases to endeavor to procure a distortion of the law, but a prosecuting attorney may, owing to his independent position, be expected to exercise a more dispassionate judgment and assume a less partisan attitude; but he has the right, and it is his duty, to request such instructions as he believes present the principles of law applicable to the evidence, and having requested them the court in giving them adopts such instructions as its own. Instructions given at the request of counsel should have the same, no less and no more, force than instructions given by the court of its own motion and it is not error to so tell the jury.

The prosecuting attorney, with commendable candor, stated in opening the case the effect of the mother's testimony on the preliminary examination, and the fact that she would on the trial testify differently. Thereupon the defendant requested a continuance to meet the case as then disclosed. This application was refused. In the showing made it was not disclosed in what respect the defense expected to be able to meet the new phase of the evidence or the names of the witnesses by whom it was to be met. In order to procure a continuance it should be shown that the party seeking the continuance expects to be able to procure material testimony, and the nature of such testimony. This not being shown, there was no error in refusing the continuance. When both sides had rested the court made an

order giving to the state forty minutes to open its case and fifty minutes to close, and to the defense, to one counsel sixty minutes and to the other counsel forty. This limitation and distribution of time was excepted to. This was a matter within the discretion of the trial court. It is not shown that the argument was unduly restricted, and it is not shown that even the time allotted to defendant was consumed. Under such circumstances there is no error apparent. (*Hart v. State*, 14 Neb., 572.)

JUDGMENT AFFIRMED.

HIRAM BOYES V. WILLIAM R. SUMMERS ET AL.

FILED NOVEMBER 8, 1895. No. 5257.

1. **Manner of Presenting Constitutionality of Statute.** When this court is asked to declare a statute unconstitutional, the particular section of the constitution which it is claimed the law infringes should be pointed out in the brief filed.
2. **Chattel Mortgages: METHODS OF SATISFYING LIENS OF RECORD.** By section 15, chapter 32, Compiled Statutes, two modes are prescribed for discharging chattel mortgages, viz.: By an entry by the mortgagee, his agent or assignee, on the margin of the index, duly attested by the county clerk; and by the county clerk, when authorized so to do by a written order signed by the mortgagee and attested by a justice of the peace, or some officer having a seal.
3. ———: ———. An order to the county clerk to release a mortgage is invalid, as a release, unless attested as above stated.
4. ———: **FAILURE TO ENTER SATISFACTION: PENALTY.** Under section 15, chapter 32, Compiled Statutes, a mortgagee is liable for the damages therein specified for failure to satisfy of record a chattel mortgage within the period therein named, after demand and the payment of mortgage debt, whether the mortgagee acted in good faith or not, or whatever may have been the motives of such mortgagee. A mere mistake or ignorance, without a corrupt intent, is no defense to such an action.

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

Coffin & Stone, for plaintiff in error.

Clements Bros., *Charles A. Munn*, and *John H. Evans*, *contra.*

NORVAL, C. J.

This is an action by William R. Summers and Albert B. Summers, partners doing business under the firm name of Summers Bros., against Hiram Boyes, under the provisions of section 15, chapter 32, Compiled Statutes, to recover the sum of $50 for failure to discharge a chattel mortgage. From a verdict and judgment in favor of the plaintiffs for the above amount, defendant prosecutes error to this court.

At the commencement of the trial the defendant objected to the introduction of any evidence, on the ground that the petition did not state a cause of action. By the objection it was intended to raise the constitutionality of said section 15, and, doubtless, the validity of said law might be brought to the attention of the court in that mode. The only reference made in the brief of plaintiff in error to the validity of the statute, or to the ruling upon the objection taken in the court below to the sufficiency of the petition, is the following paragraph: "This, as we understand, was intended by counsel who tried the case for defendant in the court below to raise the question of the constitutionality of the law under which plaintiff was seeking a recovery. We submit the same upon that theory." The foregoing is insufficient to call our attention to the particular constitutional provision which it is claimed the law in question contravenes. The constitution of this state contains eighteen articles, each of which, except the second, fourth, and twelfth, is composed of several sections.

Whether the statute authorizing the recovery by the mortgagor of a fixed sum for the failure of a mortgagee to release of record a chattel mortgage after the debt thereby secured has been paid is repugnant to some provision of the bill of rights, the article in the fundamental law relating to suffrage, the one upon the subject of education, or some one of the sections of article 3 restricting the powers of the legislature in the mode of enacting laws, we are left solely to conjecture. The constitution of Nebraska is too lengthy for us to attempt to review and consider all of its provisions in a single opinion, and counsel having failed to point out the particular section thereof which it is claimed the law infringes, we will dismiss the subject without consideration.

The first assignment of error is as follows: "The court erred in giving paragraphs 1, 2, 3, and 3½ of the instructions." The only criticism made in the brief is upon the second instruction given by the court on its own motion. No exception was taken in the court below to the instruction numbered 1, nor was the giving thereof assigned as error in the motion for a new trial. Besides, it merely, and, we think very fairly, stated to the jury the issues to be tried as presented by the pleadings. There being no reversible error in the giving of one of the instructions included in the group covered by the first assignment, we very properly might, under the decisions of this court, decline to consider the second instruction. We are, however, satisfied that it is free from criticism. It is as follows: "You are instructed that the laws of this state provide that a chattel mortgage, when satisfied, shall be discharged by an entry by the mortgagee, his agent or assignee, on the margin of a book or index in which the filing of the mortgage has been entered as provided by law, such discharge to be attested by the clerk. It is also provided that the county clerk may discharge a mortgage on the presentation or receipt of an order in writing, signed by the mort-

gagee thereof, and attested by a justice of the peace or some officer with a seal; and it is further provided that 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." This instruction, in every material respect, is a literal copy of the section of the statute under which this action is brought (Comp. Stats., ch. 32, sec. 15), and therefore it cannot be claimed to be incorrect as an abstract proposition of law. It is argued that the portion of the instruction relating to the recovery of actual damages for the failure to release a mortgage should not have been given, since the action is to recover the fixed statutory damages alone. A sufficient answer to this contention is that the instruction did not tell the jury that such damages were recoverable in this suit; but by the third instruction the jury, in express terms, were directed, in case they found a verdict for the plaintiffs, to assess their damages at $50, the sum named in the statute. The defendant could not have been prejudiced by the instruction of which complaint is made, nor did any injury in fact result therefrom, since statutory damages alone were allowed by the jury. Instructions are to be considered as a whole.

The next assignment is that the court erred in giving instruction No. 1 asked by the plaintiffs, which reads thus: "If you find from the evidence in this case that the release claimed to have been executed by Hiram Boyes, the defendant in this case, was signed by the defendant Hiram Boyes, but was not attested by a justice of the peace or some officer with a seal, then and in that case you are in-

structed that the receipt would not have authorized the county clerk to have released the mortgage in question and would not have been a valid release under the statutes of the state of Nebraska." In the brief filed we are not informed in what particular the foregoing charge is claimed to be faulty, nor have we, after a careful scrutiny of the language employed, been able to discover wherein it is erroneous. By section 15, chapter 32, Compiled Statutes, two modes are prescribed for the releasing of record chattel mortgages, viz.: One by an entry by the mortgagee, his agent or assignee, on the margin of the index, attested by the county clerk; and the other by the county clerk, when authorized so to do by an order in writing, signed by the mortgagee and attested by a justice of the peace or some officer having a seal. It was by the last method that it was insisted on the trial the mortgage had been discharged, and the rule laid down by the court in the instruction is in line with the statute, as well as applicable to the evidence in the case.

The third assignment is predicated upon the refusal of the court to give the defendant's first and fifth requests. The refusal of said requests is not available to the plaintiff in error, for the reason no complaint of the action of the court in that regard was made in the motion for a new trial. (*Cleveland Paper Co. v. Banks*, 15 Neb., 23; *Hastings & G. I. R. Co. v. Ingalls*, 15 Neb., 123.)

The next assignment, that the court erred in overruling the motion for a new trial, is unavailing, since it is too indefinite, the motion being based upon several grounds. (*Glaze v. Parcel*, 40 Neb., 732; *Sigler v. McConnell*, 45 Neb., 598.)

The assignments of error relating to the decisions of the court upon the admission and exclusion of testimony will not be considered, for the reason no particular ruling of the trial court is especially pointed out in the petition in error, the assignments therein being: "Errors of law occurring at

the trial duly excepted to at the time by plaintiff in error," and "The court erred in receiving certain evidence offered by the plaintiffs over the objection of the defendant, duly excepted to at the time, and which more fully appears from the evidence." These assignments are too general to present any question for review. (*Lowe v. City of Omaha*, 33 Neb., 587, and cases there cited.)

The remaining assignment to be considered presents the question of the sufficiency of the evidence to sustain the verdict of the jury. On the 22d day of May, 1888, defendants in error executed and delivered to plaintiff in error a chattel mortgage upon certain personal property, to secure the payment of $20 in thirty days. The indebtedness was fully paid to Boyes at maturity, by Albert B. Summers, one of the plaintiffs below. There is also evidence tending to show that twice during the month of July, following the payment of the mortgage indebtedness, demand was made upon the plaintiff in error that he release and discharge the mortgage of record. It is also disclosed that at the time the note was paid off Mr. Boyes executed in writing and delivered to A. B. Summers an order directed to the county clerk requesting that he surrender the mortgage to defendants in error and cancel the same of record. This order, however, was not attested by any officer; therefore, under the statute, it was of no validity whatever. This is too plain to admit of argument. It is insisted that plaintiff in error acted in good faith in the matter, and that his refusal to satisfy the mortgage of record was not wanton and oppressive, hence there can be no recovery. Admitting the premises to be true, the conclusion drawn therefrom does not necessarily follow, although there are authorities in other states which support the construction of the statute for which plaintiff in error contends. Mr. Boyes is not only presumed, but is bound, to know that the law required that the order which he gave requesting the county clerk to satisfy the mortgage must be attested by either a

justice of the peace or some officer with a seal of office. A mistake of law excuses no one. So, too, the fact that Mr. Boyes acted in good faith, relying upon the fact that the plaintiffs below had accepted the order, and had not returned the same to him as being invalid, is no justification. This court has held, in an action against an officer to recover the penalty imposed by statute for exacting illegal fees, that a mere mistake or ignorance, without a corrupt intent, is no defense (*Cobbey v. Burks*, 11 Neb., 157; *Phœnix Ins. Co. v. Bohman*, 28 Neb., 253); and in *Clearwater Bank v. Kurkonski*, 45 Neb., 1, it was ruled that the entry of satisfaction of a chattel mortgage after the period fixed by law will not defeat an action to recover the statutory damages. By the statute relating to the release of chattel mortgages, the action therein provided for accrues by the mere failure to satisfy the mortgage within a certain time after payment and demand is made, whether the mortgagee acted in good faith or not, or whatever may have been the motives of the mortgagee. Upon principle, we must hold that the plaintiff in error has no defense to the action. This conclusion is in harmony with our decisions in analogous cases. The judgment is

AFFIRMED.

HARRISON, J., took no part in the decision.

B. O. PERKINS ET AL., APPELLANTS, V. BUTLER COUNTY ET AL., APPELLEES.

FILED NOVEMBER 8, 1895. No. 5659.

1. **Insolvent Partnership: RIGHTS OF CREDITORS AND PARTNERS: DISTRIBUTION OF ASSETS.** The order for a rehearing in this case was as follows: "Rehearing allowed on the following question: Is this case, in view of the pleadings and the evidence, one calling for the application of the rule whereby partnership

assets are to be applied to the payment of partnership debts in preference to debts of an individual partner?" Upon a re-examination of the case the conclusion of the opinion rendered at the former hearing in relation to the question for consideration on rehearing, approved and adhered to. (For opinion see *Perkins v. Butler County*, 44 Neb., 110.)

2. ———: ———: ———. The points decided at the first hearing of the case having been then set forth in the syllabus of the opinion, they need not and will not be restated here.

REHEARING of case reported in 44 Neb., 110.

George P. Sheesley, R. S. Norval, and *George W. Lowley,* for appellants, cited: *Smith v. Smith,* 43 Am. St. Rep. [Ia.], 359, note, and cases cited.

Leese & Stewart, also for appellants.

Steele Bros., Evans & Hale, M. A. Hall, and *Frick & Dolezal, contra.*

HARRISON, J.

An opinion was filed in this case February 20, 1895, and was published in 44 Neb., 110. A motion for rehearing was filed, and on April 18 was sustained, the following being the order entered: "Rehearing allowed on the following question: Is this case, in view of the pleadings and the evidence, one calling for the application of the rule whereby partnership assets are to be applied to the payment of partnership debts in preference to debts of an individual partner?" In the decision of the case at the former hearing in this court this question was considered and determined, and it was then held: "When a partnership is dissolved and is insolvent, its assets will be treated by a court of equity as a trust fund for the payment of partnership creditors, and the creditors of one partner will not be permitted to divert the assets to the prejudice of the partnership creditors;" and the rule announced applicable to the issues

in the case as presented by the pleadings and the evidence. We have carefully re-examined the entire record, more particularly for the purpose of determining the question hereinbefore indicated, and, without entering into a discussion of it, or stating at length the reasons which have moved us to the conclusions we have reached, will say that our consideration of the case at this time has resulted in verifying the correctness of the opinion rendered at the former hearing, in holding the rule appropriating partnership assets to the payment of partnership debts applicable in this case as it was developed by the pleadings and evidence. Hence we will adhere to the former opinion. The judgment is

REAFFIRMED.

NORVAL, C. J., dissenting.

E. H. MONROE V. REID, MURDOCK & COMPANY ET AL.

FILED NOVEMBER 8, 1895. No. 6215.

1. **Appeal and Error:** ELECTION AS TO REMEDY: WAIVER OF APPEAL. A case will not be considered in this court as both an appeal and a proceeding in error. A party must elect which remedy he will pursue, and having filed a petition in error, must be presumed to have selected that remedy.
2. **Pleading:** AMENDMENTS. The amended petition in this case does not state a new and different cause of action from that set forth in the original petition, and objections to it on that ground were properly overruled by the trial court.
3. **Fraudulent Conveyances:** ACTION FOR CANCELLATION: EQUITY. This action, as disclosed by the pleadings, was to set aside an alleged fraudulent transfer of property and reach and appropriate to the payment of judgments against the debtor his moneys or property claimed to have been concealed, and was equitable in its nature and triable by the court without the intervention of a jury.

4. ——: ——: PROCEEDINGS IN AID OF EXECUTION. The right to such an equitable action existed prior to the enactment of the statute providing for proceedings in aid of execution, and still exists. The statutory remedy did not supersede or destroy it.

5. ——: ——: FINDING FOR PLAINTIFF. The evidence examined, and *held* sufficient to support the findings of the trial court.

6. **Trial to Court:** ADMISSION OF INCOMPETENT EVIDENCE: HARMLESS ERROR. In trials of fact to the court without the intervention of a jury, if sufficient competent evidence is admitted to sustain the findings of the court, the case will not be reversed on the ground of the admission of immaterial and incompetent evidence.

7. **Actions:** PLEA IN ABATEMENT. The plea in abatement of another action pending in the same court between the same parties, regarding the same subject-matter and in which the relief sought is practically the same, is a good defense to a second action, and the fact that one is an action at law and the other in equity is immaterial.

8. ——: ——: PLEADING AND PROOF. To constitute a good defense, however, it is necessary for the party seeking the abatement of the present action, by reason of the pendency of that already commenced, to plead and prove the connection of the former action to the same subject-matter, the relations of the parties therein to be the same as that in the case in which the plea is interposed, and that the relief sought is practically identical with that sought in the second action.

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

D. B. Carey and *E. F. Gray*, for plaintiff in error.

H. J. Whitmore, Montgomery, Charlton & Hall, and *Fred W. Vaughan, contra.*

HARRISON, J.

On the 1st day of April, A. D. 1892, the defendants in error filed a petition in the district court of Dodge county, in which was stated the business in which each was en-

gaged during the occurrences and circumstances set forth in the pleading, connected with the elements of the cause of action; that Reid, Murdock & Co., during the time one Frank H. Scott was in business as stated, sold to him, on credit, quantities of goods and merchandise, and on December 18, 1891, obtained two judgments against him for the amounts of their bills, one for $612.87 and one for $331.90, upon which executions were thereafter issued, which, on December 19, 1891, were returned unsatisfied for want of property of the judgment debtor on which to levy; that proceedings in aid of execution were instituted, and E. H. Monroe was summoned to appear therein and answer. It was further recited that Raymond Bros. & Co. had an account against Frank H. Scott in the sum of $541.27; the Lincoln Packing & Provision Company, a balance due on account in the sum of $95.08; Z. T. Leftwich, an account in amount $516, each of which was, by the party to whom it was due, prosecuted to judgment, execution issued and returned unsatisfied, "No property found," and in proceedings in aid of execution E. H. Monroe had been summoned to appear and answer; that on September 30, A. D. 1891, Frank H. Scott of defendants was married to the daughter of E. H. Monroe, another of defendants, and it was further averred:

"That on the 14th day of July, 1891, the said defendant Frank H. Scott, being then the owner of and in possession of a stock of goods, wares, merchandise, and fixtures to the value of upwards of $8,000, and being fully able to pay all of his indebtedness, and being indebted to these plaintiffs as aforesaid, and to divers other persons in large amounts, did, for the purpose of hindering and delaying these plaintiffs and others of his creditors in the collection of their demands, and unlawfully, willfully, and fraudulently designing to cheat and defraud these plaintiffs in the collection of their demands, the said Frank H. Scott on said day sold and conveyed to his said father-in-law, the said defendant

E. H. Monroe, the whole of said stock of goods, wares, merchandise, and fixtures, and, as plaintiffs are informed and believe, received therefor from the said E. H. Monroe the sum of $3,700 in money in cash in hand, and three promissory notes of the said E. H. Monroe payable to the order of said Frank H. Scott and dated July 14, 1891, as follows: One note for $1,000, due in sixty days from date; one note for $1,300, due in ninety days; and one note for $1,000, due in four months from date, each of said notes bearing interest from date at the rate of eight per cent per annum; that shortly after the said sale and conveyance aforesaid the said Frank H. Scott, with fraudulent intent and purpose as aforesaid, and for the purpose of placing the said notes and money so received beyond the reach of these plaintiffs and others of his creditors, secretly departed from the city of Fremont and went to the state of Colorado, taking with him the said notes and money; that he was soon followed to said state of Colorado by his father, the said defendant Pliny Page Scott, and that said notes were by the said Frank H. Scott placed in the possession and keeping of said Pliny Page Scott in the city of Denver, and, as plaintiffs are informed and believe, the second and third of said notes are still in the possession of said Pliny Page Scott.

"Plaintiffs further say that they are informed that the said Pliny Page Scott now pretends to be the owner of said two notes and refuses to return the same to the said Frank H. Scott. These plaintiffs aver that the said Pliny Page Scott knew at the time of said sale that the same was being made, and that the said Frank H. Scott was indebted as aforesaid and that the creditors of said Frank H. Scott had not been paid, that said notes were delivered to him without consideration and for the fraudulent purpose aforesaid, and that Pliny Page Scott has no right, title, or interest in or to said notes.

"Plaintiffs further say that, as they are informed, the

defendant C. B. Morrow claims some interest in said notes, or, if he makes no such claim, that he claims possession thereof, but these plaintiffs allege that if the said C. B. Morrow has said notes in his possession they are held by him fraudulently and without consideration on his part, and with knowledge on his part of the fraudulent intent as aforesaid of the defendant Frank H. Scott to cheat and defraud the plaintiffs and his other creditors by placing the notes beyond their reach.

"Plaintiffs further say that the defendant E. H. Monroe now refuses to pay the said notes to the said Frank H. Scott, or to pay the proceeds thereof to these plaintiffs into court to be applied to the payment of plaintiffs' said judgment; that the said Frank H. Scott is wholly insolvent and has no property liable to execution to satisfy said judgments, and these plaintiffs are without adequate relief at law, and that the fund in the hands of the said E. H. Monroe, and due on the said notes, is all the property of said defendant Frank H. Scott out of which plaintiffs' said judgments can be satisfied."

The prayer of the petition was as follows:

"These plaintiffs therefore pray judgment against the said E. H. Monroe for the amount of their said judgments, interest, and costs; that the said Pliny Page Scott and C. B. Morrow be required to bring said notes into court that the same may be canceled, and that the said E. H. Monroe be enjoined from paying the said notes to the said Frank H. Scott, or to Pliny Page Scott, or C. B. Morrow, or to any person whomsoever until the further order of this court, and that the said Frank H. Scott be enjoined from disposing of the said notes and from canceling or destroying the same; that said notes be decreed to be the property of said defendant Frank H. Scott, and the proceeds thereof liable to the payment of plaintiffs' said judgments, with interest and costs thereof; and plaintiffs further pray for such other and further relief as may be just and equitable."

A temporary injunction was allowed and the required bond filed and approved. E. H. Monroe filed an answer in which the allegations of the petition in relation to defendants in error, the business in which they were respectively engaged, the existence of the indebtedness of Frank H. Scott to each and the judgments obtained, the issuance and return of the executions, the institutions of the proceedings in aid of execution were admitted, and it was stated in relation to the supplemental proceedings that in all the cases the answers had been made and the answering party discharged, except in that of Z. T. Leftwich, of which it was alleged there had been no hearing. The marriage of Scott and Monroe's daughter is stated to have occurred December 30, 1891, and not September 30, 1891, as pleaded in the petition. The purchase of the stock of goods by Monroe for the consideration of $7,000, the cash payment and execution and delivery of notes for the balance are admitted, but it is denied that the goods were worth more than the amount for which they were sold, and it is further denied that the sale was made to hinder, delay, or defraud creditors of Scott, or to cheat them, or that there was any fraud, secrecy, or conspiracy connected with the placing and keeping the money paid and notes delivered as a consideration for the sale of the goods to Monroe. The allegations of the petition as to Scott's insolvency are also denied, and it is further pleaded:

"This answering defendant alleged that his purchase price of said stock of goods of Frank H. Scott was $7,000, and on said purchase, about July 14, 1891, he paid said Scott $3,700 in cash, and delivered him his three negotiable promissory notes, one for $1,000, due in sixty days from date, and one for $1,300, due in ninety days from that date, and one for $1,000, due in four months from date, each bearing interest at eight per cent from date; that said sixty-day note this answering defendant paid to said Scott shortly before due and took the same up; that the other two

of said notes this answering defendant, on March 28, 1892, paid to C. B. Morrow, who was then, and from before either of them became due had been, the owner and holder of them for value, and upon said payments said answering defendant took up said two notes, and this answering defendant owes nothing on said purchase, and did not owe anything on said purchase at the commencement of this action. This answering defendant denies each and every allegation in said petition not above admitted."

The reply to this answer was in effect a general denial of all new matter stated in the answer. The defendants in error made application to file an amended petition, which was objected to by plaintiff in error on the following grounds:

"1. Said proposed amended petition sets up a new and different cause of action from that set up in the original petition.

"2. Said proposed amendment sets up matter irrelevant to the matter set up in the original petition and in no way an amendment of the original petition, and sets up matter not triable except at law to a jury.

"3. Said proposed amended petition is an abandonment of the original cause of action and an attempt to set up a new cause of action triable to a jury at law in place of the equitable cause of action originally set up.

"4. Said proposed amended petition is filled with irrelevant matter, redundant matter, surplusage, and its allegations are indefinite and uncertain, and several different causes of action are not separately stated and numbered."

The objections were overruled and the defendants in error allowed to file the amended petition. A motion was then filed for plaintiff in error to strike the amendment from the files, which was overruled. The allegations of the amended petition in regard to the accounts of defendants in error against Frank H. Scott, the obtaining judgments, issuance, and return of executions, proceedings in

aid of the executions, and the relationship between Frank H. and Pliny Page Scott, E. H. Monroe, and C. B. Morrow, etc., were similar and in effect the same as the original petition, and it was further pleaded:

"These plaintiffs further allege that on the 14th day of July, 1891, the said Frank H. Scott was the owner of and in possession of a stock of goods, wares, merchandise, and fixtures of the value of upwards of $8,000, and was solvent and fully able to pay all his indebtedness in full.

"12. Plaintiffs further allege that on or about the said 14th day of July, 1891, the said defendants Frank H. Scott, E. H. Monroe, and Pliny Page Scott entered into an unlawful and fraudulent conspiracy and combination to defraud these plaintiffs and others of the creditors of the said Frank H. Scott and to hinder and delay them in the collection of their demands against the said Frank H. Scott.

"13. That in pursuance of the said unlawful and fraudulent conspiracy and combination against the rights of these plaintiffs the said Frank H. Scott did, on said 14th day of July, 1891, falsely pretend to sell and transfer his said stock of goods, wares, merchandise, and fixtures to the said E. H. Monroe, and the said E. H. Monroe did falsely pretend to purchase the same, and did take immediate possession of the same, and has since sold and disposed of the same and received and still holds the proceeds of the said sale.

"14. That it is claimed by said defendants that said pretended sale was for the sum of $7,000 and that $3,700 of said consideration was paid by said E. H. Monroe to said Scott in cash, and that $3,300 of said pretended consideration was in three promissory notes of said Monroe, as follows: One for $1,000, due in sixty days from date; one for $1,300, due in ninety days from date; and one for $1,000, due in one hundred and twenty days from date, all bearing interest from date at the rate of eight per cent per annum.

"15. Plaintiffs further aver that in pursuance of said unlawful and fraudulent conspiracy and combination, and to carry the same into effect, the said Frank H. Scott did, shortly after the said pretended sale, secretly depart from the said city of Fremont, and, as plaintiffs have since learned, went to the state of Colorado and took up his residence with the defendant Morrow; that shortly thereafter the said defendant Pliny Page Scott also secretly left the city of Fremont, and, as plaintiffs have since learned, also took up his residence with defendant Morrow in the city of Denver.

"16. That it is now claimed by the said defendants that the said notes so alleged to have been executed by the said Monroe were by the said Frank H. Scott taken to the city of Denver and there delivered to the defendant Pliny Page Scott, who it is alleged thereupon sold and delivered two of the said notes to the said defendant Morrow, who now claims to be the owner and holder thereof. These plaintiffs aver that if any such notes were executed and delivered by the defendant Monroe to the defendant Frank H. Scott that the same were executed and delivered for the purpose of cheating and defrauding these plaintiffs and others in the collection of their demands, and that if said notes were taken to Denver and delivered to the said Morrow, that the same was done for the purpose of carrying out said fraudulent intent; that said notes were transferred for no consideration and were taken by said Morrow with full knowledge of said fraudulent intent and for the purpose of aiding and abetting the perpetration of the said fraud; that the said Morrow was, at the time of the alleged purchase of the said notes by him, employed as a railroad conductor on the Burlington & Missouri railroad, was a man of no means and wholly unable to purchase the said notes and pay the consideration claimed to have been paid therefor; that the said Pliny Page Scott was a man of no means, said notes were placed in his possession without considera-

tion, and solely for the purpose of carrying out said fraudulent conspiracy and combination, of all of which the said Pliny Page Scott was fully informed.

"17. Plaintiffs further allege that the defendant E. H. Monroe now refuses to pay the said notes given, or alleged to have been given, to the said Frank H. Scott, or to apply the proceeds of said notes to the payment of these plaintiffs' claims or to pay said money into court for such purpose; that the said Frank H. Scott is wholly insolvent, and has no property liable to execution to satisfy said judgments, and these plaintiffs are without adequate relief at law, and that the fund in the hands of the said E. H. Monroe, alleged to be due on said notes, is all the property of said Frank H. Scott out of which these plaintiffs' said judgments can be satisfied."

The prayer for relief did not differ materially from that of the original petition. The answer of Monroe to the amended petition contained admissions of such facts as had been alleged in the original petition and admitted by the answer thereto, and they need not be restated here in detail. It pleaded affirmatively the purchase of the stock of goods by Monroe for a consideration of $7,000, the payment of a portion thereof in cash and the execution of the notes for the amount of the balance, that such purchase and sale were in good faith, and denied, either generally or specifically, all allegations of the amended petition in reference to conspiracy, fraud, intention to hinder, delay, or defraud creditors as connected with the sale of the goods, the money paid therefor, the notes or their delivery from Frank H. Scott to the father, Pliny Page Scott, and by him to Morrow, or lack of consideration for any or all of them, and states affirmatively his payment of one of the notes to Frank H. Scott, and on March 28, 1892, of the other two to C. B. Morrow, and further as follows:

"And for a second ground of defense and answer to the amended petition, defendant E. H. Monroe, answering for

himself only, states that as to the plaintiff Reid, Murdock & Co. they have another action pending in this court between themselves and Frank H. Scott, in which they caused a large portion of the said goods sold by Scott to Monroe to be attached to satisfy their judgment set up in said amended petition, and that this answering defendant thereafter commenced a replevin action in this court, and therein replevied said attached goods and gave the usual redelivery bond thereupon, and said replevin action is still pending in this court undetermined, and said plaintiff ought not to be allowed to maintain this action.

"For a third ground of defense and answer to the amended petition the said E. H. Monroe, for himself only, states that the garnishee proceedings and proceedings in aid of execution commenced against him by the said several plaintiffs, as alleged in said amended petition, have been fully heard and determined in the courts where the same were pending, and each and all of said proceedings and garnishments have been duly dismissed, and this answering defendant duly discharged therefrom and in the premises, and the matters embraced in this action have been fully determined in said garnishee and aid of execution proceedings on the merits and this answering defendant duly discharged in the premises, and therefore the plaintiff ought not to be permitted to maintain this action."

When the case was called for trial a jury trial was demanded for plaintiff in error. This was refused and an exception noted. The result of the trial was a finding and judgment against Monroe, and he has brought the case to this court for review. A motion for new trial was filed in the district court and a petition in error filed with the record in this court. The case was one which could have been appealed, and counsel for plaintiff in error, judging from a statement in the brief filed, view the case as here by appeal and by proceedings in error, and that it can be so considered. "This course is not permissible. A party must

elect which remedy to pursue, and having filed a petition in error, she must be presumed to have selected that remedy. The case will, therefore, be treated as a proceeding in error." (*Woodard v. Baird*, 43 Neb., 311.)

The question to which we will next direct our attention is, did the trial court err in overruling the objections to the amended petition, or did it state a new and different cause of action than was pleaded in the original petition? We do not think so. In the original petition the sale of the stock of goods was alleged to be fraudulent as to creditors, and it was further set forth that Frank H. Scott, Pliny Page Scott, his father, and C. B. Morrow, a brother-in-law, were seeking to secrete and dispose of the money or other proceeds of the sale, that it could not be reached by the creditors of Frank H. Scott or appropriated to the payment of his debts. In the amended petition the same elements were included in the cause of action, the statements in the pleading concerning them being somewhat amplified, and it was further alleged that the apparent transfer of the goods to Monroe, and his taking possession of them, and the pretended sale to him, were but acts in furtherance of the main design, the defrauding of the creditors of Frank H. Scott, in which Monroe was actively co-operating. This did not change the cause of action nor was a new one stated. The matters complained of in each petition were the alleged simulated sale and transfer of the stock of goods and the consequent fraud upon the creditors.

Another question is, did the trial court err in refusing the demand of plaintiff in error for a jury trial? The action, as disclosed by the petition and issues presented by the pleadings at the time this point was raised and decided, was one to set aside an alleged fraudulent transfer or sale, and to reach and appropriate to the payment of the judgments against the debtor his moneys or property which it was claimed was by certain devices concealed, so that it could not be made available for such purpose by the ordi-

nary methods, and was equitable in its nature, and hence triable by the court without the intervention of a jury.

It is urged that the defendants in error could have obtained full relief under the proceedings in aid of execution. The record discloses that the supplementary proceedings were prosecuted so far as to obtain the answer of Monroe, after which the court discharged him, and it is claimed that the defendants in error, in further pursuance of the statutory remedy in aid of execution, might have instituted an action at law against Monroe and litigated the questions involved in the case at bar. The right to the equitable action to determine the controversies existed prior to the enactment of the statute which provided the supplemental proceedings, and still exists. The statutory remedy did not supersede it or destroy it. We do not think the proceedings in aid of execution were intended to be substituted for actions in the nature of creditors' bills, while they may be made to serve in the main the same purpose, they often furnish an incomplete and imperfect remedy, and where, on the facts, such an action is proper, the one in the nature of a creditor's bill will be entertained. (*Oldenheimer v. Tressel*, 43 N. W. Rep. [Dak.], 941; *Ludes v. Hood*, 29 Kan., 49.)

It is claimed that the evidence was insufficient to sustain the finding and judgment. We have carefully examined and considered all the testimony, and will not in this opinion enter into, or discuss it, but our conclusion is that it was sufficient to support the conclusions and judgment of the trial court, and hence they will not be disturbed. (*Bond v. Dolby*, 17 Neb., 491; *Burlingim v. Warner*, 39 Neb., 497.)

In regard to the assignments of error in relation to the admission of certain testimony, it is argued by counsel on this point "that the evidence having been admitted over objection, the presumption is that the court used and relied on it in making its finding, and for this error the judgment ought to be reversed. To hold otherwise would be to place

the trial court on a plane of infallibility, and say, that notwithstanding it received incompetent evidence, after objection, deliberately, still the presumption is that it discovered its error before judgment and did not consider the incompetent evidence. In other words, it would be to hold that where a cause is tried to the court there shall be no review of erroneous proceedings on the admission of testimony, and that parties litigant are at the mercy of the single judge, as to what testimony shall be received. If we have reached that point we want to know it now." The rule as announced by this court is: "When a cause is tried to the court without the intervention of a jury, the judgment will not be reversed on the ground of the admission of immaterial or incompetent evidence, if sufficient material and competent evidence was introduced and admitted to sustain the finding of the court." (*Richardson v. Doty*, 25 Neb., 420.) In 1 Greenleaf, Evidence, section 49, the rule is laid down as follows: "In trials of fact, without the aid of a jury, the question of the admissibility of evidence, strictly speaking, can seldom be raised; since, whatever be the ground of objection, the evidence objected to must of necessity be read or heard by the judge in order to determine its character and value. In such cases the only question, in effect, is upon the sufficiency and weight of the evidence." (See, also, *Willard v. Foster*, 24 Neb., 213; *Ward v. Parlin*, 30 Neb., 376; *Tower v. Fetz*, 26 Neb., 710.) A review of the testimony has convinced us that this case is within the rule. Having reached this conclusion, we need not further consider or discuss these assignments.

The plaintiff in error set up as a defense to the amended petition and introduced testimony to show that one of defendants in error, Reid, Murdock & Co., had another action pending in the trial court; that in actions commenced there by Reid, Murdock & Co. attachments had been issued and levied on a large portion of the stock of goods claimed by

Monroe to have been by him purchased of Scott, to satisfy the judgments upon which the case at bar was predicated to the extent that the claims of this one party are involved in the action; that Monroe, to protect his rights, had commenced a replevin action in which the goods attached were retaken and in such action had executed and delivered a bond, and that the replevin action was still pending in the district court. In the case at bar, Reid, Murdock & Co., were of parties plaintiff in the district court and Monroe was of defendants. In the replevin action, the pendency of which it was sought to interpose as a defense or in abatement of this action, Monroe was the plaintiff and the officer who levied the attachment was defendant, although this officer's right to the property was based on the writ of attachment, and the rights or claims of Reid, Murdock & Co. would necessarily be involved in a trial of the replevin suit, and the character of the transactions between Monroe and Scott, which resulted in the conveyance of the goods to Monroe, whether fraudulent or not, would be fully inquired into and ventilated and the determination of this question be a governing one in the action, as it was in the case at bar, and if a trial of the replevin action resulted in favor of the officer, Reid, Murdock & Co. would be the recipients of the benefits derived from the judgment. If we consider the officer the real party defendant in the replevin action, then its pendency was no defense to the present action, the parties not being identical, as the officer was not a party to this suit. If we look beyond the form of the replevin case and the nominal defendant therein and consider Reid, Murdock & Co. the real party defendant, then the plaintiff in that (Monroe) is a defendant in this suit and the defendant in that is plaintiff in this, or, the parties in the two cases are reversed, and where relative positions in the case are thus changed it has been held that both suits may be in progress at the same time. (*Walsworth v. Johnson*, 41 Cal., 61; *New England Screw Co. v. Bliven*, 3 Blatch. [U.

S.], 240; *Washburn & Moen Mfg. Co. v. Scutt*, 22 Fed. Rep., 710; *Barr v. Chapman*, 5 O. Cir. Ct. Rep., 69. *Contra: Crane v. Larsen*, 15 Ore., 349; 1 Ency. Pl. & Pr., 758, note.) It has also been determined that a plea of the pendency of an action at law is not available in an action of equity, and *vice versa*, and that this is also true where law and equity are administered by the same court. (1 Ency. Pl. & Pr., 752, note.) This court has expressed itself in favor of the contrary doctrine in the case of *State v. North Lincoln Street R. Co.*, 34 Neb., 634, the present chief justice writing the opinion. It was said: "It may be safely stated that as a general rule the pendency of a former action between the same parties may be shown in abatement, where a judgment in such suit would be a bar to a judgment in the second suit brought in another court of concurrent jurisdiction. That one is an equitable action and the other a suit at law is immaterial, so long as both suits are based upon substantially the same facts. Cases are to be found in the books, some of which are cited in relator's brief, which hold that the plea of the pendency of a prior action is not good when the proceedings are not identical or the forms of the actions are not the same in both suits. In other words, the pendency of an action at law will not abate a suit in equity, and *vice versa;* but such rule is not sustained by the current of modern authorities, and there is no good reason why it should obtain in this state under the Code, where the forms of procedure, which, under the old system of practice, distinguished legal and equitable actions, are abolished." In the discussion of the subject of "Another Suit Pending," in a late work on pleading and practice is the following statement: "But it may be laid down as a general proposition where the substantial fact or facts upon which the plaintiff's right to relief is based are identical in the two actions, and the relief obtainable in the first includes all the relief sought in the second action, the first will abate the second, although the actions differ in

matters of form, and in the relations of the defendant to the infringement of the plaintiff's right." (1 Ency. Pl. & Pr., p. 763, and see citations in note.) If we say we will look beyond the forms of action and the nominal parties defendant in the replevin case, and hold Reid, Murdock & Co. to be the real party in interest, the reason being that the suit against Scott and the issuance and levy of the writ of attachment on the stock of goods claimed by Monroe, at the instance and by the directions of such party, forced Monroe to commence the action of replevin to protect his rights, the issue in the replevin case merely being was the sale of goods to Monroe fraudulent or in good faith, and its determination settling the question of whether the goods could be sold under the attachment levy and the proceeds appropriated to the payment of the claims of Reid, Murdock & Co., and the issue in the case at bar being in regard to the same transaction and its fraudulent or good faith character, the object of the suit, in so far as it involves the rights of Reid, Murdock & Co. and Monroe to have the transactions between Monroe and Scott held void or set aside and the proceeds of the stock of goods paid on the judgments, which embody the identical claims in suits wherein the writs of attachment were issued, and we have in view the pith of the contention of plaintiff in error under his plea of pendency of another action. It was held in *Yantis v. Burdett*, 3 Mo., 457, that a plea stating that an action on a judgment was commenced while the plaintiff was endeavoring to enforce the same judgment by an execution was good; but whether in the present controversy the conditions and subject-matters of the cases and the relations of the parties to them established the plea and constituted it an available one as to the main element or point involved, is not, as we view the pleading and evidence, sufficiently presented to call upon us to determine it. It is clear that a plea of the pendency of the replevin suit, without any showing of its connection with and being

the outgrowth of the attachments, would have been of no effect as a plea in abating the present action, and it devolved upon the party interposing the plea, to sustain his contention, to sufficiently state and prove all things necessary, not only the replevin action and its pendency, but also, among other matters, that the attachments were in furtherance of the satisfaction of the same claims as were included in the judgments, the basis of this action, and that the attachments were still in existence and force, not abandoned, withdrawn, or discharged. This last he neither pleaded nor proved; hence the plea, even if it could have been sustained, if the question had been fully presented for adjudication, which we do not decide, was not good and must fail. It is true that in a cross-examination of a clerk of the district court the statement was called out that no orders had ever been made dissolving the attachments, but this did not supply the defect in the pleadings or sufficiently show the continued pendency of the attachments. The judgment of the district court is

AFFIRMED.

GILKIE & ANSON COMPANY, APPELLEE, V. DAWSON TOWN & GAS COMPANY ET AL., APPELLANTS.

FILED NOVEMBER 8, 1895. NO. 6590.

1. **Corporations**: LIABILITY OF STOCKHOLDERS. In all cases of claims against corporations and joint-stock associations the exact amount justly due shall be first ascertained, and after the corporate property shall have been exhausted the individual subscribers thereof shall be individually liable to the extent of their unpaid subscriptions, and the liability for the unpaid subscriptions shall follow the stock. (Constitution, sec. 4, art. 11, referring to "Miscellaneous Corporations.")

2. ———: CAPITAL AND SUBSCRIPTIONS: TRUST FUND. The capital, including unpaid subscriptions for stock of a corporation, is a trust fund for the payment of its creditors.

3. ———: SUBSCRIPTIONS FOR STOCK PAYMENT. Subscriptions for stock of a corporation may be paid in money or in property such as is within the power of a corporation to acquire and hold, or in labor for the corporation in the proper furtherance of its purposes and business.

4. ———: ———: ———. Where payment of subscriptions for stock is made in property or labor, it must be of such value as to be the money's worth; if property, of the value of the amount of the par value of the stock; and if labor, it must be reasonably of the face value of the stock.

5. ———: ———: ———. When property is conveyed to a corporation in payment of subscriptions for stock, it may be at a valuation agreed upon between the parties to the transaction, provided the valuation is one made in good faith or in the fair exercise of judgment and discretion honestly directed.

6. ———: VALUE OF PROPERTY EXCHANGED FOR STOCK: FRAUD: LIABILITY OF STOCKHOLDERS: RIGHTS OF CREDITORS. Where the property conveyed in payment for stock is knowingly and advisedly overvalued, it is but a formal and illusory compliance with the requirements of the law and fair dealing in this regard and is not sufficient, and the transaction may be impeached by a creditor of the corporation as a fraud, and the liability of the subscriber for stock, to the amount of the difference between the fair and true value of the property at the time it was conveyed and the fictitious value at which it was received, be enforced against such subscriber as an unpaid portion of his subscription to the stock and appropriated, in a proper action, to the satisfaction of the debts of the corporation.

7. ———: ———: FRAUDULENT TRANSFER OF STOCK: RIGHTS OF CREDITORS: EVIDENCE: ESTOPPEL. The books of a corporation are its private books, as to third persons, and such persons are not chargeable with notice of what is contained therein, nor with the duty of examining them for the purpose of ascertaining the condition of the capital in respect to whether fully paid in or not and at what valuation, before granting credit to the corporation, to the extent that a failure to do so will bar the right in a proper action to impeach the transfer of stock to a party in consideration of the conveyance to the corporation of property, which may be shown in the books, and prove its fraudulent character.

8. ———: ———: ———: ———: PLEADING. The amended petition *held* to be sufficient in its statements of the fraudulent character of the transaction therein sought to be attacked.

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

The opinion contains a statement of the case.

G. W. Ambrose, for appellants:

Fraud will never be imputed when the circumstances and facts upon which it is predicated may consist with honesty and purity of purpose. (Bump, Fraudulent Conveyances [3d ed.], 603; *Clemens v. Brillhart*, 17 Neb., 337.)

Where subscriptions for stock are paid in property, a creditor of the corporation who alleges fraud in the transaction must not only prove that there was an overvaluation of the property, but must prove also that such overvaluation was intentional. (*Douglas v. Ireland*, 73 N. Y., 100; *Schenck v. Andrews*, 57 N. Y., 133; *Boynton v. Andrews*, 63 N. Y., 93; *Lake Superior Iron Co. v. Drexel*, 90 N. Y., 87; *Brant v. Ehlen*; 59 Md., 1; *New Haven Horse Nail Co. v. Linden Spring Co.*, 142 Mass., 349; *Coffin v. Ransdell*, 11 N. E. Rep. [Ind.], 20; *Phelan v. Hazard*, 5 Dill. [U. S. C. C.], 45; *Crawford v. Rohrer*, 59 Md., 599; *Young v. Erie Iron Co.*, 31 N. W. Rep. [Mich.], 814; *Coit v. North Carolina Gold Co.*, 14 Fed. Rep., 12.)

Where the capital subscribed is settled for by a transfer to the corporation of personal property belonging to the subscribers at an honest valuation fairly made and agreed upon between them, they cannot be held individually liable to creditors because the value of the property, estimated in the light of subsequent events, will not equal the amount at which it was received. (*Coit v. North Carolina Gold Co.*, 119 U. S., 343; *Peck v. Coalfield Coal Co.*, 11 Brad. [Ill.], 88; *Carr v. Le Fevre*, 27 Pa. St., 413; *Liebeke v. Knapp*, 79 Mo., 22.)

The books of the company were open to the creditor.

He could and should have examined them. The articles were of record providing that shares should be issued as fully paid up. These articles were posted in the office of the company. The books showed the true state of affairs—just how the property was bought and paid for. The creditor made no inquiry and is estopped by his negligence. (*Peck v. Coalfield Coal Co.*, 11 Brad. [Ill.], 88; *Buchanan v. Litchfield*, 102 U. S., 218.)

H. W. Pennock, C. A. Fowler, and *Cavanagh, Thomas & McGilton, contra:*

The capital stock of a corporation is a trust fund for the benefit of creditors, which may not be wasted or squandered by the corporation, and which may be sequestered in equity by creditors when the corporation has become insolvent. (*Fothergill's Case*, L. R., 8 Ch. App. [Eng.], 270; *Wood v. Dummer*, 3 Mason [U. S. C. C.], 308; *Sawyer v. Hoag*, 17 Wall. [U. S.], 610; *Osgood v. King*, 42 Ia., 478; *Upton v. Tribilcock*, 91 U. S., 47; *Sanger v. Upton*, 91 U. S., 60; *Crawford v. Rohrer*, 59 Md., 599; *Weatherbee v. Baker*, 35 N. J. Eq., 501; *Elyton Land Co. v. Birmingham Warehouse & Elevator Co.*, 92 Ala., 407.)

Subscriptions to capital stock may be regarded as debts due to the corporation always worth the par value of the stock. If the officers of the company have compromised with subscribers by any colorable transactions, so that the stock has not been fairly paid for, creditors may step in and enforce full payment therefor against all parties holding such stock with knowledge of the facts. (*Upton v. Tribilcock*, 91 U. S., 47; *Sanger v. Upton*, 91 U. S., 60; *Gogebic Investment Co. v. Iron Chief Mining Co.*, 47 N. W. Rep. [Wis.], 726.)

A gross and obvious overvaluation is sufficient of itself to establish fraud as against creditors, unless the transaction can be fully and fairly explained upon a reasonable business basis. (*Douglas v. Ireland*, 73 N. Y., 100; *Na-*

tional Tube Works Co. v. Gilfillan, 124 N. Y., 302; *Northwestern Mutual Life Ins. Co. v. Cotton Exchange Real Estate Co.*, 46 Fed. Rep., 22; *Boulton Carbon Co. v. Mills*, 78 Ia., 460; *Bailey v. Pittsburgh & Connellsville Coal & Coke Co.*, 69 Pa. St., 334.)

The following cases were also referred to in the argument of counsel for appellee: *Thayer v. El Plomo Mining Co.*, 40 Ill. App., 345; *Gogebic Investment Co. v. Iron Chief Mining Co.*, 78 Wis., 427; *Carter v. Union Printing Co.*, 54 Ark., 576; *Terry v. Little*, 101 U. S., 216; *Farmers Bank v. Gallaher*, 43 Mo. App., 483; *Shickle v. Watts*, 94 Mo., 410; *Jackson v. Traer*, 64 Ia., 469; *Scoville v. Thayer*, 105 U. S., 143; *Union Ins. Co. v. Frear Stone Mfg. Co.*, 97 Ill., 537; *Alling v. Wensell*, 133 Ill., 264.

HARRISON, J.

December 26, 1891, this action was instituted by the creditors of the Dawson Town & Gas Company, a corporation formed under the laws of this state, against the corporation and the appellants, stockholders therein, to recover the amounts of judgments in favor of such creditors. The original party plaintiff was the Gilkie & Anson Company, the Crane Company becoming a party plaintiff by intervention. In the original petition the organization and existence as a corporation, of the defendant and also the plaintiff company, was averred, the object and purpose for which the defendant company was organized, its place of business, and the sale to it by plaintiff of a quantity of lumber, and that judgment was obtained for the debt thus created, execution issued and returned no property found. The insolvency of the defendant company was also alleged, and it was further stated: "That the authorized capital stock of said defendant corporation is $300,000; that the said defendant refuses to allow the plaintiff to examine its books, and the plaintiff cannot learn and has no means of finding out the exact amount of stock actually issued, or the amount

of the unpaid portion of the subscriptions; but plaintiff alleges, upon information and belief, that defendants Norman A. Kuhn, Charles D. Woodworth, Arthur H. Cooley, and J. T. Hoile each own a large amount of said stock, the full par value of which has never been paid into said corporation, and that the amount remaining unpaid of the stock so owned and held by each of the said defendants is sufficient to pay the claim of the plaintiff in full. Plaintiff alleges further that the said corporation defendant was created in the month of September, 1889, and alleges, upon information and belief, that since its creation it has failed and neglected to give any annual notice, signed by its president and a majority of its board of directors, of the amount of all its existing debts in any newspaper printed in the county or any of the counties in which its business has been transacted, as is provided and required by the statutes of the state of Nebraska." These allegations, except in relation to the creation of the corporation, were denied in answer filed for the defendant company and the stockholders, and it was further averred that full payment of the par value of the stock owned by the stockholders, had been made. The Crane Company was allowed to intervene and become a party plaintiff. Its petition stated no new facts, but referred to, and made a part of it, the material allegations of plaintiff's amended petition. The plaintiff company was, on application, allowed to file an amended petition, in which it included other and further parties as stockholders and defendants, and after pleading substantially as in the original petition, the creation of the corporation, its purpose and powers, the indebtedness to plaintiff, the judgment, etc., the insolvency of the defendant company, and the failure to publish the annual notice required by law, further alleged: "That the authorized capital stock of said defendant corporation is $300,000; that said stock was issued to each of the defendants Cooley and Hoile to the amount and of the par

value of $120,000, and that as payment therefor defendants fraudulently turned into said corporation certain real estate at a false and fictitious valuation of $205,000 and nothing else whatever, and that said real estate was worth no more than $10,000, of all of which defendants Cooley, Kuhn, and Woodworth at the time had knowledge, and that there now remains unpaid on said stock the sum of $230,000; that defendant Cooley is now the owner of said stock issued to him of the par value of $53,500, and that there remains unpaid thereon, and said Cooley is individually liable to the creditors of said corporation by reason thereof, in the sum of $51,270.80; that defendant Charles D. Woodworth is now the owner and holder of said stock issued to said Cooley, by assignment from him, of the par value of $35,000, and that there remains unpaid thereon, and said Woodworth is individually liable to the creditors of said corporation by reason thereof, in the sum of $33,451.66; that defendant Thomas H. Platter is now the holder and owner of said stock issued to said Cooley, by assignment from him, of the par value of $4,000, and that there remains unpaid thereon, and said Platter is individually liable to the creditors of said corporation by reason thereof, in the sum of $3,833.33; that defendant Norman A. Kuhn is now the owner and holder of said stock issued to defendant Hoile, by assignment from him, of the par value of $35,000, and that there remains unpaid thereon, and said Kuhn is individually liable to the creditors of said corporation by reason thereof, in the sum of $33,541.66; that defendant Alexander G. Charlton is now the owner and holder of said stock issued to said Hoile, by assignment from him, of the par value of $12,500, and that there is unpaid thereon, and said defendant Charlton is individually liable to the creditors of said corporation by reason thereof, in the sum of $11,979.16; that defendant J. R. Pearson is now the owner of said stock issued to said Hoile, by assignment from him, of the par

value of $5,000, and that there remains unpaid thereon, and said Pearson is individually liable to the creditors of said corporation by reason thereof, in the sum of $4,785."

The answer to the amended petition and petition of intervenor put in issue all the material facts therein stated, except that of the formation of the corporation, and further pleaded as follows: "Defendants aver as true that all stock as owned by them, or either of them, was in good faith taken and paid for at the time, and they, nor either of them, are now or at any time were indebted to said corporation for any amount of said stock or shares thereof. The defendants further answering show to the court that neither said amended petition nor the petition of intervention of the Crane Company states facts sufficient to constitute a cause of action against either of said defendants."

The plaintiff filed a reply, which was a denial general as to some and special as to others of the allegations of the answer. In the portion of the amended petition which we have copied herein the following words appear, "of all of which defendants Cooley, Kuhn, and Woodworth at the time had knowledge," which were not in the petition at the time of trial or introduction of testimony. There was a demurrer *ore tenus*, on the ground that the petition did not state a cause of action, and plaintiff and intervenor asked leave to amend, which, at the time of the rendition of decree, was granted, the amendment to be by interlineation, and pursuant to this leave the words above quoted were inserted in the petition. The petition stated two causes of action against the stockholders, one based upon their ownership of shares of stock for which full value had not been paid, and a second upon a failure to publish an annual notice of the indebtedness of the corporation. Counsel agree in the statement that the second of these was waived and that no evidence was introduced to prove or sustain it; that it was not of the issues litigated, was not urged, or was withdrawn from the issues in the trial court, and is not

urged here and need not be further noticed. The trial in the district court was of the issues joined upon the first cause of action, and in its decree the court set forth the findings, which, to the extent we need notice them particularly, were as follows: "The court finds from the evidence that the plaintiff, a corporation, on July 5, 1890, duly recovered judgment against the Dawson Town & Gas Company, a corporation, in the district court of Douglas county, Nebraska, in the sum of $763.38, and costs taxed at $15.68; and on September 3, 1890, the intervenor, the Crane Company, a corporation, duly recovered judgment against said defendant corporation in the county court of Douglas county, Nebraska, in the sum of $904.50, and costs taxed at $3.15; that the defendant the Dawson Town & Gas Company is insolvent and without property wherewith an execution may be in any part satisfied; that the authorized stock of the defendant corporation was $300,000, to be issued in shares of $100 each; that stock of the defendant corporation was issued to each of two of its incorporators, A. H. Cooley and J. T. Hoile, defendants, of the par value, and to the amount of $120,000; that as full payment for said stock said incorporators turned into said company certain real estate, subject to mortgages aggregating $25,000, the equity in which was at the time of the value of $20,000, and that said real estate was accepted by the directors of the defendant corporation in full payment of said stock, and that said stock was issued as fully paid and non-assessable; that of said stock so issued defendant Arthur H. Cooley is now the owner of 575 shares; defendant Norman A. Kuhn (as to the complaining creditors), of 350 shares; defendant Charles C. Woodworth, of 350 shares; and defendant Alexander G. Charlton, of 125 shares. The court further finds that the act of the directors in accepting said real estate in full payment of said stock was a fraud in law as to the creditors of said corporation, and that said estate was a payment on said stock

only to the amount of the actual value of the interest of said incorporators therein, and that there remains unpaid on said $240,000 the sum of $220,000; that defendants Arthur H. Cooley, Norman A. Kuhn, and Charles D. Woodworth had knowledge at the time they acquired their said stock of the manner in which the pretended payment was not accepted by the defendant company in good faith, and that the defendants owning shares of said stock are each liable for the unpaid portion thereof in such ratio to the whole amount unpaid as the number of shares owned by each bears to the whole number of said shares; *i. e.*, Arthur H. Cooley, in the sum of $52,708.33; Norman A. Kuhn, $32,083.33; Charles D. Woodworth, $32,083.33; and Alexander G. Charlton, $11,458.33."

The liability upon which this alleged cause of action was predicated, and which was and is relied upon, is provided for in the following section of the constitution of our state, being section 4 of article 11, referring to "Miscellaneous Corporations": "In all cases of claims against corporations and joint stock associations the exact amount justly due shall be first ascertained, and after the corporate property shall have been exhausted, the original subscribers thereof shall be individually liable to the extent of their unpaid subscription, and the liability for the unpaid subscription shall follow the stock." The plaintiffs claimed that the transactions which occurred at the inception of the defendant corporation, the issuance of stock and acceptance of the equity in certain land in payment for the stock, were of such a character as to constitute a fraud, and the transfer of the lands will only be considered a payment for the stock to the amount of their true values, and the stockholders be liable individually to creditors for any balance required to make the par or face value of the stock. The defendant company was organized for the following purposes, as shown by its articles of incorporation: "The business to be transacted by said corporation shall be the

buying of lands in the states of Iowa and Nebraska, platting into lots and selling the same, lending money on real estate and other securities, building houses, leasing and selling the same, erecting and furnishing buildings, machinery and all necessary appliances for the manufacture of brick, terra-cotta, tiling, and other products from clay, and the conducting of a general business of the manufacture and sale of brick, terra-cotta, tiling, and other products as aforesaid; acquiring by purchase and lease of lands upon which to sink wells, producing natural gas and oil, and acquiring by purchase, lease, or the exercise of the right of eminent domain, of lands for right of way for the laying of gas mains, laterals, and house connections; the erection of buildings and machinery for the manufacture, storage, and transmission both of artificial and natural gas and oils; the purchase, sale, and exchange of pipes, mains, fixtures, machinery, and material for the business of furnishing natural and artificial gas to municipalities and individuals; the mortgaging of the property of said association, procuring of loans; and, generally, the transaction of all business incident to the development and storage of oil and natural gas, and the manufacture of artificial gas and storage, transmission, sale, and delivery of such gases and oil to municipalities and individuals."

It appears from the testimony that Cooley, Hoile, Kuhn, and Woodworth organized the defendant company, signed the articles, and were directors and well acquainted with the details of its formation, the purchase of the lands and issuance of $240,000 in stock in payment for them. There were two tracts of land, one of 300 acres, known as the "Tolle Farm," and one of 320, known as the "York Farm." Coal had been discovered on the "Tolle Farm" and had been developed, or two shafts sunk on one forty-acre piece. The rights to all coal or all mineral existing under the surface of this forty acres had been conveyed to a Mr. Whiteman. Coal had been prospected for on the

other portions of this farm, but not developed or mined. Cooley and Hoile had contracted for the purchase of the "Tolle Farm" at some date prior to the formation of the defendant corporation in such a manner that they had what they termed an option on it, and after they had made arrangements for the creation of the corporation and its probable purchase of the land, they completed the deal and became the owners of the farm, paying therefor $21,000. The conveyance to them did not include the coal under the forty acres in which shafts had been sunk. The other 320 acres, or the "York Farm," belonged at the time of its purchase by Cooley and Hoile to the Perry Natural Gas Company, in which Cooley and Hoile had each a one-sixth interest. H. B. Stout, T. R. Pearson, and C. H. Wigton also each owned a one-sixth interest in the Perry Gas Company, and agreed to sell their interests to Cooley and Hoile for $5,000 each of stock of the Dawson Town & Gas Company, and the "York Farm" of 320 acres was conveyed to Cooley and Hoile. There were on this farm some gas wells which were in operation prior to and about the time of the sale to Cooley and Hoile. They then gave two mortgages on the 620 acres of land, one of $20,000 and one of $5,000, and conveyed it to the defendant corporation, it assuming and agreeing to pay the incumbrances, and Cooley and Hoile receiving as a further consideration for the transfer of the land to the company $240,000 in stock, or $120,000 each. Kuhn purchased fifty shares, for which he paid cash, as did also C. D. Woodworth, these being the only shares of stock sold for which money was paid or received. Cooley transferred $35,000 worth of his $120,000 of stock to Woodworth and a like amount to Bartlett. Hoile transferred $35,000 in stock to Kuhn, and on the date when the one hundred shares which Kuhn and Woodworth had bought were issued to them respectively there was issued to Bartlett, Kuhn, and Woodworth, respectively, $35,000 each of the

stock which had belonged a part to Cooley and part to Hoile. Neither Woodworth nor Kuhn nor Bartlett paid any cash or gave any definitive or fixed consideration for this $35,000 worth of stock. Cooley, when testifying, stated in relation to the issue to Woodworth, in answer to a question by the court, that a part of the consideration for the issue of the $35,000 in stock to him was that he, Woodworth, would subscribe for fifty shares of stock. Subsequently, during his testimony, he stated this was not the fact and that he did not think he had so testified. All parties agreed that these shares were issued to Bartlett, Woodworth, and Kuhn for assisting in floating the institution, to aid in selling stock, in inducing parties to go to Dawson and invest in lots or property or build factories and to contribute money when needed in the business of the corporation. Kuhn stated that he advanced to the company $7,000 and Woodworth claims that he contributed $5,400 to pay running expenses of the company, not as payment for or on stock, but advances which they expected to be repaid to them. The defendant corporation was organized in September, 1889. It continued its various operations for several months afterwards, when it ceased active business. Some of the parties testify for want of funds. The $20,000 mortgage was foreclosed and on February 28, 1891, sale of the property was made by the sheriff, the sum realized being $16,000. The foregoing are some of the facts and circumstances attendant upon and entering into the formation of the defendant corporation. There was considerable testimony on behalf of defendants which it was claimed tended to show the good faith of the members of the company in the transactions which occurred at or near the time of its formation, the purchase of the land and issuance of the stock in payment therefor; and by plaintiffs an attempt to show the want of good faith in the actions to which we have just alluded. The value of the land at the time it was conveyed to the corporation was also made

the subject of testimony on behalf of either party to the case, but we do not deem it necessary to quote from or summarize it.

It is urged that the findings of the trial court are not sustained by the evidence, and especially as to the points in regard to the alleged overvaluation of the property conveyed to the corporation in payment for stock of the face value of $240,000, the knowledge which it was claimed the parties who were actors in the formation of the corporation had of the excessive valuation of the land at the time it was conveyed to the company and the stock issued, and their participation or aquiescence in the transaction. We have carefully read and considered all the testimony, and, without entering upon a lengthy discussion of or commenting upon it, will say that we are satisfied that it is sufficient to support the findings of the trial judge.

It is further contended by the able counsel for defendants that it is not proved that in accepting the land at the valuation they did in payment for the stock they were acting otherwise than in good faith with each other and with the public, and although it may be claimed, and probably truthfully, that subsequent developments disclosed that there was an error of judgment, yet fraud in law or in fact cannot be imputed, and that in a case similar to the one at bar, in order to establish a basis for a recovery, the law requires that more than proof of an overvaluation of property conveyed or services rendered in payment for stock of corporations be given; that it must be shown that the overvaluation was intentional and therefore fraudulent; that what the parties have constituted a payment will be treated as a payment until impeached for fraud, even where the rights of creditors are involved; that before parties gave the corporation credit they should have examined its books, the condition of its affairs, and how the stock was paid for, and to what extent, and not having done so they were at fault, and a number of au-

thorities are cited to sustain the propositions announced in this contention. In some jurisdictions it is provided by law that stock purchased of a corporation, such as the one from the creation of which this controversy arose, must be paid for in money. In others that it may be paid for in money or in property or labor which the corporation is entitled to acquire, or can use in the furtherance or forwarding the purposes for which it was created. In some the provisions further require that the property or labor be the "money's worth" at a fair and reasonable value, and others that property or labor be received at its worth in money, and in good faith. In California there is a statute under which mining stock may be purchased at less than its par value without making the stockholder liable for such par value, and custom seems to have sanctioned a similar relaxation of the rule that par value must be paid. (*In re South Mountain Consolidated Mining Co.*, 7 Sawy. [U. S.], 32; *Ross v. Silver & Copper Island Mining Co.*, 26 Am. Law. Reg. [Minn.], 158.) But, as is said in a note to the last mentioned case, on page 164, "Concluding with reference to mines, it may be laid down as a general proposition, that, in the absence of a custom or statute, shareholders in a mining corporation are liable for the par value of shares subscribed by them, and if a custom to the contrary is relied upon to exonerate a shareholder from liability, such custom must be proved; it will not be judicially noticed." (See cases cited.) In this state there were no specific requirements or restrictions in relation to the manner of payment for the stock purchased, and no doubt the land, being such as it was within the province of the company to hold and appropriate for use in its business, could be received in payment for stock. There was no statutory requirement that payment should be in money or the money's worth; but without such an enactment, we think there is a rule of honesty and fair dealing, which should and will be recognized by the courts, which required it. It is the settled doc-

trine in this country that "the capital stock of a corporation is a trust fund, to be preserved for the benefit of corporate creditors," and this includes the unpaid subscriptions to such stock. It follows that the funds cannot be wasted or dissipated and that an acceptance of payment for stock subscriptions which is merely simulated, or any other arrangement or scheme by which something is allowed as a payment of subscriptions for stock, which lacks the element of good faith, will not be sufficient to and cannot impair or work the defeat of the trust. (*Scovill v. Thayer*, 105 U. S., 143; *Osgood v. King*, 42 Ia., 478; *Wetherbee v. Baker*, 35 N. J. Eq., 501.) It must be true that where a number of persons have organized themselves as a body corporate and enter the business arena as such and invite and entertain dealings on the faith and credit of a fund which, increased by gains or decreased by losses, will alone be available for the liquidation or payment of debts, that they will be held to fairness and good faith in fulfilling the promise they made to contribute to the fund which they hold out to the business world as the basis for credit. It is upon the faith of the amount of the capital stock, either fully paid in and existing in the form of assets of the corporation, or to be paid in, that the creditor has dealt with and allowed the corporation to incur the liability, or has extended to it the credit, and it seems but just and right to require that payment for stock in other than money be required to be made in the money's worth in good faith and honesty of purpose, and when the circumstances and facts of a sale and purchase of stock disclose that there has been knowingly less than these, that it shall not be upheld as against creditors, but the parties be compelled to right what is wrong, to pay and make good that which, through any device or scheme, has been withheld. Upon the question of the liability of stockholders to creditors on stock which had been issued for property received at an overvaluation the decisions of the courts are apparently irreconcilable. (For a review of

them see *Elyton Land Co. v. Birmingham Warehouse & Elevator Co.*, 9 So. Rep. [Ala.], 129.) We are satisfied that the weight of authority in this country is in favor of the doctrine that where any agreement is made whereby stock is knowingly and advisedly issued as paid in full, though but partially paid for, it may be set aside by creditors and the enforcement of payment in full of the subscription for the stock obtained for the satisfaction of the debts of the corporation. This is a result of the doctrine that the subscriptions for stock of a corporation are a trust fund for the payment of its debts, which is an American doctrine, and which does not prevail in England. (Taylor, Private Corporations, sec. 658, note 1.)

It may be conceded that when the power exists to accept property in payment for stock the corporation and subscriber may agree upon the value of property to be received in payment for stock in such manner as to be binding upon creditors, if there is no considerable advised and deliberate excessive overvaluations of the property, and that the stockholders will not be liable where the valuation was in good faith, although the property may subsequently prove to be of a less value than that placed upon it, or if there was nothing more than an honest mistake of judgment, but "a gross and obvious overvaluation of property, would be strong evidence of fraud," in an action by a creditor to enforce a personal liability. (*Coit v. Gold Amalgamating Co.*, 119 U. S., 343, 7 Sup. Ct. Rep., 231.) Where property is conveyed to a corporation as payment of a subscription for stock, it is insufficient to satisfy the liability of subscribers to the creditors of the corporation, if there has been a fraudulent overvaluation of the property,—an overvaluation knowingly and advisedly made. The property proffered and received as payment must be of such a value as to make it of the money's worth stated in the subscription, at a valuation made in good faith in an exercise of judgment honestly and fairly directed. (*Williams v. Evans*,

87 Ala., 725, 6 So. Rep., 702.) It will be sufficient to impeach the transaction to prove that the stock issued and delivered to the subscriber exceeded in amount the value of the property conveyed to the corporation in payment for the stock; that the parties to the transaction of sale and purchase of the stock knowingly and advisedly placed such overvaluation upon it that there was paid in stock for it an amount the par value of which was known to be more than the actual value of the property. (*National Tube Works Co. v. Gilfillan*, 124 N. Y., 302; *Wetherbee v. Baker*, 35 N. J. Eq., 501; *Osgood v. King*, 42 Ia., 478; *Boulton Carbon Co. v. Mills*, 78 Ia., 460; *Jackson v. Traer*, 64 Ia., 469; *Bailey v. Pittsburg & Connellsville Gas, Coal & Coke Co.*, 69 Pa. St., 334; *Thayer v. El Plomo Mining Co.*, 40 Ill. App., 345; *Elyton Land Co. v. Birmingham Warehouse & Elevator Co.*, 92 Ala., 407; *Leucke v. Tredway*, 45 Mo. App., 507; *Crawford v. Rohrer*, 59 Md., 599; *Northwestern Mutual Life Ins. Co. v. Cotton Exchange Real Estate Co.*, 46 Fed. Rep., 22; *Scovill v. Thayer*, 105 U. S., 143.) The trial court established by its findings that the facts of the present case brought it within the foregoing rules, and there was sufficient testimony to support the findings.

It is urged that these parties—creditors,—before they gave credit to the corporation, should have examined the books of the company and ascertained whether appellants had paid in full for the stock or in what manner the payment had been made, and, having failed to do so, cannot now complain or be heard, and cases are cited in support of this proposition. In Cook, Stock, Stockholders & Corporation Law, section 199, it is said: "The public, in dealing with a corporation, has the right to assume that its actual capital in money or money's worth is equal to the capital stock which it purports to have, unless it has been impaired by business losses." We think the true rule to be that "Entries in the books of a corporation are, as a general rule, competent evidence of the proceedings of the corpora-

tion and of the acts and votes of its officers transacted at official meetings; but such entries are not notice to third persons of the acts or resolutions entered upon its minutes. As to third persons, the books of a corporation are private books, and such persons are not chargeable with knowledge of matters therein recorded, any more than a third person would be chargeable with knowledge of entries made against him in the books of a private person. (1 Greenleaf, Evidence, sec. 493; 1 Wharton, Evidence, sec. 662; *Haynes v. Brown*, 36 N. H., 545; *Marriage v. Lawrence*, 3 B. & Ald., 142;" *Wetherbee v. Baker*, *supra*.)

It is claimed that upon the abandonment of the alleged statutory default in respect to publication of notice the petition did not state a cause of action; that there was no sufficient allegation of fraud. We think the petition, as amended by leave of the court, sufficiently stated and charged fraud (*Northwestern Mutual Life Ins. Co. v. Cotton Exchange Real Estate Co.*, 46 Fed. Rep., 22); and the amendment and its allowance were entirely proper under the provisions of the Code.

Complaint is also made of the ruling of the trial court in sustaining an objection to an interrogatory propounded to one of appellants during his examination as a witness. No statement or offer of proof was made, and we cannot hold that the objection was wrongfully sustained. (*McMillan v. Malloy*, 10 Neb., 235; *Stanton County v. Canfield*, 10 Neb., 388; *Sieber v. Weiden*, 17 Neb., 584.) The judgment of the district court is

AFFIRMED.

RAGAN, C., dissenting.

This is a suit by some creditors of an insolvent private corporation against its stockholders. The creditors seek to recover their debts of the stockholders on the ground that the latter are indebted to the corporation on their stock subscription. This corporation was authorized by its charter

to engage in the business of buying and selling lands in the states of Nebraska and Iowa; to plat and lay out real estate into lots, blocks, streets, and alleys for the purposes of cities, villages, and towns; to manufacture brick, terra-cotta, tiling, and other articles that could be made from fire clay; to pipe gas and to mine coal, etc. The authorized capital stock of the corporation was $300,000, of which the appellants Hoile and Cooley took $240,000, and paid for the same by deeding to the corporation 620 acres of land. The petition of the appellees filed in the court below charged that the appellants in payment for the stock subscribed by them fraudulently turned into said corporation certain real estate at a false and fictitious valuation, to their knowledge. The district court found that the act of the directors in accepting said real estate in full payment of said stock was a fraud in law as to the creditors of said corporation. The court also found that the value of the real estate transferred to the corporation by Cooley and Hoile was $20,000.

The decision of this court treats this conclusion of the district court as a finding that the transaction by which Cooley and Hoile transfered their real estate to the corporation in payment of their stock subscription was a fraud in fact. I do not think the district court found or meant to find that the transaction was a fraud in fact, but, assuming that it did, let us inquire on what evidence this finding was based. Briefly it is that Cooley and Hoile owned 620 acres of land and that they conveyed this land to the corporation in payment and satisfaction of their contract of subscription with it to take $240,000 of its capital stock; that this land at that time was worth only $20,000, and that the debts of the appellees were contracted long after this transaction. If this evidence stood alone—stood unexplained—it might support the finding, but it does not stand alone and unexplained. I quote the evidence given by appellee's own witness.

Q. Do you know whether at that time there had been any prospecting for gas; that is, at the time the conveyance of the land was made to the corporation?

A. Yes, sir; there had been considerable prospecting for gas and they might have incidentally prospected for coal at that time.

Q. Had gas been found?

A. Yes, sir.

Q. How long had gas been found on this farm at this time? In what quantities; state what you can as to the fact.

A. My recollection as to the time of first striking gas there is that it was perhaps fifteen to eighteen months after gas was first struck there on this farm until the transfer to the Dawson Town & Gas Company. As to the quantity I would not feel qualified to state more than just what I could naturally see, not being a gas expert.

Q. Do you know how many of the gas wells were sunk prior to this time?

A. As to the number I could not definitely say, more than I know that there was one we called the "original well," and I think that there were one or two others, but I am not sure whether they were sunk. If they were it was just previous to the time of the Dawson Town & Gas Company buying this.

Q. What can you say as to the flow of the gas from the well or the continuity of it and the amount of it?

A. * * * I have been there a good many times and lived right there, and of course everybody had a natural curiosity to see them, and I have been there a time or two when there were excursions. I know when they were turned on and lighted up flames would flash up there twenty-five or thirty feet and higher.

Q. Was any use or attempted use ever made of this gas after this?

A. After they acquired it?

Q. After they acquired it.

A. Yes, sir.

Q. You may state what use it was put to.

A. These wells are situate about a mile from the town of Dawson * * * and probably a mile and a quarter from what is known as the "brick plant," and the company, after acquiring these wells, laid pipes from the wells to the brick plant * * * up to the edge of the town or into where the town was planned, * * * and this gas was piped into our store, and we burned it one winter; I do not know but two winters.

Q. Did they ever use it at the brick yard?

A. They used it there and they piped it into the furnace under the engine, and they also piped it into the brick-kilns.

Q. When were the developments of coal made there?

A. The first developments?

Q. Yes, sir.

A. The fall of 1886 and the winter of 1886 and 1887.

Q. Do you know anything about in what quantities coal was taken from this land?

A. At what time?

Q. Well, after it was developed, from 1887 on.

A. Up to what time?

Q. Well, any time.

A. Well, they sunk a shaft in the fall of 1886 and they took out coal that winter and they run the most of that winter there; they run from eight to fifteen miners and they would take out, oh, probably twenty tons a day. * * *

Q. How long did this continue?

A. Well, this continued until the Dawson Coal Company bought. * * *

Q. At the time this property was transferred to the Dawson Town & Gas Company was any of this land platted into a town site?

A. There had been a survey made. * * *

Q. Well, take it in the fall of 1889. How much of a town was there then?

A. There were about three hundred inhabitants.

Q. Do you know how many of these gas wells there were there?

A. At the present time?

Q. Well.

A. Well, they were all there that was. They were all either sunk in 1889 or previous to that. I think there are five wells, four of these that they have houses over and use, and the fifth one is what we call a gurgle and that is filled with water and they have trouble with it, but there is more or less gas in it. * * * I think there is only four that is piped that I spoke of.

The lands conveyed to the corporation by Cooley and Hoile are contiguous, all situate in the state of Iowa, and one tract of about 300 acres had been purchased by Cooley from the Tolle estate. Tolle in his lifetime had leased to certain parties the right to mine coal on forty acres of the lands conveyed to Cooley, the lessees paying Tolle a royalty of ten cents per ton. Now let us hear once more the appellee's witness:

Q. Now, there has been some other leases spoken of. Under what particular portion of the lands were those leases?

A. Those were under the lands acquired by Mr. Cooley.

Q. In the transfer to Cooley, who acquired the right to those leases, did he?

A. Yes. * * *

Q. So that whatever would accrue on those leases would belong to Mr. Cooley instead of the Tolle heirs?

A. Yes, on those leases, that is right. * * * Mr. Tolle died in February, 1888. In the spring of 1887 * * * Mr. Tolle requested me to make a measurement, to take the measurement on coal and estimate how much royalty he would receive at ten cents per ton on the coal.

I made the measurements in the first bank or clay shaft that was sunk. * * * I made those measurements, and on the figures that Mr. Tolle gave me three cubic feet per ton of solid coal, and if the veins were the same it would net him about $400 per acre if the veins were the same on the other forties as they were on this forty where I made the measurements. * * *

Q. What was the thickness of the vein where you made the measurement?

A. The one vein was three feet ten inches, I believe. These veins vary, however, in different parts of the mine, and they would run from two feet and one-half to four feet and one-half.

Q. Is this village of Dawson situate on a part of this land?

A. Yes; * * * about a mile and a quarter from the gas well. * * *

Q. It is the coal land?

A. Yes, sir.

Q. Has coal been mined there continuously from that time on?

A. No, sir; coal has not been mined continuously, that is, if you mean by that taken out all the time, because there was a time for nearly a year there was no coal taken out.

Q. The mines were not worked?

A. No, sir.

Q. When was that?

A. That was previous to this last fall. * * *

Q. When was it first discovered on the York farm; part of the land conveyed by Cooley?

A. It must have been in 1888.

Q. Prior to the development and discovery of gas and the development of coal there, how much of a town was Dawson?

A. Well, in January, 1887, there wasn't only four or five houses in Dawson. * * *

Q. How many houses were there in January, 1888?

A. Well, I should say, just estimating from my recollection, about fifty.

Q. After the purchase of this land * * * was there any town platted known as the town of Dawson, by the Dawson Town & Gas Company?

A. Yes, sir.

Q. How many acres?

A. One hundred and sixty.

Q. Did you sell any of these lots?

A. A few; yes.

Q. At what price?

A. They varied in price.

Q. What did the business lots sell for?

A. From $125 to $266.

Q. How many miners worked there?

A. All the way from one hundred and fifty down at different times.

Q. How large a brick plant was started there after the gas was used?

A. The main part of the building was about sixty by sixty-five or seventy-five and the drying room was about fifty by probably one hundred and fifty.

Q. Do you know anything about the fire clay there under that ground?

A. I know there is fire clay there.

Q. To what extent?

A. I do not know.

Q. Did you ever make an examination?

A. No, sir; no personal examination. I have been in the mines where fire clay was and asked miners about it.

Q. Out of what was brick manufactured?

A. Brick was manufactured out of shale and fire clay.

Q. Where was that latter to be obtained?

A. Out of the coal mines, and I think some little surface clay was used, but not very much.

Q. And that was all understood and known to exist there at the time of this sale by the Tolle heirs to Cooley?

A. Yes, sir.

The evidence quoted above stands absolutely uncontradicted, and is the evidence introduced by the appellee itself. This evidence does not show that the appellants intentionally overvalued the lands which they conveyed to the corporation in payment of their stock subscription. Granted that subsequent events have proved that the appellants erred in their judgment as to the valuation put on their lands, will the evidence that the appellants erred in their judgment support a finding of fraud? I think that this evidence shows that at the time these lands were deeded to the corporation for its stock it was honestly believed and reasonably believed by the appellants that they were coal, gas, and fire clay lands. Shafts had been sunk, coal had been mined on part of the lands, on other parts of the lands wells had been drilled and inflammable gas had been found, and the existence of these facts led to the organization of this corporation. The evidence further shows what appellants did after they became stockholders of this corporation, and this is important here in determining with what intention they made the transfer and took the stock; and the evidence shows that these appellants expended thousands of dollars of their money in efforts to develop these lands believed to be coal and gas lands, and had these proved to be what they appeared, if their development had disclosed valuable coal and oil deposits, who can estimate their value? Yet the transaction by which the corporation became possessed of these lands and the intent with which they were conveyed by the appellants would have been the same transaction and the same intent. A transaction cannot be said to be in good faith simply because successful, nor can a fraudulent intent be inferred because the transaction proved unsuccessful. Fraud will never be imputed when the circumstances and facts upon

which it is predicated may consist with honesty and purity of purpose. (*Clemens v. Brillhart*, 17 Neb., 335.) Is it not clear that this evidence is entirely consistent with the theory of honesty of purpose on the part of these appellants? Overvaluation of property will not of itself support a finding that the transaction was fraudulent, but the proof must show that such overvaluation was made intentionally and with a sinister motive. (*Schenck v. Andrews*, 57 N. Y., 133; *Boynton v. Andrews*, 63 N. Y., 93; *Lake Superior Iron Co. v. Drexel*, 90 N. Y., 87.) An overvaluation of property affords no ground of complaint to creditors of the corporation, provided such payment is made and accepted in good faith. (*Young v. Erie Iron Co.*, 65 Mich., 111.) While the contract stands unimpeached as fraudulent, the courts, even where the rights of creditors are involved, will treat that as a payment which the parties have agreed should be a payment (*Phelan v. Hazard*, 5 Dill. [U. S.], 45); and the fraud must be an actual fraud in the sense of a dishonest purpose, not a theoretical fraud (*Bank of Fort Madison v. Alden*, 129 U. S., 372). If these appellants have not paid in full their stock subscription, they are indebted to the corporation; but the appellee has no greater rights against the appellants than the corporation has; and how can it be said under this evidence that this corporation could impeach this transaction between it and Cooley and Hoile for fraud? If the corporation cannot impeach the contract, the creditors cannot do it. There is no evidence in this record that Cooley and Hoile, or either of them, in anything that they did in and by which they became stockholders of this corporation, were actuated by other than the purest motives. In *Coit v. Gold Amalgamating Co.*, 119 U. S., 344, the capital stock of the corporation was fixed at $100,000. Previous to the organization of the corporation the incorporators had been engaged in mining operations, and when the corporation was organized they turned in their mining property to

the corporation in payment of the full amount of the capital stock taken by them. The corporation became insolvent, and a creditor having obtained a judgment against it had execution issued, and it being returned no property found, he sued the stockholders to recover his debt, the ground of his action being that the property turned in by the stockholders to the corporation in payment of the stock subscribed was turned in at a fictitious valuation. The evidence disclosed that the property, when turned into the corporation, was of small value as compared to the amount of stock given for it, but that the stockholders, the nature of the property considered, had good reason to believe that it was of as great value as that put upon it by them and that the entire transaction was in good faith and not entered into for the purpose of putting the stock on the market, selling it, and keeping the proceeds and thus victimizing the public, but with a view on the part of the stockholders to develop the mines supposed to be on the property. The argument was that the transaction should be held fraudulent solely on the overvaluation of the property transferred to the corporation. The court said: "If it were proved that actual fraud was committed in the payment of the stock, and that the complainant had given credit to the company from a belief that its stock was fully paid, there would undoubtedly be substantial ground for the relief asked. But where * * * the shareholders honestly and in good faith put in property instead of money in payment of their subscription, third parties have no ground of complaint. * * * Where full paid stock is issued for property received, there must be actual fraud in the transaction to enable creditors of the corporation to call the stockholders to account." To the same effect see *Peck v. Coalfield Coal Co.*, 11 Ill. App., 88; *Coalfield Coal Co. v. Peck*, 98 Ill., 139. They believed, and the evidence shows that they believed, and they had good reason to believe, and the evidence shows that they had such reason to

believe, that these properties were worth at the time they transferred them to this corporation four or five hundred dollars an acre. They proved their faith by what they did. They paid thousands of dollars for these lands and they spent thousands of dollars in their efforts to develop them after they became the property of the corporation. The evidence does not show, it does not tend to show, that they organized this corporation for the purpose of victimizing the public; they did not organize it for the purpose of putting this stock upon the market and selling it and pocketing the proceeds. The finding of a district court is entitled to serious consideration and great weight, but if the learned district court found in this action that the act of the appellants in paying for their stock in the land conveyed to the corporation was fraudulent, the finding has no evidence upon which to rest. The effect of this finding is to stamp the intention with which an act is done fraudulent or not as it may finally turn out that the party in doing the act did or did not err in his judgment; and where the act is a part of a commercial venture, whether or not it is fraudulent is made to depend upon the success or failure of such venture. To this I cannot agree.

C. W. TRACEY V. STATE OF NEBRASKA.

FILED NOVEMBER 8, 1895. No. 6928.

1. **Criminal Law: MOTION FOR NEW TRIAL: MISCONDUCT OF JURY: EVIDENCE: REVIEW.** A defendant convicted of a felony, in support of his motion for a new trial, filed an affidavit alleging misconduct of the jury while deliberating. The statements of the affidavit were not corroborated, and it did not appear by what means the affiant obtained possession of the facts alleged to constitute the misconduct. The averments of the affidavit were not denied by the state. *Held*, (1) That the trial court was not

obliged to take the statements of the affidavit as true; (2) that whether there had been misconduct of the jury was a question of fact for the district judge; (3) that in trying such issue the district judge had a right to weigh and consider, as against the statements in the impeaching affidavit, the presumption of law that the jurors had obeyed their oaths.

2. ———: SENTENCE: QUESTIONING CONVICT. A district court, when called upon to pronounce judgment against a person convicted of a felony, is not limited to the sole question whether the person so convicted has anything to say why judgment should not be pronounced against him.

3. ———: ———: ———. The district court in such a case has no authority to coerce an answer from a prisoner to any question whatever; but what inquiries the court shall make of such a prisoner, aside from the inquiries provided by statute, or whether any, is a matter resting entirely in its discretion.

4. **Robbery**: SENTENCE. The obvious intent of the statute in fixing the punishment for the crime of robbery at imprisonment from three to fifteen years was to invest the trial court with discretion to grade the punishment, within the limits of the statute, according to the enormity of the offense; to take into consideration in fixing the punishment all the circumstances in evidence under which the crime was committed; perhaps to consider the age, the mental condition, and the previous good character of the person convicted.

5. ———: EVIDENCE. In a prosecution for robbery everything said and done by the prosecuting witness and the prisoner at the time of the felonious assault is competent evidence as being a part of that transaction.

6. ———: INFORMATION: ALLEGATION AS TO CHARACTER OF MONEY. An information for robbery charged the prisoner with having robbed the prosecuting witness of $14.50, "good and lawful money of the United States." *Held*, That the averment as to the character of the money was surplusage and need not be proved in order to sustain the conviction. (Criminal Code, sec. 420.)

7. **Modification of Instructions.** It is error for the district court to modify an instruction requested, by interlineation or erasure, and thus give such an instruction. (Compiled Statutes, ch. 19, sec. 53.)

8. **Review.** To secure the reversal of a judgment in an error proceeding to this court it is not enough to establish that the dis-

trict court erred, but it must appear from the record that such error may have caused or contributed to the judgment under review and thus have prejudiced the complaining party.

ERROR to the district court for Lancaster county. Tried below before STRODE, J.

The facts are stated by the commissioner.

Walter A. Leese, for plaintiff in error:

A juror during deliberation upon the verdict made statements of facts in the case within his own personal knowledge. These statements were prejudicial to plaintiff in error and are grounds of reversal. (*Richards v. State*, 36 Neb., 18; *Wood River Bank v. Dodge*, 36 Neb., 708; *Anshicks v. State*, 6 Tex. App., 524; *Wharton v. State*, 45 Tex., 2; *Winslow v. Morrill*, 68 Me., 362; *Morton v. State*, 1 B. J. Lea [Tenn.], 498; *Boody v. State*, 4 Yerg. [Tenn.], 111; *Wade v. Ordway*, 57 Tenn., 229.)

The information alleges the robbery of fourteen dollars and fifty cents "in good and lawful money of the United States." Torn bills are not admissible to prove this allegation. (*Taylor v. State*, 29 N. E. Rep. [Ind.], 415; *Coffelt v. State*, 11 S. W. Rep. [Tex.], 639.)

The court erred in giving an instruction modified by interlineations. (Consolidated Statutes, sec. 1072.)

The court, in defining the crime of robbery, should have instructed on the crime of larceny, and larceny from the person. Where the court undertakes to define the elements of the crime it should define the lesser offenses included in the crime. (*Stevens v. State*, 19 Neb., 647; *Brown v. State*, 33 Neb., 354, 34 Neb., 448.)

C. W. Starling, also for plaintiff in error.

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

RAGAN, C.

In the district court of Lancaster county C. W. Tracey was convicted of the crime of robbery and sentenced to the state penitentiary for seven years. He brings the judgment of the district court here for review and assigns as a reason for its reversal the following alleged errors:

1. In support of his motion for a new trial Tracey filed in the district court an affidavit alleging that while the jury that convicted him was deliberating upon its verdict one of the jurors stated to his fellows that he was personally acquainted with a witness who had testified on the trial in behalf of the prisoner; that this witness was an unchaste woman, unworthy of belief, and that her testimony could not be relied upon; that another juror, while the jury was deliberating upon its verdict, stated to his fellows that he also was personally acquainted with said witness; that he knew her when she was a respectable woman; that he now knew her to be unchaste and unworthy of belief. The witness referred to testified on the trial in behalf of the prisoner and her evidence tended to establish an *alibi* in his favor. The reputation of this witness for veracity was not assailed on the trial. The statements made by the prisoner in his affidavit were not denied by the state at the hearing of the motion for a new trial, and it is to be observed that the prisoner does not state in his affidavit by what means he became possessed of what he alleges occurred in the jury room while the jury was deliberating. The argument is now made that since the testimony of the said witness was material, and if believed by the jury, established the innocence of the prisoner of the crime for which he was tried, and since the reputation of said witness for veracity was not assailed on the trial and the truth of the statements made by the prisoner in his affidavit was not denied by the state, that the district court was compelled to take the statements made in such affida-

vit as true, and that such statements show such misconduct on the part of the jury as to vitiate the verdict, and that the district court erred in not so holding; but we are of opinion that the trial judge was not compelled to take the statements made in the prisoner's affidavit as true. The district court, in trying the issues presented by the motion for a new trial, had the right, if it was not obliged, to indulge the presumption that the jurors had been mindful of the oaths which they took, and had found the verdict which they had solely upon the evidence introduced on the trial of the case. What were the issues presented? Whether the juror had been guilty of such misconduct as to vitiate the verdict. This was a question of fact to be determined by the trial court from the competent evidence before it bearing on the subject. The law supplied, by presumption, the evidence on the one hand that the jurors had obeyed their oaths. This evidence, this presumption, the district court weighed and considered; on the other hand it weighed and considered the statements made by the prisoner in his affidavit impeaching the verdict; and after weighing this presumption in support of the verdict and the affidavit of the prisoner against the verdict it reached the conclusion that the evidence did not support the assault made upon the verdict. We think that the evidence before the district judge justified the conclusion reached. We agree with the supreme court of South Carolina in *State v. Duestoe*, 1 Bay, 377, where it is said there is no rule of law which requires a trial judge to believe affidavits filed impeaching a verdict, even though such affidavits are not contradicted, since the jurors themselves are under oath to well and truly try, etc. The evidence for and against impeaching a verdict in such a case is the oaths of the jurors upon the one side, coupled with the presumption that they have obeyed such oaths, and the statements in the impeaching affidavits upon the other side.

2. When Tracey was arraigned for sentence in the dis-

trict court he was asked by the trial judge how many terms he had already served in the state penitentiary, and he answered "two." The record does not disclose that Tracey made any objection whatever to answering this question. So far as the record shows, the question was promptly and voluntarily answered. It is now insisted that the district court had no authority of law for making such inquiry; that the only object which the trial judge could have had in making the inquiry was to increase the punishment of the prisoner for the crime of which he stood convicted if it should turn out that the prisoner had previously been in the penitentiary. Section 495 of the Criminal Code provides: "Before the sentence is pronounced, the defendant must be informed by the court of the verdict of the jury, and asked whether he has anything to say why judgment should not be pronounced against him." We do not think that a district court, when called upon to pronounce judgment against a person convicted of a felony, is limited to the sole question whether the person so convicted has anything to say why judgment should not be pronounced against him. This provision is for the benefit of the prisoner, is mandatory in his behalf, and if not complied with is ground for setting aside the judgment pronounced. (*Dodge v. People*, 4 Neb., 222.) We do not decide that the court has any authority to coerce an answer from a prisoner arraigned for a sentence to any question whatever, but what inquiries a court may make of such a prisoner, aside from the inquiry provided by the statute, or whether any, is a matter resting entirely in the discretion of the court. We do not know what the object of the trial judge was in inquiring of the plaintiff in error as to his having previously been in the penitentiary, nor are we obliged in this case to determine whether the court may take into consideration information so obtained from the prisoner in fixing his punishment for the crime of which he stands convicted. The law fixes the punishment for the crime of

robbery, of which the plaintiff in error was convicted, at imprisonment in the penitentiary for not less than three and not more than fifteen years. In this case, as already stated, the plaintiff in error was sentenced to the state penitentiary for seven years. If the district judge in fixing this punishment took into consideration that the plaintiff had previously been twice in the penitentiary, such fact does not appear in the record. The obvious intent of the statute in fixing the punishment for the crime of robbery at imprisonment from three to fifteen years was to invest the trial court with discretion to grade the punishment—within the limits of the statute—according to the enormity of the offense; to take into consideration in fixing the punishment all the circumstances in evidence under which the crime was committed; perhaps to consider the age, the mental condition and the previous good character of the person convicted. True the district court may determine what penalty shall be imposed solely from the evidence produced before the jury on the trial, but we do not think that the court is confined to that evidence alone in fixing the punishment. When the prisoner is inquired of by the court whether he has anything to say why judgment should not be pronounced against him he may make such statements of his previous good behavior, of his previous good character, of his age, of his condition at the time he committed the offense, and the influences which were brought to bear upon him and led to his commission of the crime as may induce the court "to temper justice with mercy" and to give the prisoner the least punishment provided for by the statute; and we cannot say that such action on his part would be an abuse of his discretion.

3. On the trial the state introduced evidence which tended to show that on the night of the 14th of April, 1893, one Osterlow was in the city of Lincoln intoxicated and drinking intoxicants; that about midnight Osterlow got into a hack at a hotel for the purpose of driving to his

home. The plaintiff in error, who was a hack driver, and two other hack drivers were also in or on the hack. They drove the hack in which Osterlow was to the outskirts of the city near a park where there were few people living. There they stopped the hack, jerked Osterlow out, knocked him down, demanded his money, and one of the three put his hand in Osterlow's pocket and took therefrom silver amounting to about three dollars. In the scuffle Osterlow held in his hand two five-dollar bills, and one of the parties in attempting to take these bills from Osterlow's hand tore them in two. The three parties then drove away, leaving Osterlow on the ground and in possession of the torn five-dollar bills, or the two pieces of said bills. On the trial the state offered in evidence these two parts of said two five-dollar bills which had been retained by Osterlow. To this evidence the plaintiff in error objected, on the ground that the indictment charged the plaintiff with robbing Osterlow of $14.50, "of good and lawful money of the United States;" that the torn bills offered in evidence had not been proven to be good and lawful money of the United States, and it had not been shown that they had any value. The objection was overruled, the torn bills admitted in evidence, and this ruling of the district court is now assigned as error. Conceding that these torn bills had not been shown to be good and lawful money of the United States, and had not been shown to have any value, we still think that the court did not err in permitting the torn bills to be introduced in evidence. These bills tended to corroborate the evidence of Osterlow as to the felonious assault made upon him by the plaintiff in error and the others with intent to rob him. These torn bills were the results of what occurred at the time the assault with intent to rob was made, and for that reason alone, if for no other, they were admissible in evidence. Everything said and done at the time of the felonious assault was competent evidence as being a part of that transaction.

4. The plaintiff in error requested the court to charge the jury as follows: "If you find from the evidence that no money was taken from the person or custody of the prosecuting witness, Osterlow, at the time of the alleged robbery, then the defendant is not guilty of the crime charged in the information, and it is your duty to return a verdict accordingly. In considering whether or not any money was so taken, it is the duty of the state to prove beyond a reasonable doubt that some money *other than the torn bills* was so taken, or to prove that the defendant took, or assisted in taking, such *torn bills, and that the parts of such torn bills thus taken were redeemable at their former full value.*" The refusal of the district court to give this instruction is the next error assigned here. The instruction was requested upon the theory that as the plaintiff in error was charged in the information with having robbed Osterlow of $14.50, of good and lawful money of the United States, it was incumbent upon the state to prove beyond a reasonable doubt that whatever money was taken from Osterlow by the plaintiff in error, or his accomplices, was in fact good and lawful money of the United States. Section 420 of the Criminal Code provides: "In every indictment in which it shall be necessary to make any averment as to any money, or bank bill, or notes, United States treasury notes, postal and fractional currency, or other bills, bonds, or notes, issued by lawful authority and intended to pass and circulate as money, it shall be sufficient to describe such money or bills, notes, currency, or bonds, simply as money, without specifying any particular coin, note, bill or bond; and such allegation shall be sustained by proof of any amount of coin or of any such note bill, currency, or bond, although the particular species of coin of which such amount was composed, or the particular nature of such note, bill, currency, or bond shall not be proved." In view of this provision of the Criminal Code we think that the expression in the information, "good and lawful

money of the United States," was surplusage, and that the state, in order to convict, was not bound to prove that the money of which Osterlow was robbed was good and lawful money of the United States. We are aware that a contrary conclusion was reached in *Taylor v. State*, 29 N. E. Rep. [Ind.], 415, in which state there is a statute almost identical with ours quoted above. We do not know how the supreme court of Indiana reached the conclusion it did in view of the statute. With all due deference to that court we feel bound to follow the express provision of our statute rather than the decision. In *Coffelt v. State*, 11 S. W. Rep. [Tex.], 639, it was held, where an indictment for robbery alleged that the money taken was "good and lawful money of the United States," that in order to convict the state was compelled to prove that the money was of the character alleged in the information. In the absence of a statutory provision, such as ours, we have no doubt but that is correct. The court did not err in refusing to give this instruction.

5. The court modified the instruction quoted above, requested by the plaintiff in error, by drawing a line with a pen through the words in italics in said instruction, and as thus modified gave the instruction. The action of the court in giving the instruction as thus modified by interlineation and erasure is another of the errors assigned here by the plaintiff in error. Section 53, chapter 19, Compiled Statutes, provides: "If the court refuse a written instruction as demanded, but give the same with a modification, which the court may do, such modification, shall not be by interlineation or erasure, but shall be well defined and shall follow some such characterizing words, as 'changed thus,' which words shall themselves indicate that the same was refused as demanded." There can be no doubt but that the district judge—doubtless unwittingly—disregarded this plain provision of the statute in giving to the jury this instruction erased and interlined as it was;

but the instruction was not excepted to on that account, and the instruction as originally drawn, we have seen, was one to which the plaintiff in error was not entitled and the instruction as given by the court correctly stated the law. The assignment must therefore be overruled. To secure the reversal of a judgment of a district court it is not enough, in an error proceeding, to establish the fact that the court erred, but it must appear from the record that there was an exception to the act and that such error may have prejudiced the party complaining of it. In other words, it must appear that the error of the court may have caused or contributed to the judgment complained of.

6. Another error assigned is that the verdict of the jury is not supported by sufficient evidence. Without summarizing it here we have not the slightest doubt but that it is. If all consideration of the evidence relating to the two five-dollar bills which Osterlow claims he had in his possession at the time he was assaulted by the plaintiff in error and his accomplices be disregarded, there is sufficient evidence remaining in the record to show that the plaintiff in error and his accomplices, at the time they assaulted Osterlow, robbed him of three dollars of silver.

Counsel for the plaintiff in error also indulges in criticisms upon certain other instructions given by the trial court. We have carefully examined all these instructions and find no criticism which we think merits our further attention. The judgment of the district court is in all things

AFFIRMED.

ELIZABETH GALLIGHER, APPELLANT, V. WILLIAM J. CONNELL ET AL., APPELLEES.

FILED NOVEMBER 8, 1895. NO. 5515.

Quieting Title: STARE DECISIS. The facts in this case and the law applicable thereto are substantially the same as those in *Connell v. Galligher*, 36 Neb., 749, and 39 Neb., 793, and following these cases, the decree is affirmed.

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

Gregory, Day & Day, for appellant.

Connell & Ives, contra.

RAGAN, C.

This is in appeal from a decree of the district court of Douglas county. The action was one in equity brought by Mrs. Galligher against Connell and others to have quieted and confirmed in her the title to certain real estate. The real estate involved is a part of the tracts, the title to which was litigated in *Connell v. Galligher*, 36 Neb., 749, 39 Neb., 793. The decision of the court in this last case controls and supports the decree appealed from. In the case at bar the district court found specially that Connell was the owner of the legal title to the premises in controversy. This finding was correct under the facts in evidence and the law. (See *Connell v. Galligher*, 36 and 39 Neb., *supra*, in which the evidence was substantially the same as in the case under consideration.) But this conclusion of the district court was correct, if we omit all consideration of *Connell v. Galligher*, 36 and 39 Neb., *supra*, and the evidence on which those decisions were based, for the reason in the case at bar Connell, among other defenses, pleaded that he and

his grantors had been in the open, notorious, exclusive, and adverse possession of the premises in controversy, claiming title thereto, for more than ten years before Mrs. Galligher brought this suit. The evidence in the record sustains such defense. The decree of the district court is

AFFIRMED.

IRVINE, C., not sitting.

STATE OF NEBRASKA, EX REL. BOARD OF REGENTS OF THE UNIVERSITY OF NEBRASKA, V. EUGENE MOORE, AUDITOR OF PUBLIC ACCOUNTS.

FILED NOVEMBER 8, 1895. No. 7997.

Vouchers: CLAIMS AGAINST STATE UNIVERSITY. Session Laws, 1895, chapter 65, providing for a uniform system of vouchers, applies to claims against the state university.

ORIGINAL application for *mandamus* to compel the respondent to issue a warrant in payment for property purchased for the use of the University of Nebraska in accordance with the certificate of the board of regents. *Writ denied.*

Ricketts & Wilson, for relator.

A. S. Churchill, Attorney General, and *George A. Day, Deputy Attorney General, contra.*

IRVINE, C.

The relator alleges that it purchased of one Beruh Liebisch certain philosophical treatises for the use of the University of Nebraska, to the value and at the agreed price of $22.06; that on June 26, 1895, the board of regents

having audited the account, found the same correct and issued its certificate, signed by its president and secretary, to the effect that Liebisch was entitled to payment of that amount from the appropriation of 1895, account current expenses, and directing the respondent to draw his warrant therefor on the university fund; that thereafter the board caused said certificate to be presented on behalf of Liebisch to the respondent, Liebisch being a resident of Germany; that the respondent refused to draw a warrant for the reason that the account was not verified and vouchered as provided by Session Laws of 1895, chapter 65. It is further averred that there was in the treasury of the state to the credit of the temporary university fund at that time the sum of $9,872.50. The relator prays for a writ of *mandamus* commanding the respondent to issue a warrant to Liebisch in accordance with the certificate. To this petition the auditor demurs. Session Laws of 1895, chapter 65, is entitled "An act to provide for a uniform system of vouchers for use for all disbursements of the state's funds, through the auditing and treasury departments of the state, and to provide for the affixing of an oath or affirmation thereto by the claimant, and to provide a penalty for the violation thereof." The act in its first section provides that within thirty days after its passage and approval the auditor shall prepare blank forms of vouchers for use in all the state's departments and for use of "all manner of claimants against the state who receive their pay by warrant drawn by the auditor upon the state treasurer." Other provisions of the section relate to the issuance of such vouchers in original, duplicate, and triplicate forms, as necessities of the especial institutions may require. Section 2 provides: "All claims against the state to be paid as hereinbefore provided shall be extended in full on the voucher and fully and carefully itemized, and accompanied in all instances, where possible, with the original bill or item of expense. Said bills or items, and each of them,

shall give the exact date of purchase or service rendered, quantity purchased, name of article or service, price per item, and total, and shall be properly signed by the party to whom the claim is payable, or his or its agent or attorney, or a member of the firm, and shall be signed in full by the name of the claimant," etc. Section 3 provides that with the original voucher there shall be an affidavit in form prescribed by the section. The remaining sections of the act are not material to the present inquiry. If this act is applicable to such claims as that now presented, neither the relator nor the claimant has shown a compliance therewith, and the writ must be denied. The question presented is, therefore, whether the act referred to applies to claims against the university.

The university derives its revenue in part from a state tax and in part from the proceeds of two grants of land by the federal government. One of these grants was by the act of congress of July 2, 1862, commonly known as the "Morrill Act." The other was contained in the enabling act of April 19, 1864, section 10 of which granted seventy-two sections of land for the use and support of a state university, to be appropriated and applied as the legislature might prescribe for the purpose named, and for no other purpose. The first state constitution contained no provision relating to either of these grants, except in sections 1 and 2 of article 7, providing that the principal of all funds arising from the sale of land granted to the state for educational purposes shall forever be preserved inviolate and undiminished; and the income arising therefrom shall be faithfully applied to the specific objects of the original grants or appropriations, and that the university lands and other educational lands shall not be sold at less than $5 an acre. The present constitution contains in different sections substantially similar provisions, but the minimum price of sale is changed; and it is provided that the general government of the university shall, under direction of the legisla-

ture, be vested in a board of regents, whose duties and powers shall be prescribed by law. (Constitution, art. 8, sec. 10.) There was no legislation to create the university or to give effect to these grants until 1869, when a comprehensive act was passed. (Session Laws, 1869, p. 172.) Under this act the university was created, and its general government vested in a board of regents, who are constituted a body coporate, and empowered as such to sue and be sued, to make and use a common seal, to acquire real and personal property for the use of the university and to dispose of the same whenever the university can be advantaged thereby. The only limitation to the power of the board in this respect was that they should not dispose of grounds upon which any building of the university should be located without the consent of the legislature. By this act as subsequently amended the funds of the university were declared to be two—the endowment fund and the regents' fund. The endowment fund consisted of the proceeds of the sales of lands and funds acquired by donation or bequest. The regents' fund consisted of the proceeds of investment of the endowment fund, of the rental of lands leased, tuition and text-book fees, and the state tax. In other words, the endowment fund was the principal and the regents' fund the income available for use. By act of March 2, 1870, the state treasurer was made the custodian of the endowment fund and he was required to pay over monthly to the treasury of the university all moneys accruing to the regents' fund. The treasurer of the university was authorized to pay moneys out of this fund on warrants drawn upon the secretary and countersigned by the president of the board of regents. In 1875 an act was passed (Session Laws, 1875, p. 154), entitled "An act providing for the more efficient government of the state university and for the disposition of funds belonging thereto." By this act the office of treasurer of the university was abolished and the state treasurer "made custodian of the

funds," the treasurer of the university being directed within sixty days to turn over to him all moneys, securities, books, and papers pertaining to his office. This act also provided that disbursements from the university fund should be made by the state treasurer upon warrants drawn by the auditor, who should issue warrants upon certificates issued by the board of regents, signed by the secretary and president. It also provided that all money accruing to the university was thereby appropriated to the use of the university. So the legislation stood until the act of 1895 was passed. In 1877 the effect of this legislation was drawn in question in the case of the *Regents v. McConnell*, 5 Neb., 423. This was an action by the regents to recover from McConnell certain moneys belonging to the regents' fund which had come into his hands as treasurer of the university and which he refused to turn over to the state treasurer as required by the act of 1875. The court reviewed the legislation down to that time and declared that the board of regents of the university was not a private eleemosynary corporation, because its whole interest and franchises are the exclusive property and domain of the government itself; that it was a public corporation, and but a part of the machinery employed in carrying on the affairs of state; that upon such corporation the legislature had power to impose such modifications, extensions, or restraints as the general interest and public exigencies may require; that the rights of such corporation never become vested as against the state; that the effect of the act of 1875 was to take from the treasurer of the university the control of the regents' fund and make the state treasurer its custodian, "to be disbursed by him upon warrants drawn by the state auditor in the same manner as funds appropriated for the support of other state institutions not incorporated are disbursed." The court further said that by virtue of the act of 1875 "the custody and control of these funds are taken from the corporation and placed in the custody of the state treasurer for disbursement; and under the settled doctrine

of the law, in respect to public corporations of this kind, the legislature had the undoubted authority to take these funds from the custody of the corporation and divest it of any corporate power over them, and having done so, we think it clear that the regents, as such corporation, have no authority in law to bring or maintain this action." Here then, two years after the passage of the act of 1875, and eighteen years ago, the court construed it as taking from the board of regents the control of the regents' fund and vesting it in the state treasurer, to be disbursed in the same manner as funds of other state institutions, and the logic of the decision reduced the university very much to the same position as other state institutions, although its distinct corporate character was affirmed. In *State v. Liedtke*, 9 Neb., 468, the court said: "Upon careful examination of the several acts of the legislature and constitutional provisions applicable to this question, we are forced to the conclusion that it was the intention of the legislature, which passed the act of February 23, 1875 (Session Laws, 1875, p. 154), that all moneys belonging to the university fund then in the hands of the treasurer of the board of regents should not only be paid over to the state treasurer, but should thereupon be covered into the state treasury, and that thereafter all like funds, upon reaching the hands of the state treasurer, would by force of law be covered into the state treasury." The court therefore held that the state treasurer acted in receiving and paying out the revenues of the university in his capacity as state treasurer, and not as treasurer of the university, and that no funds could be drawn except in pursuance of a specific appropriation. The doctrine of these two cases was reaffirmed in *State v. Babcock*, 17 Neb., 610, Chief Justice COBB dissenting, but unfortunately not writing an opinion to support his dissent; and the same line of reasoning controlled the decision in *State v. Moore*, 36 Neb., 579.

It is argued that the act of 1895 does not in terms apply

to claims against the university; that it relates only to claims against the state; that the university, being a body corporate, capable of being sued, its debts are to be enforced by suit and judgment against the corporation; that the state is not liable therefor, and its creditors are not claimants against the state; and further, that the act of 1895, if construed to apply to claims against the university, would be unconstitutional, as abridging and restricting the constitutional powers of the board of regents. We think the argument addressed to the construction of the act cannot be maintained without disregarding the decisions we have cited. For eighteen years it has been held that the university is merely a state institution and its board of regents a state agent; that the funds of the university were by the act of 1875 not merely entrusted to the state treasurer as custodian for the university, but were covered into the treasury and became a part of the state's funds entrusted to him in his official capacity as state treasurer; that for the withdrawal of such funds specific appropriations are necessary, as in the case of other state institutions. Hence the logical conclusion that the constitutional provisions and legislative enactments in regard to drawing of warrants by the auditor must apply. The legislature in passing the act of 1895 must be presumed to have had in contemplation these decisions, and the construction so given by this court to the legislation affecting the university, and, therefore, in using the term "claims against the state" it was not the legislative intent to except from the operation of the act claims against the university. So far as the constitutional question is concerned, it will be observed that while the constitution vests the general government of the university in the board of regents, this government is to be "under direction of the legislature," and the powers and duties of the board are merely such as "shall be prescribed by law;" that is, by the legislature. The decisions already cited necessarily imply such a construction of this provision as

permits to the legislature the greatest latitude in extending or restricting these duties and powers. In *Regents v. McConnell, supra*, it was clearly the view of the court that the vesting of the general government of the university in the board of regents did not prevent the legislature from depriving the board of the control of the university funds. The act of 1895 is complete in itself, relating generally to the forms and requisites of vouchers, and must be held to have operated an implied repeal of that part of the act of 1875 which required warrants to be issued on the certificate of the board of regents. Claims against the university must be presented to the auditor upon vouchers drawn in conformity with the act of 1895.

The foregoing has been written merely from the standpoint of authority. We do not feel that decisions which have so long controlled the operations of the board of regents, of state officers, and of the legislature itself, in matters affecting the university, should be overruled if such a course can be avoided, and this case cannot be otherwise resolved without overruling those decisions; but we feel that we would be placing ourselves in a false attitude did we not before leaving this subject express our opinion to the effect that our minds do not assent to the reasoning of the line of decisions referred to. Were the question a new one, we would take an entirely different view, both of the validity and the construction of the act of 1875.

WRIT DENIED.

NORFOLK NATIONAL BANK V. P. SCHWENK & COMPANY.

FILED NOVEMBER 19, 1895. NO. 5808.

1. **Usury:** ACTION FOR PENALTY: LIMITATION. An action against a national bank to recover the penalty provided in section 5198 of the Revised Statutes of the United States, for knowingly taking and receiving usurious interest, must be brought in two years from the time the usurious transaction occurred. (*First Nat. Bank of Dorchester v. Smith*, 36 Neb., 199.)
2. ———: ———: SET-OFF. Following the decisions of the supreme court of the United States, it was *held* that usurious interest paid a national bank on a note cannot be applied by way of set-off or payment against the principal sum due in any suit by the bank upon such note.
3. **National Banks:** USURY. Where a national bank knowingly charges usurious interest upon a loan of money which is included in the note, in an action to enforce the contract, the entire interest is forfeited. Where illegal interest has been paid to a national bank, the borrower may recover double the amount of interest actually paid, if the action is brought within two years after such payment is made.

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

Powers & Hays, for plaintiff in error, cited: *Driesbach v. Second Nat. Bank*, 14 Otto [U. S.], 52; *Farmers & Mechanics Bank v. Hoagland*, 7 Fed. Rep., 159; *Barnet v. Second Nat. Bank*, 98 U. S., 555; *Higley v. First Nat. Bank*, 26 O. St., 75; *Central Nat. Bank v. Pratt*, 115 Mass., 539.

Barnes & Tyler, *H. C. Brome*, and *B. T. White*, *contra*, cited: *First Nat. Bank of Whitehall v. Lamb*, 50 N. Y., 95; *Hintermister v. First Nat. Bank of Chittenango*, 64 N. Y., 212; *National Bank of Auburn v. Lewis*, 75 N. Y.,

516; *First Nat. Bank v. Commonwealth*, 9 Wall. [U. S.], 353.

E. K. Valentine, also for defendants in error.

NORVAL, C. J.

This action was brought in the court below on the 5th day of August, 1889, by Peter Schwenk & Co. under the provisions of section 5198 of the Revised Statutes of the United States to recover the penalty therein prescribed for taking and receiving usurious interest. The petition contains thirty-eight counts, which are substantially alike, excepting as to the date and amount of the loans made by the defendant to the plaintiffs, and the date and amount of illegal interest paid on such loans.

The first count alleges, in effect, that on the 5th day of August, 1889, the plaintiffs, as principals, and T. H. Eghert, as surety, executed and delivered to the Norfolk National Bank their promissory note, therein set forth, payable to the order of said bank, calling for the sum of $582.80, due in sixty days, with interest at ten per cent per annum from maturity; that at the same time plaintiffs paid to the defendant and the defendant unlawfully and wrongfully received as interest upon said note, from the date thereof until its maturity, the sum of $11.65, the same being interest at the rate of twelve per cent per annum in advance, and that by reason of the premises defendant became and is justly indebted to plaintiffs in the sum of $23.30, no part of which has been paid. The amount of usurious interest alleged in the other thirty-seven counts of the petition to have been paid by the plaintiffs, and unlawfully and knowingly received by the defendant, aggregate the sum of $1,046.25. The plaintiffs pray judgment for double the amount of interest alleged to have been paid, to-wit, the sum of $2,139.10. The defendant answered denying each and every allegation

of the petition, and set up, as a cross-demand against the plaintiffs, the sum of $3,500 due upon three promissory notes executed and delivered by the plaintiffs to the bank, described as follows: One for $1,500, dated May 1, 1889, and due in ninety days thereafter; one for the sum of $1,000, of the date of May 4, 1889, due in ninety days from date; and one for $1,000, dated April 19, 1889, maturing in ninety days from date. The notes called for ten per cent interest from maturity. The answer further avers that said notes are wholly unpaid and that each one arose out of the contracts and transactions set up in the petition, is connected with the subject of the action, and is a renewal of one of the notes described in the petition. The defendant asks judgment against the plaintiffs for the sum of $3,500, with ten per cent interest thereon, according to the terms of said notes. To this answer the plaintiffs replied, admitting the execution and delivery of the notes and the non-payment thereof, and alleged, in substance and effect, that said notes were renewals of the notes previously given to the defendant for various loans of money; that defendant at the time contracted for, exacted, and received, and the plaintiffs paid, as illegal interest on said original notes and renewals thereof for the use of the amounts borrowed, the sum of $833.50, which, together with the sum of $2,139.10 demanded in the petition, plaintiffs ask to have applied as payments on the notes forming the basis of the defendant's counter-claims or cross-demands.

Upon a trial of the issues to a jury, the following verdict was returned:

"We, the jury impaneled and sworn in the above entitled cause, do find as follows:

"1. We find for the plaintiffs P. Schwenk & Co. on the several causes of action set out in their petition, the sum of $2,139.10.

"2. We do further find for the defendant the Norfolk National Bank, on its several causes of action set up in the answer, the sum of $3,500.

"3. We do further find for the plaintiffs P. Schwenk & Co., on the several counter-claims or offsets set up in the reply, the sum of $802.50.

"And we further find that there is due from the plaintiffs to the defendant (the balance) the sum of $538.40."

From a judgment for the defendant entered on the verdict for $538.40, and from an order denying the motion for a new trial, the bank prosecutes a petition in error to this court. The evidence introduced on behalf of the plaintiffs below tended to sustain the averments contained in the several counts of the petition, and the jury found for the plaintiffs for the full amount claimed.

The main ground urged for a reversal of the judgment, and the only one decided, is that the plaintiffs were allowed, as a set-off against the notes described in the answer, the sum of $802.50, on account of usurious interest paid by the plaintiffs to the bank on the loans evidenced by said notes. It appears from the pleadings and evidence that the bank made the plaintiffs below loans upon the dates and for the amounts following: January 14, 1886, $1,000; June 16, 1885, $1,500; and May 11, 1886, $1,500. Plaintiffs at the same time executed their promissory notes for the respective sums, which were renewed from time to time, the notes set up in the answer being the last renewals thereof. On the making of the several loans and upon each renewal note, the plaintiffs paid the bank interest exceeding the lawful rate, all of said payments having been made more than two years prior to the bringing of this suit. The question is squarely presented whether the amount of interest paid a national bank on a usurious loan of money can be applied as a payment on the note given for the sum lent in an action brought to recover the principal sum? Section 5, chapter 44, of the Compiled Statutes of this state declares: "If a greater rate of interest than is hereinbefore allowed shall be contracted for or received or reserved, the contract shall not, therefore, be void;

but if in any action on such contract proof be made that illegal interest has been directly or indirectly contracted for, or taken, or reserved, the plaintiff shall only recover the principal, without interest, and the defendant shall recover costs; and if interest shall have been paid thereon, judgment shall be for the principal, deducting interest paid." There is no room for doubt that, as a general rule, where a loan is tainted with the vice of usury, in an action by the lender, to recover the debt, under the foregoing provision, all payments of interest by the borrower must be applied as payments *pro tanto* of the principal. (*Nelson v. Hurford*, 11 Neb., 465; *Knox v. Williams*, 24 Neb., 630; *Blackwell v. Wright*, 27 Neb., 269.)

It is contended that the statute of this state above quoted does not apply to national banks in so far as it allows all sums paid as usurious interest to be credited as a payment upon the principal debt, but that section 5198 of the Revised Statutes of the United States alone determines the penalties that shall be imposed upon national banks for exacting illegal interest. This section provides: "The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it and which has been agreed to be paid thereon. In case a greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back in an action in the nature of an action of debt twice the amount of interest thus paid from the association taking or receiving the same, provided such action is commenced within two years from the time the usurious transaction occurred." The foregoing section has more than once been under consideration by this court. In construing its provisions in the case of *Hall v. First Nat. Bank of Fairfield*, 30 Neb., 99, it was said: "It is apparent that this section covers two classes of cases. The last clause

provides that when illegal interest has been paid to a national bank double the amount so paid may be recovered back, while under the first clause of the section, if usurious interest has been knowingly charged, but not paid, a recovery can only be had for the amount borrowed; in other words, where illegal interest has been added into the note, but not paid, it cannot be recovered in an action brought for that purpose." The case was followed with approval in *McGhee v. First Nat. Bank of Tobias*, 40 Neb., 92. Under said section 5198, the loaning of money by a national bank at a usurious rate forfeits all interest, and in case interest has been paid on such a contract, the borrower may recover double the amount thereof where the action is brought within two years after such payment; but the federal statute contains no provision which authorizes the applying of payments of usurious interest upon the principal sum, while the statute of this state permits the deduction of interest payments from the principal.

Which statute should govern and control in this case? If the only remedy afforded the borrower, and the only penalty imposed upon a national bank, is that prescribed by said section 5198, it is clear that the plaintiffs below were not entitled to recoup from the face of the three notes set up in the answer any sum whatever on account of usurious interest paid thereon to the bank. It has been held in some of the sister states that national banks are not exempt from the penalties imposed by state laws for exacting usurious interest by such banking institutions. In other words, where a national bank makes a usurious loan and the statute of the state where the bank is located declares that the lender in such case should forfeit all interest, credit must be given for all the interest which has been paid on the contract. This court, likewise, without considering the point whether national banks are amenable to state laws relating to usury, has applied the interest paid on a loan of money tainted with the vice of usury as an offset

against the principal of the note. (*Exeter Nat. Bank v. Orchard*, 39 Neb., 485; *Hall v. First Nat. Bank of Fairfield*, 30 Neb., 99.) Now our attention has been challenged to the fact that the supreme court of the United States has announced a contrary doctrine. Mr. Justice Swayne, in delivering the opinion of the court in *Farmers & Mechanics Nat. Bank v. Dearing*, 1 Otto, 29, in construing the provisions of section 5198 of the Revised Statutes of the United States, uses this language: "The national banks, organized under the act, are instruments designed to be used to aid the government in the administration of an important branch of the public service. They are means appropriate to that end. Of the degree of the necessity which existed for creating them, congress is the sole judge. Being such means, brought into existence for this purpose, and intended to be so employed, the states can exercise no control over them, nor in anywise affect their operation, except in so far as congress may see proper to permit. * * * The power to create carries with it the power to preserve. The latter is a corollary from the former. The principle announced in the authorities cited is indispensable to the efficiency, the independence, and indeed to the beneficial existence of the general government, otherwise it would be liable in the discharge of its most important trusts to be annoyed and thwarted by the will or caprice of every state in the Union. Infinite confusion would follow. The government would be reduced to a pitiable condition of weakness. The form might remain, but the vital essence would have departed. In the complex system of polity which obtains in this country the powers of government may be divided into four classes: Those which belong exclusively to the states; those which belong exclusively to the national government; those which may be exercised concurrently and independently by both; and those which may be exercised by the states, but only with the consent, express or implied, of congress. Whenever the will of the

nation intervenes exclusively in this class of cases, the authority of the state retires and lies in abeyance until a proper occasion for its exercise shall recur. * * * It must always be borne in mind that the constitution of the United States, 'and the laws which shall be made in pursuance thereof,' are 'the supreme law of the land' (Const., art. 6), and that this law is as much a part of the law of each state, and as binding upon its authorities and people, as its own local constitution and laws. In any view that can be taken of the thirtieth section [Revised Statutes, 5198] the power to supplement it by state legislation is conferred neither expressly nor by implication. There is nothing which gives support to such a suggestion. There was reason why the rate of interest should be governed by the law of the state where the bank is situated, but there is none why usury should be visited with the forfeiture of the entire debt in one state, and with no penal consequence whatever in another. This, we think, would be unreason, and contrary to the manifest intent of congress." In the case from which the above quotation was taken it was held that a national bank is not liable to the penalties imposed by the usury laws of a state, reversing the decision of the court of appeal of the state of New York upon that question. The case in 1 Otto was reaffirmed in *Barnett v. Second Nat. Bank of Cincinnati*, 8 Otto [U. S.], 555; *Driesbach v. Second Nat. Bank of Wilkes Barre*, 14 Otto [U. S.], 52, and *Stephens v. Monongahela Bank*, 111 U. S., 197, the court in these several cases holding that in an action by the bank on a note given as a renewal of a usurious loan, usurious interest paid thereon could not be applied to the discharge of the principal debt. The same doctrine has been held by other courts. (*Farmers & Mechanics Bank of Mercer v. Hoagland*, 7 Fed. Rep., 159; *Central Nat. Bank v. Pratt*, 115 Mass., 539; *Davis v. Randall*, 115 Mass., 547; *Higley v. First Nat. Bank of Beverly*, 26 O. St., 75; *Huggins v. Citizens Nat. Bank of Kansas City*, 24

S. W. Rep. [Tex.], 926; *Rockwell v. Farmers Nat. Bank of Longmont*, 36 Pac. Rep. [Colo.], 905.)

It is insisted by counsel for defendants in error that congress, by the removal act of March 3, 1887, as corrected by the act of August 13, 1888, has subjected national banks to the laws of the respective states where they are located, so far as remedies are provided for the wrongs they may perpetrate. In the first subdivision of the act mentioned above it is provided: "That all national banking associations established under the laws of the United States shall, for the purposes of all actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the states in which they are respectively located." This language cannot be construed as making national banks liable to the penalties fixed by a state for exacting unlawful interest. The object and purpose of congress was to prevent the removal from the state to the federal courts of causes in which national banks are parties.

Whatever may be our own views of the question under consideration, we feel bound to keep in line with the decisions of the highest court of the land—the supreme court of the United States—upon all matters of which it is the final arbiter. It follows that the district court erred in allowing the plaintiffs below to offset against the three notes set up in the answer the amount paid the bank as interest on the usurious transactions. For the error pointed out, the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

PATRICK FORD, JR., V. STATE OF NEBRASKA.

FILED NOVEMBER 19, 1895. No. 7091.

1. **Jury**: RULINGS ON CHALLENGES: MOTION FOR NEW TRIAL: REVIEW. Alleged errors in overruling challenges to jurors for cause will not be reviewed by the appellate court where they were not called to the attention of the trial court in the motion for a new trial.

2. **Trial**: OBJECTIONS TO EVIDENCE: WAIVER. Where objection to the materiality or relevancy of testimony is not made when offered, and before it has gone to the jury, ordinarily it should be deemed waived.

3. ———: EXCLUSION OF EVIDENCE: HARMLESS ERROR. It is not reversible error to exclude testimony, where the fact attempted to be proved has been fully established by uncontradicted evidence.

4. ———: ———: REVIEW. Where a question is asked a witness on the examination in chief, to which objection is made, and sustained by the court, in order to obtain a review of the ruling the party desiring the evidence must offer to prove the facts sought to be elicited by the question.

5. **Review**: TRANSCRIPT. The transcript of the record filed in this court imports absolute verity. If incorrect, or it fails to speak the truth, the correction must be made in the trial court and not in this court.

6. **Criminal Law**: INSTRUCTION AND ARGUMENT AS TO PENALTY. Where the jury are not required to fix the punishment in a criminal prosecution, it is not error for the trial judge to refuse to instruct them as to the penalty prescribed by statute for the offense, or to permit that question to be argued to the jury.

7. **Larceny**: INSTRUCTIONS. In a prosecution for larceny as bailee, an instruction which fails to charge that the original taking of the property must be felonious is not for that reason erroneous. The gist of the offense in such a prosecution is the conversion of the property without the knowledge and consent of the owner thereof with the intent to steal the same.

8. ———: ———. *Held*, That the charge of the court, to the effect that every sane person is presumed to intend the natural and

probable consequences of his voluntary acts, was not only abstractly correct, but was applicable to the case made by the evidence.

9. **Intoxication as Defense:** INSTRUCTIONS. *Held*, That the sixth instruction correctly stated the rule relating to the defense of intoxication.

10. **Instructions.** It is a well settled rule that instructions should be construed together, and if, when considered as a whole, they properly state the law, it is sufficient.

11. ———: REVIEW. The supreme court will not reverse a case for the refusing of an instruction, where the substance thereof has been given in other instructions.

12. **Larceny:** EVIDENCE. Evidence examined, and *held* sufficient to sustain a conviction of larceny as bailee.

ERROR to the district court for Douglas county. Tried below before SCOTT, J.

Mahoney, Minahan & Smyth, for plaintiff in error.

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

NORVAL, C. J.

The plaintiff in error stands convicted of the offense of larceny, as bailee, of a diamond ring of a value of more than $35, the property of one Catlin. The material and undisputed facts in the case, as disclosed by the bill of exceptions, are substantially as follows: Patrick Ford, Jr., the plaintiff in error, resided in the city of Fremont. A short time prior to the 7th day of March, 1894, he applied to the superintendent of the Fremont, Elkhorn & Missouri Valley Railroad Company for the position of brakeman on that road, and was informed that in the near future he would be given work. After waiting a few days he made a visit to his parents' home, in the city of Omaha, and while there, on the morning of the date above stated, he received word, to the effect, that if he returned to Fre-

mont he could secure the promised position as brakeman. He replied that he would be there in the morning. During the day of March 7 he drank intoxicating liquors, and by night he was somewhat under their influence. He continued to drink intoxicants until about 11 o'clock in the evening, when he entered the saloon of Wright & Coleman on South Twelfth street, where he met Charles Catlin, an old acquaintance, and the prosecuting witness. Ford invited Catlin and others to drink with him, which they did. Catlin was wearing a diamond ring of the value of $55, which Ford saw, and the latter said, "That's a nice ring. Let's see it. Take it off." Catlin removed the ring, handed it to Ford, who put it on his finger and displayed it to those present. Afterwards Ford suggested that they visit Pat Horrigan's saloon, located at Twelfth and Davenport, and as they started, Catlin asked for the ring. Ford replied, "I will let you have it in a few minutes. I want to go up there and flash it." Upon reaching Horrigan's they drank together two or three times, and then they went to Martin Shields' saloon, which was just closing, and they passed by, stopping at Ella Mitchell's for a short time. From there they returned to Horrigan's, and, after taking several drinks, they went back to Ella Mitchell's. Both went into the house together, and after they had been there a few minutes, Ford went out of the back door, saying that he was going to the water closet. He failed to return, and Catlin did not see him again. About 8 o'clock in the morning of March 8, Ford, under the assumed name of Meyers, went to the pawn shop of H. Friedman, borrowed $10 of him and pawned therefor Mr. Catlin's ring. Mr. Ford signed the pawnbroker's book "Jim Meyers, 1024 Davenport street." In the forenoon of the same day Ford went to Fremont, but claims he has no recollection of what he had done until he awoke about noon, when he found himself in Gannon's grocery store in Fremont. At this time Mr. Gannon, with whom he was

acquainted, gave Ford a cigar, and the latter, on putting his hand in is pocket to procure a match with which to light the cigar, discovered the pawn ticket which he had received for the ring. Within a brief period he wrote a letter to Catlin, informing him what he had done with the ring and inclosing therein the pawn ticket, which Catlin received the same day. Ford went to work for the railroad company, and two or three weeks later he was arrested for stealing the ring.

The first complaint made in the brief relates to the overruling of the prisoner's challenge for cause of juror Coombs. The ruling just referred to cannot be reviewed, since the attention of the trial court was not challenged to the same by the motion for a new trial. It is too firmly settled in this state to require the citation of authorities in support thereof that allegations of error will be disregarded, upon a review of a cause in this court by petition in error, where they are not pointed out in the motion for a new trial.

Upon the trial one John Wright was called and examined as a witness on behalf of the state. On his direct examination he was asked by the county attorney this question: "You may state whether or not that ring which you hold on your hand, which is marked 'Exhibit 1' in this case, is the ring which you saw on the hand of Pat Ford the evening of March 7, to the best of your knowledge." The witness answered, "It is, to the best of my knowledge;" whereupon the defendant moved to strike the answer as immaterial and incompetent, which was overruled, and an exception was entered. This ruling is presented for review by the second assignment of error. The answer responded to the question. If it was incompetent or immaterial to the issues, an objection should have been made on that ground when the interrogatory was put to the witness. It is too late to raise such objections, after the answer of the witness had been taken, without objection.

(*Palmer v. Witcherly*, 15 Neb., 98; *Oberfelder v. Kavanaugh*, 29 Neb., 427; *Western Home Ins. Co. v. Richardson*, 40 Neb., 1.) In no event, even though this evidence was incompetent, could a reversal be had for that reason, since it was conclusively established by other uncontradicted testimony that Exhibit 1 was the identical ring which Mr. Catlin owned and which he let the prisoner have. Moreover, we are satisfied that the testimony of Mr. Wright, to which objection was made, was admissible. True, the witness testified concerning the identity of the ring to the best of his knowledge. It was only from his knowledge of the matter that he could speak. If the defendant had desired to ascertain the witness' means of information of the matter he should have interrogated him in regard thereto.

The third, fourth, fifth, seventh, and eighth assignments of error are not well taken. They are based upon the refusal of the trial court to permit certain witnesses to answer questions framed for the purpose of eliciting the condition of the defendant as to his being under the influence of liquors on March 7. It had already been shown that the defendant was drinking heavily, where, how often, and the kind of liquors he drank, and the effect they had upon him. There was no dispute among the witnesses upon that point, and had the testimony excluded been received, it only would have been cumulative in its nature.

By the ninth assignment is presented the ruling of the court in sustaining the objection of the state to the question asked the accused as to whether or not he had any sleep between the time he left Mitchell's place and the time he reached Fremont. The decision of court upon this point cannot be reviewed, since no offer was made in the court below to prove the fact sought to be elicited by the interrogatory. (*Kearney County v. Kent*, 5 Neb., 227; *Masters v. Marsh*, 19 Neb., 458; *Mathews v. State*, 19 Neb., 330; *Lipscomb v. Lyon*, 19 Neb., 511; *Connelly v. Edgerton*, 22 Neb., 82; *Burns v. City of Fairmont*, 28 Neb., 866.)

Two assignments, the tenth and eleventh, relate to the remarks of the trial judge during the argument of the cause to the jury. In support of the charge of misconduct imputed to the judge were read the affidavits of the accused, his attorney, C. J. Smyth, W. S. Shoemaker, Lee Herdman, and Oscar J. Pichard. Opposing these are the affidavits of Mr. Slabaugh, the deputy county attorney, and Mr. Henderson, the court stenographer. The record also contains the statement of the presiding judge, of what was said and done. It is not important that we stop and consider whether the language used by the court was prejudicial or not, since the record fails to disclose that the attorney for the accused excepted thereto at the time, but shows whatever exception was made was only to a remark confessedly unprejudicial. It should be stated that so far as the affidavits are concerned those filed on behalf of the prisoner show a proper exception was taken, while the counter-affidavits show such was not the fact. Whether a party excepts to a ruling, or to the conduct of the trial judge, must be determined alone from the record; an issue of fact cannot be made thereon in this court. The transcript imports absolute verity, and cannot be impeached. If incorrect, or if it fails to speak the truth, the correction must be made in the district court and not here. (*Weander v. Johnson*, 42 Neb., 117.) The record failing to disclose any exception to the remarks of the trial judge, of which complaint is here made, the same cannot be reviewed.

What has been said disposes of the thirteenth assignment of error, which is that the court erred in not informing the defendant of the verdict of the jury, and in not asking him whether he had anything to say why sentence should not be pronounced against him. Unfortunately for the accused this assignment is not supported by the record. The journal entry in the case, a certified copy of which is before us, affirmatively shows that the prisoner, on being arraigned for sentence and judgment, was informed of the verdict

and of the penalty provided by law for the crime of which he had been found guilty, and was asked by the court if he had anything to say why sentence of the court should not then be pronounced against him, and the defendant replied he had nothing to say. It is contended that the record is incorrect, and the journal entry is sought to be impeached by the affidavits. This, as we have seen, when considering the previous assignment, cannot be done in that mode in this court.

It is insisted that prejudicial error was committed in the failure of the trial judge to inform the jury of the statutory penalty attaching to the offense charged, and denying to counsel for the prisoner permission to comment on the penalty before the jury. It is obvious that both contentions must stand or fall together. If it was the duty of the court to instruct the jury what the penalty was, then it was a fair subject of discussion before the jury, otherwise it was not. Two cases are cited by counsel for the accused to support the propositions advanced, viz., *People v. Cassiano*, 30 Hun [N. Y.], 388, and *Collins v. State*, 5 Tex. App., 38. The last case was decided in a state having a statute which makes it the duty of the jury, in a criminal prosecution, when the prisoner is found guilty, to assess the punishment, in all cases where the same is not absolutely fixed by law, to some particular penalty. (Texas Criminal Code, sec. 626.) We can readily see, under such legislative enactment, that the court should inform the jury of the penalty imposed by law for the offense charged. It would be part of the case. Without being so instructed, the jury could not intelligently and properly determine the punishment. But we have no such law in this state as obtains in Texas, except in capital cases, hence the decision in *Collins v. State* cannot be regarded as a precedent to be followed here. The case decided by the New York court, already cited, sustains the contention of counsel for plaintiff in error; but it is not a well considered opinion, nor is any authority cited in that

state, or elsewhere, to support the doctrine. The judge who prepared the opinion disposes of the question in the following brief language: "We think the information should have been given. In all cases the jury should know the effect of their verdict. While it is proper to instruct them that, when a crime is proven, the extent of the punishment therefor is no sufficient reason why a verdict according to the facts found should not be rendered, yet, as a part of the case, the punishment should be known by the jury." In states where the courts, and not the jury, impose the punishment, the effect or consequences of a verdict of guilty in a criminal case does not concern the jury. They have no right to convict an innocent person because the statutory punishment is light, nor can they acquit one proven guilty of a crime merely because the punishment for the offense prescribed by the law is severe. It follows that where the jury have nothing to do with the punishment prescribed by law for the offense, it is not error for the court to fail to inform them of the statutory penalty. It is discretionary with the trial judge whether he do so or not. Mr. Bishop, in his work on Criminal Procedure (vol. 1, sec. 480), lays down the rule, in effect, that if the punishment is for the court, it need not instruct them as to the penalty, but otherwise if the jury fixes the punishment. (See *Russell v. State*, 57 Ga., 420.)

The next assignment of error is predicated upon the fourth paragraph of the instructions, which reads thus: "If you find from the evidence, beyond a reasonable doubt, that defendant obtained the ring in question temporarily from said Charles Catlin, and that he afterwards, without the knowledge or consent of said Charles Catlin, unlawfully disposed of said ring at a pawn-shop and received money thereon, such an act on the part of the defendant would be a conversion of the property in question to defendant's own use; and if you find, beyond a reasonable doubt, that defendant unlawfully converted said

ring to his own use by disposing of the same at a pawnshop, and received money thereon, with intent to steal the same, then defendant would be guilty of larceny of said ring the same as if he had originally feloniously stolen said property from the said Charles Catlin at the time he obtained possession thereof from said Charles Catlin if he did obtain it."

It is argued that this instruction is fatally defective, in that it omitted the element of "felonious taking," and *Mead v. State*, 25 Neb., 444, and *Barnes v. State*, 40 Neb., 545, are cited to support the proposition. Those cases are clearly distinguishable from the one at bar. They were prosecutions for simple larceny, while this is for larceny as bailee. In the decisions referred to the original taking must have been felonious in order to constitute the offense charged, while such is not the case in a prosecution like this. Here the gist of the offense is not the felonious taking of the ring, but the conversion thereof by Ford without the knowledge and consent of the owner, with the intent to steal it. The statute under which the information in this case was filed, section 121*b* of the Criminal Code, declares "That if any bailee of any money, bank bill, or note, goods, or chattels shall convert the same to his or her own use, with an intent to steal the same, he shall be deemed guilty of larceny, in the same manner as if the original taking had been felonious." The instruction includes every element of the offense described in the statute.

It is insisted that the instruction is defective for the reason that the word "same" in the sentence, "pawned the ring and received money thereon with intent to steal the same," refers to the word "money" and not to the word "ring." This criticism is without merit. The word "same" refers to "ring," and the jury must have so understood. This is made clear by the portion of the instruction following the sentence quoted above. The jury could not have inferred from the language employed in the in-

struction that they should find the defendant guilty if the evidence showed that he obtained money on the ring with the intent to steal the money. The instruction was not misleading or uncertain.

The foregoing remarks dispose of all the objections urged against the fifth instruction, excepting the one directed to the opening sentence of the instruction, which reads: "Every sane person old enough to be accountable for his acts is presumed to intend to do that which he does do, and is presumed to intend the natural and probable consequences of his voluntary acts, and such presumption becomes conclusive in the absence of evidence to the contrary." It is not contended that this portion of the charge was abstractly incorrect, but it is urged that it was not applicable to the case. In other words, that a specific intent to steal had to be proved,—that is, an intent distinct and separate from the acts done,—and that the rule laid down by the court appertains only where a general intent is sufficient, and not where a specific intent must be shown. It is true the intent to steal the ring had to be proven, but the fact, like any other, could be established by the facts and circumstances detailed by the witnesses. Doubtless, where one who has the lawful possession of the property of another converts the same to his own use, the intent to convert alone might be inferred from the acts, rather than the intent to steal; but whether such inference shall be drawn depends upon the facts of each particular case. The mere proving of the conversion alone, not coupled with any criminating circumstance, would be insufficient to establish the intent to steal. The jury could not have understood by the instruction that from the fact of the conversion of the ring they were bound to find that the defendant had a specific intent to steal the same. The instruction, as an entirety, left to the jury to determine the question of intent with which the act was committed from a consideration of all the evidence adduced. The objection to the instruction is overruled.

The next assignment is based upon the sixth instruction, which reads: "The defendant claims that at the time he disposed of the ring in question he was so under the influence of liquor that he was incapable of forming an intent to steal, and for that reason he claims he is not guilty. Drunkenness is no excuse for crime. If the state has proved, beyond a reasonable doubt, that defendant, at and within the county of Douglas and state of Nebraska, at or about the time named in the information, temporarily obtained the property in question from the said Charles Catlin; that while holding the possession of the property he unlawfully and feloniously converted said property to his own use, without the consent of the said Charles Catlin, by disposing of said property at a pawn-shop, with the intent feloniously to permanently appropriate the same to his own use, against the will of said Charles Catlin, then the burden would rest upon the defendant to satisfy you by evidence that he was so under the influence of liquor at the time that he was mentally unable to form an intent in his mind to steal said property, or raise a reasonable doubt in your minds, after careful weighing and consideration of all the evidence in the case, whether he is guilty, because of such a state of intoxication at the time as not to be able to form an intent to steal. You are to determine this matter from all the evidence in the case." Objection is made to the sentence, "Drunkenness is no excuse for crime." The soundness of this statement cannot be successfully controverted. (3 Rice, Criminal Evidence, sec. 387; *Hoyt v. Utah*, 104 U. S., 631; *Hill v. State*, 42 Neb., 503.) Drunkenness was urged as a defense, and the fact that the court informed the jury that it was no excuse for crime, in no manner tended to belittle the prisoner's defense, as in the brief suggested.

It is strenuously insisted that the sixth paragraph of the charge cast the burden upon the defendant below to show that he was intoxicated when he converted the ring to such

an extent that he was unable to form an intent to steal the property. The instruction is not susceptible of such interpretation. If the defendant succeeded in showing that he was incapacitated at the time, by reason of drunkenness, to form an intent to steal, or if he raised a reasonable doubt in the minds of the jury upon that point, he was entitled to an acquittal. While the language used in the instruction might have been more concisely as well as clearly expressed, yet we are unable to see how it could have misled the jury. It was only necessary that the evidence raise a reasonable doubt of the prisoner's ability to form an intent to steal, to make the defense available, and this idea is sufficiently expressed in the instruction. It did not require that the defendant satisfy the jury of this defense, either by a preponderance of the evidence or beyond a reasonable doubt. If the evidence raised a reasonable doubt as to his ability to form an intent, it was sufficient.

Complaint is made of the eighth instruction, which is in the following language: "If you find the defendant guilty you will determine in your verdict, under the evidence and these instructions, the value of the property, or what it was worth in the market." By this instruction the jury were told to fix the value of the ring in case a verdict of guilty was returned at what it would bring, or was worth, in the market. This, doubtless, was the correct rule. It is true the instruction does not state whether the value was to be determined by a preponderance of the evidence, or beyond a reasonable doubt; but this point was covered by the second instruction, by which the jury were told that the burden was upon the state to establish beyond a reasonable doubt each material averment in the information. The jury, therefore, were fully informed by the court that the value of the property must be established beyond a reasonable doubt. Instructions must be construed together, and if, when considered as a whole, they properly state the law, it is sufficient. (*St. Louis v. State*, 8 Neb., 406; *Mur-*

phy v. State, 15 Neb., 383.) Applying this rule to the case at bar, we are convinced the prisoner's theory of defense was fairly submitted to the jury, and no prejudicial error was committed in refusing the instructions asked by him. The points upon which instructions were asked were fully covered by those given by the court upon its own motion, and it was not error to refuse to repeat them. (*Olive v. State*, 11 Neb., 1.)

It is finally insisted that the verdict was not sustained by the evidence. That the defendant converted the ring to his own use is undisputed, and the careful perusal of the evidence discloses that it was sufficient to warrant the jury in finding that the conversion was felonious and with the intent to steal, and that the accused was sufficiently sober at the time he pawned the property to form such an intent. The judgment is

AFFIRMED.

JEREMIAH C. WILCOX ET AL. V. STATE OF NEBRASKA.

FILED NOVEMBER 19, 1895. NO. 7086.

1. **Contempt**: REFUSAL OF WITNESS TO BE SWORN. A witness in attendance upon a court, who, on being ordered to be sworn or affirmed, contumaciously refuses, is guilty of a contempt of court, and is punishable therefor.
2. ———: ———: RECORD. But it is not a contempt of court for a witness to decline merely to be sworn, but he must also refuse to be affirmed, and the record must so disclose.
3. ———: REFUSAL OF WITNESS TO TESTIFY. A witness who contumaciously refuses to answer any legal and proper question asked him is guilty of a contempt.
4. ———: COMMITMENT. When a witness is committed for contempt for refusing to testify, the questions asked and refused to be answered must be stated in the order of commitment.

ERROR to the district court for Douglas county. Tried below before BLAIR, J.

David Van Etten and *J. C. Wilcox*, for plaintiffs in error.

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

NORVAL, C. J.

These proceedings were instituted in this court to review certain orders made by the court below by which Jeremiah C. Wilcox and Sherman Wilcox were adjudged to be in contempt of court. It appears from the record that on the 6th day of June, 1894, one Harry Carton recovered a judgment in the district court of Douglas county against the plaintiff in error, Jeremiah C. Wilcox, in the sum of $1,237.13, besides costs of suit. An execution was issued upon this judgment on the 25th day of June, 1894, which upon the same day was returned by the sheriff unsatisfied for want of goods and chattels or lands and tenements of the defendant in the county upon which to levy the writ. Thereupon proceedings in aid of execution were instituted before Judge Blair, one of the judges of the district court in and for Douglas county, under the provisions of section 532 *et seq.* of the Code of Civil Procedure, by the filing of the affidavit of one L. F. Crofoot, setting up the recovery of the aforesaid judgment, the issuing of the execution thereon, and the return thereof unsatisfied; that the judgment debtor is interested as a stockholder in certain specified corporations, which interests, together with other property, both real and personal, of which he is possessed, he refuses to disclose or apply towards the satisfaction of said judgment, and that Sherman Wilcox is in possession of the facts with reference to Jeremiah C. Wilcox's ownership of the stock in said corporations, and is a material witness in the proceedings. The district judge made an order com-

manding the said Jeremiah C. Wilcox and Sherman Wilcox to appear before him at a time and place stated therein to answer under oath all questions concerning the interests of Jeremiah C. Wilcox in said corporations, or concerning his other property, as may be propounded to them, and further, that they bring with them the original subscriptions for stock and the stock books of each of said corporations. This order was personally served upon each of the Wilcoxes, and Sherman Wilcox having failed to appear at the time fixed for his appearance, a *capias* was issued to the sheriff commanding him to arrest and bring the said Sherman before the district judge for examination, which writ was accordingly executed. The record shows the following proceedings were had and taken: "Whereupon the said Sherman Wilcox, now being before the court, refused to be sworn and refused to testify. Thereupon the said Sherman Wilcox was adjudged to be in contempt of court," and was committed to the county jail until he should signify his willingness to obey the order of the judge and submit to an examination. The record further discloses that Jeremiah C. Wilcox appeared before Judge Blair, and upon being sworn, refused to give testimony. Thereupon he was adjudged guilty of contempt, and sentenced to pay a fine of $100, and to stand committed to the jail of the county until such fine is paid and he signify his willingness to answer such questions as might be put to him under the direction of such judge. The foregoing orders adjudging the plaintiffs in error guilty of contempt are before us for review. There is no bill of exceptions in the record, and the question is presented for our consideration whether the findings of the district judge are sufficient to sustain the orders complained of.

It will be observed that Sherman Wilcox was adjudged in contempt of court for declining to be sworn and for refusing to testify, and Jeremiah C. Wilcox was punished as for a contempt for declining to answer questions. Under

the statutes of this state a witness, before giving testimony, is required to take an oath to testify to the truth, the whole truth, and nothing but the truth. The oath is to be administered in the mode most binding upon the conscience of the witness. (Code, sec. 365.) By section 894 of the Code of Civil Procedure it is provided that "whenever an oath is required by this code, the affirmation of a person conscientiously scrupulous of taking an oath shall have the same effect." Section 669 declares: "Every court of record shall have power to punish by fine and imprisonment, or by either, as for criminal contempt, persons guilty of any of the following acts: * * * Fifth—The contumacious and unlawful refusal of any person to be sworn or affirmed as a witness, and when sworn or affirmed, the refusal to answer any legal and proper interrogatory." It requires no argument to show that in this state a witness in court may be sworn by taking the statutory oath, or he may refuse to be sworn on the ground of conscientious scruples, in which case he may affirm. There can be no doubt that where a witness in a court of record, on being ordered to be sworn or affirmed, contumaciously refuses to do either, he is guilty of contempt; but it is not a contempt of court for a witness to decline merely to be sworn by taking the usual oath administered to witnesses, since the statute gives him the right to affirm. The finding of the district judge was insufficient and fatally defective, in that it failed to set forth that Sherman Wilcox refused to be affirmed, as well as declined to be sworn. Presumptions and intendments will not be indulged to support a conviction for contempt of court. (*Hawes v. State*, 46 Neb., 149.)

It remains to be determined whether the plaintiffs in error were rightfully adjudged guilty of contempt for refusing to testify. It cannot be doubted that the refusal of a witness to testify at all may be punished as a contempt of the court or officer of whom his testimony is required, in case the court or officer has jurisdiction of the controversy

or proceeding in which the witness is called upon to give his evidence. The statute, section 360 of the Code of Civil Procedure, provides: "Every attachment for the arrest, or order of commitment to prison of a witness by a court or officer, pursuant to this chapter, must be under the seal of the court or officer, if he have an official seal, and must specify particularly the cause of the arrest or commitment; and if the commitment be for refusing to answer a question, such question must be stated in the order." The language quoted is imperative, and requires, when a witness is committed for contempt for refusing to testify, or answer a question asked him, that such question asked and refused to be answered shall be stated in the order of commitment. This was not done in either of the orders under review. So far as this record discloses, no question of any kind was propounded to either of the plaintiffs in error, or that either refused to answer any legal or proper interrogatory. The findings, for this reason, are wholly insufficient upon which to base the convictions. The orders adjudging plaintiffs in error guilty of contempt must be set aside.

REVERSED AND REMANDED.

MARY MCDONALD, APPELLANT, V. JOHN GRABOW ET AL., APPELLEES.

FILED NOVEMBER 19, 1895. No. 5765.

Appeal: TRANSCRIPT: AUTHENTICATION. In order to effect an appeal from the district to the supreme court, it is necessary to file with the clerk of this court, within the time prescribed by statute, a transcript of the proceedings, authenticated by the certificate of the clerk of the district court. Such requirement is jurisdictional, and the stipulation of the parties or their at-

torneys stating that the transcript contains all the proceedings will not supply the omission of the certificate of the clerk of the trial court.

APPEAL from the district court of Sarpy county. Heard below before SCOTT, J.

J. J. O'Connor, for appellant.

George A. Magney, contra.

NORVAL, C. J.

The appeal in this case must be dismissed because no transcript of the proceedings, authenticated by the certificate of the clerk of the district court, has ever been filed in this court. In the record is a stipulation signed by the parties to the effect that the transcript contains all the proceedings in the case, but this does not meet the requirements of the statute relating to appeals to the supreme court, Code, section 675, which declares: "The party appealing shall, within six months after the date of the rendition of the judgment or decree, or the making of the final order, procure from the clerk of the district court and file in the office of the clerk of the supreme court a certified transcript of the proceedings had in the cause in the district court, containing the pleadings, the judgment, or decree," etc. The stipulation of the parties does not take the place of the certificate of the clerk of the district court. The requirement of the statute, regarding the authentication of the transcript by the clerk of the district court, is mandatory. (*Moore v. Waterman*, 40 Neb., 498, and cases there cited.) For the reason stated, the appeal cannot be entertained and it is accordingly dismissed.

APPEAL DISMISSED.

STATE OF NEBRASKA, EX REL. FRANKLIN COUNTY, V. B. HALL VINCENT.

FILED NOVEMBER 19, 1895. No. 5244.

1. **Fees:** CONSTITUTIONAL LAW. The legislature may, in the absence of a constitutional restriction, express or implied, increase or diminish the emoluments pertaining to any office of its own creation.

2. ———: ———. The right to fees or salary earned by a public officer under existing laws is property which the legislature is powerless to destroy by a subsequent act altering the emoluments of such office.

3. **Claims Against Counties:** RULINGS OF COUNTY BOARD. The county commissioners, or board of supervisors, in examining and passing upon claims against the county act judicially, and their action in allowing or rejecting claims has the force and effect of a judgment, and is binding upon all parties thereto, unless vacated or reversed by means of appropriate appellate proceedings. (*Heald v. Polk County*, 46 Neb., 28.)

ORIGINAL application for *mandamus* to compel the respondent, as county clerk of Franklin county, to enter upon his fee book and pay into the county treasury the fees received by him for making the tax list for the year 1891. *Writ denied.*

H. Whitmore and *Robert Ryan*, for relator, cited: *Douglas County v. Timme*, 32 Neb., 272; *State v. Shearer*, 29 Neb., 477.

George W. Sheppard and *Cobb & Harvey, contra*, cited: *Richardson County v. Mussleman*, 25 Neb., 625; *People v. McCall*, 65 How. Pr. [N. Y.], 443; *People v. Supervisors of Columbia County*, 43 N. Y., 130; *In re Bank of Niagara*, 6 Paige Ch. [N. Y.], 213; *Johnson v. Burrell*, 2 Hill [N. Y.], 238; *Roesink v. Barnett*, 8 Neb., 147; *United States v. Morse*, 3 Story [U. S.], 87.

POST, J.

This is an original application for a writ of *mandamus* to compel the respondent, as clerk of Franklin county, to enter upon the fee book kept by him as such clerk, and to pay over to the treasurer of the county, the sum of $629.64 paid to and received by him for the making of the tax lists of said county for the year 1891. It is alleged by way of answer that the taxes for the year named were levied on the 17th day of June; that the respondent immediately entered upon the work of preparing the tax lists in accordance with the requirement of sections 80, 81, and 82 of the revenue law (Compiled Statutes, ch. 77, art. 1), and that he "had prior to the 4th day of July done and performed a large part of such duty and labor, the exact amount or near approximate respondent is now unable to state." It is further alleged that fully one-half of the labor of preparing said lists had been performed prior to the 1st day of August following. The other allegations of the answer tender questions of law only, and do not require notice in this connection.

By section 13*a*, chapter 28, Compiled Statutes, 1887, the county clerk was required to enter upon his fee book and account for all fees except for making tax lists. Said section was by the act approved April 3, 1891, so amended as to read "all fees to be entered on the fee book and accounted for." (Session Laws, 1891, ch. 26.) The amendatory act, in the absence of a special provision upon the subject, took effect three calendar months after the adjournment of the legislature of 1891, or on the 5th day of July, the session having terminated on the 4th day of April of that year. (See *McGinn v. State*, 46 Neb., 427.) It is by section 80 of the revenue law made the duty of the county clerk, after the equalization by the state and county boards, and after the levy of taxes by them, and before the 1st day of October following, to prepare the tax lists in the manner therein prescribed. It was the right, therefore,

if not indeed the duty, of the respondent to undertake the work thus imposed upon him immediately after the levy of the taxes for the year 1891, to-wit, on the 17th day of June. It is admitted by the pleadings, as already intimated, that a considerable part of the labor required in the preparation of the tax lists had been performed at the time the amendment of 1891 became a law. It has been held by this court, in conformity with the decided weight of authority, that the legislature may, in the absence of a constitutional restriction, express or implied, increase or diminish the emoluments pertaining to any office of its own creation. (*Douglas County v. Timme*, 32 Neb., 272.) It does not follow, however, that the legislature may, under the pretense of altering the compensation of a public officer, confiscate fees or salary previously earned by him. We are referred by the respondent to numerous cases as supporting the proposition that the amendment of 1891 could have no application to such part of the sum in controversy as had been earned by him at the time said act took effect. It is deemed unnecessary to examine the authorities cited, since it cannot be denied that compensation earned under existing laws is property which is within the protection of the bill of rights. It is clear that in no view of the case is the county entitled to recover the full amount paid to the respondent for the preparation of the tax lists; and in the absence of any admission or evidence from which to determine the amount thereof earned subsequent to July 4, the writ must be denied.

Although the allegations of the petition are by no means definite in that regard, the necessary inference therefrom is that the amount alleged to have been received by the respondent for the preparation of the tax lists for 1891 was paid upon a claim therefor presented to, and in due form allowed by, the county board, which brings the case directly within the rule asserted in *Heald v. Polk County*, 46 Neb., 28, viz., that the county commissioners, or board of

supervisors, in passing upon claims against the county act judicially, and that its action is binding upon all parties thereto, unless reversed or vacated by means of appropriate appellate proceedings.

WRIT DENIED.

RYAN, C., not sitting.

BOARD OF DIRECTORS OF ALFALFA IRRIGATION DISTRICT, APPELLEE, V. M. S. COLLINS ET AL., APPELLANTS.

FILED NOVEMBER 19, 1895. No. 8060.

1. **Constitutional Law.** The term "due process of law," as employed in section 3, article 1, of the constitution of this state, relates primarily to the remedy for wrongs to persons and property rather than to matters of substantive law.

2. ———: DISTRICT IRRIGATION LAW: BONDS: TAXATION. The act approved March 26, 1895, known as the "District Irrigation Law," provides that when bonds are authorized by a vote of any irrigation district, application may be made to the district court of the county in which such district or part thereof is situated for an order confirming and approving the same. At the time set for hearing, and after notice by publication to all concerned, any person interested in said district may appear and resist such application, and the court may examine into and determine all questions pertaining to the organization of the district as well as the regularity of the voting and issuing of such bonds. *Held*, Not to contemplate the taking of property without due process of law, by means of taxation, within the prohibition of the state or federal constitution.

3. **Irrigation Districts:** CORPORATIONS: OFFICERS. Irrigation districts organized under our laws are public, rather than municipal corporations, and their officers are public agents of the state.

4. **Statutes:** CONSTRUCTION: POWER OF COURTS. While it is within the province of the judiciary to declare invalid acts evi-

dently not designed to subserve public interest, if the subject-matter of legislation be such that there is any doubt of its character, or if by any reasonable construction it can be held to be for the welfare of the public, the will of the legislature should prevail over any mere doubt of the court.

5. **Constitutionality of District Irrigation Law.** The district irrigation law does not conflict with the constitution by authorizing the taking of property for private use only.

6. **Taxation.** The power of taxation is an attribute of sovereignty having its source in the necessities of organized society, and the limits of its exercise depending, in the absence of express limitations upon such power, upon the exigencies of the public. That power has been committed by the people to the discretion of the legislature, and for an abuse of the trust thus imposed the remedy is by appeal to the people themselves in the manner prescribed by law.

7. ———: VALIDITY OF DISTRICT IRRIGATION LAW. The district irrigation law is not unconstitutional on the ground that the power thereby conferred upon districts to levy taxes is without limitation.

8. **Constitutionality of District Irrigation Law.** Nor does said act conflict with the constitution on the ground that the effect thereof is to confer legislative power upon county boards.

9. **Taxation.** The provision of section 1, article 9, of the constitution, for uniform taxation, relates to the revenue required for the general purposes of state and municipal government only, and has no application to taxes or assessments levied for local improvements.

10. **Corporations:** SEALS. Corporations, both municipal and private, may, in the absence of limitations, express or implied, as an incident to their general corporate powers, adopt and use a common seal.

11. **Validity of Tax Deeds:** TREASURER'S SEAL. *Larson v. Dickey*, 39 Neb., 463, and *Dickey v. Paterson*, 45 Neb., 848, distinguished.

APPEAL from the district court of Keith county. Heard below before NEVILLE, J.

T. Fulton Gantt and *J. R. Brotherton*, for appellants, cited: Cooley, Constitutional Limitations [4th ed.], sec. 117;

Cooley, Taxation [1st ed.], 48; *Harvard v. St. Clair & Monroe Levee & Drainage Co.*, 51 Ill., 130; *Cypress Pond Draining Co. v. Hooper*, 2 Met. [Ky.], 350; *Bradley v. Fallbrook Irrigation District*, 68 Fed. Rep., 948; *Clother v. Maher*, 15 Neb., 6; *Larson v. Dickey*, 39 Neb., 463.

G. W. Shields, contra, cited: *Olmstead v. Camp*, 33 Conn., 532; *Todd v. Austin*, 34 Conn., 84; *Gammell v. Potter*, 6 Ia., 548; *Venard v. Cross*, 8 Kan., 260; *Harding v. Funk*, 8 Kan., 315; *Holyoke v. Lyman*, 15 Wall. [U. S.], 507; *Boston & Roxbury Mill Corporation v. Newman*, 12 Pick. [Mass.], 477; *Hazen v. Essex Co.*, 12 Cush. [Mass.], 475; *Miller v. Troost*, 14 Minn., 282; *Newcomb v. Smith*, 1 Chand. [Wis.], 71; *Fisher v. Horicon Iron & Mfg. Co.*, 10 Wis., 351*; *Dean v. Davis*, 51 Cal., 410; *People v. Reclamation District*, 53 Cal., 347; *People v. Williams*, 56 Cal., 647; *Hoke v. Perdue*, 62 Cal., 546; *People v. La Rue*, 67 Cal., 527; *Dayton Gold & Silver Mining Co. v. Seawell*, 11 Nev., 394; *Tide Water Co. v. Coster*, 18 N. J. Eq., 521; *In re Drainage of Lands*, 35 N. J. Law, 497; *In re Commissioners to Drain*, 39 N. J. Law, 434; *Talbot v. Hudson*, 16 Gray [Mass.], 423; *Rutherford v. Maynes*, 97 Pa. St., 78; *Hagar v. Reclamation District*, 111 U. S., 701; *Mobile County v. Kimball*, 102 U. S., 691; *Louisiana v. Pillsbury*, 105 U. S., 278; *Turlock Irrigation District v. Williams*, 18 Pac. Rep. [Cal.], 379; *Central Irrigation District v. De Lappe*, 21 Pac. Rep. [Cal.], 825; *In re Bonds of Madera Irrigation District*, 28 Pac. Rep. [Cal.], 675; *Board of Directors v. Peterson*, 29 Pac. Rep. [Wash.], 995; *Lux v. Haggin*, 69 Cal., 255; *People v. Salomon*, 51 Ill., 50; *Stockton & V. R. Co. v. City of Stockton*, 41 Cal., 147; *Wynehamer v. People*, 13 N. Y., 378; *Wellington, Petitioner*, 16 Pick. [Mass.], 87; *Erie & N. E. R. Co. v. Casey*, 26 Pa. St., 287; *Powell v. Commonwealth*, 114 Pa. St., 265; *Turner v. Althaus*, 6 Neb., 54; *Jenal v. Green Island Draining Co.*, 12 Neb., 163; *Darst v. Griffin*, 31 Neb., 668; *Dakota*

County v. Cheney, 22 Neb., 437; *Welton v. Dickson*, 38 Neb., 767; *In re House Roll No. 284*, 31 Neb., 506; *Brennan v. City of Weatherford*, 53 Tex., 330; *Porter v. Androscoggin & K. R. Co.*, 37 Me., 349; *Tenney v. East Warren Lumber Co.*, 43 N. H., 343.

POST, J.

This was a proceeding by the appellee before the district court for Keith county under the provisions of section 59 *et seq.* of the act approved March 26, 1895, known as the "District Irrigation Law," seeking a confirmation of steps resulting in the formation of the Alfalfa Irrigation District, and the issuance thereby of certain bonds intended to promote the general purposes of the act. The appellants, who are taxpayers within said district, filed an answer, to which more particular reference will hereafter be made, but which puts in issue substantially all the allegations of the petition. A decree having been entered in accordance with the prayer of the petition, the cause was removed into this court by appeal. The objections urged by the appellants in this court are substantially as follows:

1. The district irrigation law conflicts with section 1, article 3, of the constitution, (1) since it confers on county boards legislative powers in the creation of corporations; (2) because it authorizes the levy by irrigation districts of taxes upon real estate without limitation.

2. Said act conflicts with sections 3 and 21, article 1, of the constitution of this state, and with section 1 of the fourteenth amendment of the constitution of the United States, by authorizing the appropriation of the property of non-residents without due process of law.

3. It conflicts with the constitution of the United States, by authorizing the appropriation of private property without the owner's consent to a mere private use.

4. It violates section 1, article 9, of the constitution of this state, by providing a system of taxation which ex-

cludes from its operation all personal property within the several districts.

5. The bonds in question are invalid, for the reason that they are required to be attested by a seal, whereas the said act makes no provision for the procuring or use by such districts of an official seal.

6. Said district was not legally organized.

7. The issuance of said bonds was not authorized by the requisite vote, and the election mentioned in the petition was accordingly illegal and void.

The first, second, third, and fourth objections challenge the validity of the district irrigation law, and may, for convenience, be considered together. It should, as preliminary to an examination of the subject, be remarked that the act in question is in all essential features copied from the district irrigation law of California, in which state it had, by decisions hereafter cited, received a settled construction long before its adoption by us, and its enactment in this state must be construed as a legislative approval of the interpretation there given it. (*Clark v. Cambridge & Arapahoe Irrigation & Improvement Co.*, 45 Neb., 798; *Paxton & Hershey Irrigating Canal & Land Co. v. Farmers & Merchants Irrigation & Land Co.*, 45 Neb., 884.) It was held in the cases cited that the reclamation of the arid lands of the state is, in a constitutional sense, a public use, to promote which the legislature may authorize the acquiring, by condemnation, of the right of way over private property by irrigating companies. It is not necessary at this time to examine the grounds upon which those cases rest, as the doctrine there asserted is not assailed in the able argument of counsel for appellants. It is said, however, that the district irrigation law was not involved in those cases and that the principle by which they are controlled can have no application to the case at bar. Since we are unable to concede that proposition, an examination of the act mentioned, and some of the cases to which refer-

ence has been made, will not be out of place in this connection.

The act provides for the creation of irrigation districts comprising property susceptible of irrigation from the same source and by means of the same system of works. It requires a petition to be filed with the county board, signed by a majority of the resident freeholders, who are qualified electors, and who own a majority of the whole number of acres of land belonging to resident electors, particularly defining the boundaries of the proposed district. The county board may, on the final hearing of the petition, and after notice therof to all parties interested, define the boundaries, making such changes thereof as may be deemed proper, but including therein no lands which are not susceptible of irrigation by the same system. The question is then, at a special election, submitted to the electors of the proposed district who are also the owners of real estate therein. Upon the adoption of the proposition, a record thereof is to be filed in the office of the county clerk of each county in which any portion of the land included in said district is situated, and immediately thereafter the county board shall call a special election, at which there shall be chosen a treasurer, an assessor, and three directors. Provision is made for regular meetings of the directors, whose duty it is to manage and conduct the business and affairs of the district, to make and execute all necessary contracts, establish equitable by-laws, rules, and regulations for the distribution and use of water, and to perform all such acts as may be necessary to fully carry out the purposes of the act. Power is also conferred upon said board to acquire, by purchase or condemnation, all lands, waters, and other property necessary for canals, reservoirs, and aqueducts, and to take conveyances therefor. Provision is made for the issuing of the bonds of the district when authorized by a vote of a majority of the electors having the qualifications in said act prescribed, not exceeding the

estimated cost of ditches and other necessary improvements, and for the time and manner of payment thereof. All real estate within the districts is to be listed and assessed by the district assessor, and the board of directors, after equalizing the assessment in the manner therein provided, is required to levy the taxes necessary to pay interest and principal of all bonds previously issued. Upon the issuance of any bonds whether the same shall have been sold or not, the directors of the irrigation districts by which they were authorized may present to the district court of the county in which such district or part thereof is situated a petition praying that all proceedings relating to said bonds may be examined, approved, and confirmed. Upon the hearing of such application, after notice to all persons interested, the court is authorized to examine into and determine the legality of, and approve all of, the proceedings relating to or which may affect the validity of said bonds.

The foregoing synopsis is necessarily incomplete, but it serves to illustrate the general scope and purpose of the measure under consideration.

The validity of this species of legislation was first called in question in *Turlock Irrigation District v. Williams*, 76 Cal., 360, in which it was held, under constitutional provisions substantially similar to ours, that the districts contemplated by the statute of that state are *quasi*-public corporations in the sense that the purpose of their organization is the general public benefit. It is further said that it is not essential to the validity of taxes contemplated by said act "that the method of their assessments and their collection adopted must be assimilated to and follow exactly the mode provided in the constitution for the assessment and collection of taxes for general state purposes." In *Central Irrigation District v. De Lappe*, 79 Cal., 351, the constitutionality of said act was again affirmed, and the rule asserted that proceedings for the formation of irrigation districts should be liberally construed in order to give effect

to the purpose of the law. In *Crall v. Poso Irrigation District*, 87 Cal., 140, the same doctrine was asserted. A proceeding like that before us, to establish the validity of bonds voted by an irrigation district, was declared to be an action *in rem*, and the decree therein entered was held a bar to a subsequent action to enjoin the issuing of said bonds on account of irregularity in the organization of the district. Like views are also expressed in the well considered case of *Modesto Irrigation District v. Tregea*, 88 Cal., 334. And in *Re Bonds of Madera Irrigation District*, 92 Cal., 296, almost every phase of the subject is again examined and the doctrine of the previous cases in that court reasserted without qualification.

We cannot, in this connection, forbear to quote at some length from the very able and convincing opinion of Harrison, J., in the case last cited, viz.: "It is contended that the act is unconstitutional for the reason that it is a delegation of the legislative power to create a corporation. If by this is meant that only the legislature can create such corporation, the answer is that the constitution prohibits such action. If it is meant that because the corporation is not 'created' until the voters of the district have accepted the terms of the act, the answer is, that such proceeding is in direct accord with the principles of the constitution. Having the power to create municipal corporations, but being prohibited from creating them by special law, the only mode in which such corporations could be created under a general law would be by some act on the part of the district or community seeking incorporation, indicative of its determination to accept its terms. As the constitution has not limited or prescribed the character of such general law, its character and details are within the discretionary power of the legislature. We know of no more appropriate mode of such indication than the affirmative vote of those who are to be affected by the acceptance of the terms of the act. * * * Inasmuch as there is no

restriction upon the power of the legislature to authorize the formation of such corporations for any public purpose whatever, and as when organized they are but mere agencies of the state in local government, without any powers except such as the legislature may confer upon them, and are at all times subject to a revocation of such power, it was evidently the purpose of the framers of the constitution to leave in the hands of the legislature full discretion in reference to their organization. * * * In determining whether any particular measure is for the public advantage it is not necessary to show that the entire body of the state is directly affected thereby, but it is sufficient that that portion of the state within the district provided for by the act shall be benefited thereby. The state is made up of its parts, and those parts have such a reciprocal influence upon each other that any advantage which accrues to one of them is felt more or less by all of the others. A legislature that should refrain from all legislation that did not equally affect all parts of the state would signally fail in providing for the welfare of the public. In a state as diversified in character as is California it is impossible that the same legislation should be applicable to each of its parts. Different provisions are as essential for those portions whose physical characteristics are different as are needed in the provisions which are made for the government of town and country. Those portions of the state which are subject to overflow, and those which require drainage, as well as those which for the purpose of development require irrigation, fall equally within the purview of the legislature, and its authority to legislate for the benefit of the entire state, or for the individual district. The power of the legislature to adapt its laws to the peculiar wants of each of these districts rests upon the same principle, viz., that it is acting for the public good in its capacity as the representative of the entire state." The reasoning here employed is reinforced by the later case of

Middle Kittitas Irrigation District v. Peterson, 29 Pac. Rep. [Wash.], 995. It is, as has been observed, quite as applicable to the provisions of our constitution, and leads irresistibly to a conclusion in harmony with that announced in the cases cited. The only case to which we have been referred as authority for the opposing view is *Bradley v. Fallbrook Irrigation District*, 68 Fed. Rep., 948. It was in that case held that the use contemplated by the California statute, to which reference has been made, is, in no proper sense of the term, a public one, and that said act accordingly conflicts with the fourteenth amendment of the United States constitution, prohibiting the several states from depriving any person of life, liberty, or property without due process of law. The opinion of the learned circuit judge in that case, in so far as it arraigns the act involved as a matter of legislative policy, may be accepted as altogether sound, but that it is a sound interpretation of the restrictive feature of the constitution of the United States, or of this state, does not necessarily follow. While all agree that the legislature cannot, without the consent of the owner, appropriate private property to purposes which in no way subserve public interests, the rule is quite as firmly settled that the courts will not interfere by declaring acts invalid simply because they may differ with the law-making power respecting the wisdom or necessity thereof. For if, by any reasonable construction, a designated use may be held to be public in a constitutional sense, the will of the legislature should prevail over any mere doubt of the court. (*Paxton & Hershey Irrigating Canal & Land Co. v. Farmers & Merchants Irrigation & Land Co.*, *supra*.

We are aware that the subject under consideration has by federal tribunals been likened to questions of commercial law, depending for their solution, not upon the decisions of a single state or tribunal, but upon general principles common to all courts. As said in *Olcott v. Supervisors of Fond du Lac County*, 16 Wall. [U. S.], 618, cited in sup-

port of the conclusion announced in *Bradley v. Fallbrook Irrigation District*, "The nature of taxation, what uses are public and what are private, and the extent of unrestricted legislative power are matters which, like questions of commercial law, no state court can conclusively determine for us." We do not, however, understand the court, by what is there said, to call in question the rule by which mere doubts are resolved in favor of the judgment of the legislature. The prohibition against the taking of private property without due process of law is not peculiar to the national constitution, but is a part of the fundamental law of a majority, if not all, of the states. It is worthy of note, too, in this connection, that the foregoing rule was firmly established long prior to the adoption of the fourteenth amendment. (2 Kent's Commentaries, p. 340; *Beekman v. Saratoga & S. R. Co.*, 3 Paige Ch. [N. Y.], 73; *Coster v. Tide Water Co.*, 18 N. J. Eq., 54, 518, and cases cited.) The reasonable inference is that the restriction therein upon the powers of the states relating to private property was intended to harmonize the national bill of rights with the provisions of the several state constitutions, rather than to introduce a new and distinct principle or rule of construction. It is doubtful, indeed, if that enactment had the effect to enlarge the rights of property secured by the common law, since, as shown in *Davidson v. New Orleans*, 96 U. S., 97, the term "due process of law" means no more than the "law of the land," as employed in Magna Charta. (See, also, *Parsons v. Russell*, 11 Mich., 129; *Bonning v. Taylor*, 24 Pa. St., 292; *Greene v. Briggs*, 1 Curt. [U. S.], 311.)

In the opinion of Mr. Justice Miller in *Davidson v. New Orleans, supra*, is found an exceedingly comprehensive discussion of the subject, concluding as follows: "There is wisdom, we think, in the ascertaining of the intent and application of such an important phrase in the federal constitution by the gradual process of judicial inclusion and

exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded. * * * As contributing to some extent to this mode of determining what class of cases do not fall within its provision, we lay down the following proposition as applicable to the case before us: That whenever, by the laws of a state, or by state authority, a tax, assessment, or servitude, or other burden, is imposed upon property for the public use, whether it be for the whole state or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections." That case arose under the provisions of a statute of Louisiana authorizing the assessment of property within drainage districts for the purpose of reclaiming overflowed lands. Before such assessments could become effectual they are required to be filed in the proper court, and personal notice given all owners known and within reach of process, and service by publication as to such as are unknown or not within the jurisdiction of the court. An order of confirmation was denied by the lower court, which judgment was reversed on appeal to the supreme court of the state, and the judgment last mentioned was affirmed on error, by the supreme court of the United States. In *Pearson v. Yewdall*, 95 U. S., 294, it is said by Waite, C. J., referring to a Pennsylvania statute of the same general character: "In the act of the general assembly of Pennsylvania, now under consideration, ample provision is made for an inquiry as to damages before a competent court, and for a review of the proceedings of the court of original jurisdiction upon appeal to the highest court of the state. This is due process of law within the

meaning of that term as used in the federal constitution." The question was again directly presented in *Hagar v. Reclamation District*, 111 U. S., 701, which arose under a California statute for the reclamation, by districts, of swamp and overflowed, salt, marsh, and tide lands by means of assessments upon property thereby benefited, in which Mr. Justice Field uses this language: "If property taken upon an assessment, which can only be enforced in this way, be not taken by due process of law, then, as said by Mr. Justice Miller in the New Orleans case, these words, as used in the constitution, can have no definite meaning. The numerous decisions cited by counsel, some of which are given in the note, as to the necessity of notice, and of an opportunity of being heard, are all satisfied where a hearing in court is thus allowed." And the same doctrine is reasserted and emphasized by Mr. Justice Gray in *Wurts v. Hoagland*, 114 U. S., 606. (See in this connection, also, *Spencer v. Merchant*, 125 U. S., 345; *Paulsen v. City of Portland*, 149 U. S., 30; *Dean v. Davis*, 51 Cal., 410; *People v. Reclamation District*, 53 Cal., 348; *Turlock Irrigation District v. Williams*, *Central Irrigation District v. De Lappe*, *In re Bonds of Madera Irrigation District*, *supra*.) It is said in the case last cited that "his [the complainant's] property is not taken from him without due process of law if he is allowed a hearing at any time before the lien of the assessment thereon becomes final;" citing *Gilmore v. Hentig*, 33 Kan., 170, *Davies v. City of Los Angeles*, 86 Cal., 37, and *Hagar v. Reclamation District*, *supra*. And in *Turlock Irrigation District v. Williams* the court, referring to the analogy between irrigating districts and districts organized for the reclamation of swamp and overflowed lands, say: "The one is intended to bring into cultivation and make productive a large acreage of land which would otherwise remain uncultivated and unproductive of any advantage to the state, being useless, incapable of yielding any revenue of importance toward the support of the general pur-

poses of state government, by reason of too much water flowing over, or standing upon, or percolating through them. The other has for its main object the utilizing and improvement of vast tracts of arid and unfruitful soil, desert-like in character, much of it, which, if water in sufficient quantity can be conducted upon and applied to it, may be made to produce the same results as flow from the drainage of large bodies of swamp and overflowed lands."

The conclusions we reach from an examination of the foregoing authorities are, first, that the term "due process of law" relates primarily to the remedy or means of redress where property rights are invaded rather than to matters of substantive law, and that the provision of our statute for a hearing, upon notice, of all questions pertaining to the organization of irrigation districts and the imposition by them of taxes and assessments fully satisfies the requirements of the state and federal constitution; second, the end and purpose of said act is, in a constitutional sense, public, and, therefore, resting in the wisdom and discretion of the legislature. The reasoning, based upon the decision in *Bradley v. Fallbrook Irrigation District*, must accordingly be rejected.

The objection to said act on the ground that it authorizes the creation by county boards of municipal corporations in violation of section 1, article 3, of the constitution, is fully met by the California cases cited holding that irrigation districts are public and not, strictly speaking, municipal corporations, and that their officers are agents of the state.

To the proposition that the authority conferred upon irrigation districts to levy taxes without limitation upon the property within their boundaries, is an invasion of the provisions of the state constitution, it may be answered: First —That the power of taxation is an attribute of sovereignty having its source in the necessities of organized society. That power has, by the people, been committed to the discretion of the legislature, and the limits within which it

may be exercised depend, in the absence of express limitation upon such power, upon the exigencies of the public, and for an abuse of the trust thus imposed the remedy is an appeal to the people themselves in the manner ordained by the constitution. Second—The power of taxation so conferred is not, as counsel assume, unlimited, but is restricted to revenue sufficient to meet the obligations voluntarily assumed by the taxpayers themselves. Third—Although ample provision is made for resisting the issuance of bonds, by taxpayers and others interested, the record contains no suggestion of an abuse in this instance of the taxing power; nor does said act conflict with section 1, article 9, of the constitution, requiring taxation to be equal and uniform; that provision relates to the revenue required for the general purpose of government, state and municipal, and has no application to taxes or assessments levied for local improvements. (*City of Sterling v. Galt*, 117 Ill., 11; *Davis v. City of Litchfield*, 145 Ill., 313; *Reinken v. Fuehring*, 130 Ind., 382; *City of Chester v. Black*, 132 Pa. St., 568; *City of St. Joseph v. Owen*, 110 Mo., 445; *City of Denver v. Knowles*, 17 Colo., 204.)

The only other objection which calls for notice is that by which the validity of the bonds is assailed on the ground that the act under consideration does not expressly authorize the procuring of a seal by irrigation districts. That contention is based upon the ruling of this court in *Larson v. Dickey*, 39 Neb., 463, and *Dickey v. Paterson*, 45 Neb., 848, that inasmuch as no provision is made by law for the use by county treasurers of an official seal, there exists under the present revenue law no authority for the execution by them of valid tax deeds. Our first impression, it must be confessed, was strongly in favor of the soundness of that argument; but upon reflection we are satisfied that the cases cited rest upon principles entirely different from that which must control in this. By reference to *Larson v. Dickey* it will be observed that the provision there under

consideration was section 127 of the revenue law (Compiled Statutes, ch. 77, art. 1), requiring tax deeds to be executed by the treasurer "under the official seal of his office," substantially in accordance with the form therein prescribed, and which concludes as follows: "Given under my hand and the seal of our court this —— day of ———, A. D. 18—." It is shown in that case that the section mentioned was copied from section 221 of the revenue law of Illinois. By statute of that state the sale of lands for delinquent taxes was made under decree of the county court, a court of record, in a proceeding instituted by the county treasurer, the section above mentioned requiring all deeds therefor to be executed by the clerk under the seal of the court. What was there held, in effect, is that the history of section 127 emphasizes the oft-asserted rule that provisions intended to divest persons of title to property, in the exercise of the taxing power, should be strictly construed. The cause before us, on the other hand, involves the mere contractual obligation of the district named and not calling for the application of the strict rule of construction recognized in the cases mentioned. It may with safety be asserted that in the absence of limitation, express or implied, corporations, both private and municipal, may, as an incident to their general corporate powers, adopt and use a common seal. (1 Dillon, Municipal Corporations [4th ed.], sec. 190; 4 Thompson, Law of Corporations, secs. 5044, 5045; 1 Beach, Private Corporations, sec. 376.)

It follows that the decree of the district court is right and must be

AFFIRMED.

BARNEY MCGINN V. STATE OF NEBRASKA.

FILED NOVEMBER 19, 1895. NO. 6354.

1. **Constitutional Law:** CALENDAR MONTH. The term "calendar month" is used in section 24, article 3, of the constitution in the sense in which it was understood prior to the adoption of that instrument.

2. **Calendar Month.** The term "calendar month," whether employed in statutes or contracts, and not appearing to have been used in a different sense, denotes a period terminating with the day of the succeeding month numerically corresponding to the day of its beginning, less one. If there be no corresponding day of the succeeding month, it terminates with the last day thereof.

3. **Statutes:** TIME. The provision of section 895 of the Code of Civil Procedure, for the exclusion of the first day in computing the time within which an act is to be done, was intended to establish a uniform rule, applicable alike to the construction of statutes and to matters of practice.

4. ———: TIME OF GOING INTO EFFECT: PENALTY FOR MURDER. The penalty for murder in the first degree was, by section 3 of the Criminal Code, as originally adopted, death by hanging. By an act approved April 8, 1893, passed without an emergency clause, said section was so amended as to provide that the penalty for the crime therein denounced shall be death by hanging, or imprisonment for life, in the discretion of the jury. The legislature of 1893, having adjourned on the 8th day of April of that year, *held*, that said amendment took effect on the 9th day of July following.

5. **Criminal Law:** CONVICTION: REVIEW: FORMER JEOPARDY: WAIVER. When the defendant in a criminal prosecution is adjudged guilty of the crime charged, and subsequently procures a reversal of the judgment of conviction on account of error by the trial court, he will be held to have waived his right to object to further prosecution on the ground that he has been once put in jeopardy.

6. ———: SENTENCE: IMPRISONMENT. While the practice of confining persons convicted of capital offenses from the date of sentence until the day of execution has prevailed from time imme-

morial, such confinement is not a part of the penalty, although a necessary incident thereof, and the power of the court in that regard does not rest upon any positive provision of statute.

ERROR to the district court for Douglas county. Tried below before SCOTT, J.

The facts are stated in the opinion.

Mahoney, Minahan & Smyth and *Estelle & Hoeppner*, for plaintiff in error:

If the plaintiff in error is guilty of murder as charged in the information, the crime was committed July 29, 1893, and he should have been tried under the laws then in force. By chapter 44, Session Laws, 1893, the jury, in finding a conviction of murder in the first degree, must fix the penalty and say by their verdict whether the defendant shall suffer death or imprisonment for life. This statute was approved April 8, 1893, and the legislature adjourned the same day. The court, in refusing to permit the jury to fix the penalty, committed an error. The law formerly in force prescribed the death penalty as the only punishment for murder in the first degree, and a verdict thereunder finding the accused guilty is illegal and will not support a sentence, where the alleged crime was committed after the new law went into effect. Under the constitutional provision that no act shall take effect until three calendar months after the adjournment of the legislature, the act requiring the jury to fix the penalty for murder in the first degree took effect July 9, 1893, before the alleged crime had been committed. (Constitution, sec. 24, art. 3; Session Laws, 1893, ch. 44; Cooley, Constitutional Limitations [6th ed.], 187; *Glore v. Hare*, 4 Neb., 131; *Migotti v. Colvill*, 4 L. R., C. P. D. [Eng.], 233; *Lacon v. Hooper*, 6 T. R. [Eng.], 224; Bishop, Contracts, sec. 1339; *Ellis' Case*, 8 N. J. Law, 286; *Loring v. Halling*, 15 Johns. [N. Y.], 119; *Stackhouse v. Halsey*, 3 Johns. Ch. [N. Y.],

74; *Redmond v. Glover*, Dud. [Ga.], 107; *Gross v. Fowler*' 21 Cal., 393; *Savings & Loan Society v. Thompson*, 32 Cal., 347; *Beacon v. State*, 22 Fla., 46; *Brown v. Williams*, 34 Neb., 376; *Heaston v. Cincinnati & F. W. R. Co.*, 16 Ind., 275; *Snyder v. Warren*, 2 Cow. [N. Y.], 518; *Parsons v. Chamberlin*, 4 Wend. [N. Y.], 512; *French v. English*, 7 Neb., 124; *Roesink v. Barnett*, 8 Neb., 146; *Guaranty Trust Co. v. Green Cove S. & M. R. Co.*, 139 U. S., 137; *People v. Ulrich*, 2 Abb. Pr. [N.Y.], 28; *Commonwealth v. Maxwell*, 27 Pa. St., 444; *Lester v. Garland*, 15 Ves. [Eng.], 248; *Hardy v. Ryle*, 9 Bar. Cr. [Eng.], 603; *Castle v. Burdilt*, 3 T. R. [Eng.], 623; *Young v. Higgon*, 6 M. & W. [Eng.], 49; *Watson v. Pears*, 2 Campb. [Eng.], 294; *South Staffordshire Tramway Co. v. Sickness & Accident Assurance Association*, 1 Q. B., 1891 [Eng.], 402; *Radcliffe v. Bartholomew*, 1 Q. B., 1892 [Eng.], 161.)

On December 29, 1893, the court pronounced sentence on plaintiff in error, by the terms of which he was to be confined in the county jail in solitary confinement until April 6, 1894, and then hanged. Under that sentence he was taken to the jail and kept in solitary confinement until the following day, when he was brought into court, the sentence vacated and a new sentence pronounced, fixing his execution at a later date, and his imprisonment at solitary confinement for a different period. The second sentence was absolutely without authority, for the reason that the punishment prescribed by the first being partly borne, the power of the court over it was exhausted. Under the constitutional guaranty that a man shall not be twice put in jeopardy for the same offense, the court had no power or authority to impose another and different sentence. (*In re Fuller*, 34 Neb., 581; *People v. Kelly*, 44 N. W. Rep. [Mich.], 615; *People v. Meservey*, 42 N. W. Rep. [Mich.], 1133; *Ex parte Lange*, 18 Wall. [U. S.], 163; *In re Jones*, 35 Neb., 499; *State v. Gray*, 37 N. J. Law, 368.)

In support of the argument that the first sentence is er-

roneous and that the plaintiff in error should be discharged, reference was made to the following authorities: Criminal Code, sec. 503; *Rex v. Ellis*, 5 Barn. & C. [Eng.], 395; *Rex v. Bourne*, 7 Ad. & El. [Eng.], 58; *Shepherd v. Commonwealth*, 2 Met. [Mass.], 419; *Stevens v. Commonwealth*, 4 Met. [Mass.], 360; *Christian v. Commonwealth*, 5 Met. [Mass.], 530; *People v. Taylor*, 3 Denio [N. Y.], 91; *Daniels v. Commonwealth*, 7 Pa. St., 371; *Beale v. Commonwealth*, 25 Pa. St., 11; *Commonwealth v. Ellis*, 11 Mass., 465; *Sheperd v. People*, 25 N. Y., 406; *State v. Gray*, 37 N. J. Law, 368; *McDonald v. State*, 45 Md., 90; *Benedict v. State*, 12 Wis., 313; *Peglow v. State*, 12 Wis., 534; *Williams v. State*, 18 O. St., 46; *Picket v. State*, 22 O. St., 405; *State v. Shuchardt*, 18 Neb., 454; *Conklin v. State*, 25 Neb., 784; *Jackson v. State*, 15 So. Rep. [Ala.], 351.

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

Prior to the act approved April 8, 1893, the penalty for murder in the first degree was death. (Criminal Code, 1891, sec. 3.)

By the provisions of the act approved April 8, 1893, the legislature amended section 3 of the Criminal Code so that the penalty should be death or imprisonment for life, in the discretion of the jury. (Criminal Code, 1893, sec. 3.)

Section 24, article 3, of the constitution provides: "No act shall take effect until three calendar months after the adjournment of the session at which it passed, unless in case of emergency." The precise question presented is a construction of the meaning of the term, "three calendar months." The construction as applied to written constitutions should give effect to the intent of the people adopting it, so as to give meaning if possible to every word and phrase. (Cooley, Constitutional Law, 72; *State v. Bacon*, 6 Neb. 297.)

In 1850 the parliament of England defined the word "month" to mean calendar month. (13 and 14 Vic., c. 21.)

"Calendar month" has been defined one of the months of the year as enumerated in the calendar, without reference to the number of days it may contain. (Black, Law Dictionary; Abbott, Law Dictionary; Webster, Dictionary; 13 Am. & Eng. Ency. Law, 712; Encyclopædia Britannica.)

"Calendar month" is one of the divisions of time as January, February, March. (Rapalje, Dictionary; Sedgwick, Statutory and Constitutional Law, 358, 372; *Roesink v. Barnett*, 8 Neb., 146; *Opinion of the Judges*, 5 Neb., 566; *State v. Babcock*, 22 Neb., 37.)

A week is a definite period of time, commencing on Sunday and ending on Saturday. (*Steinbe v. Bell*, 12 Abb. Pr., n. s. [N. Y.], 172; *State v. Yellow Jacket Silver Mining Co.*, 5 Nev., 430.)

For a review of the authorities relating to the meaning of the word "month," see *Guaranty Trust & Safe Deposit Co. v. Buddington*, 12 L. R. A. [Fla.], 771.

In 1891 the term "three calendar months" was construed adversely to the contention of plaintiff in error by the attorney general. His construction has since been followed by the department of state. The construction given to a statute by those charged with the duty of executing it should not be overruled without strong reason. (*United States v. Moore*, 95 U. S., 760; *Brown v. United States*, 113 U. S., 568; *Hahn v. United States*, 107 U. S., 402; *Cooper Mfg. Co. v. Ferguson*, 113 U. S., 727; *Stewart v. Laird*, 1 Cranch [U. S.], 299; *Peabody v. Stark*, 16 Wall. [U. S.], 240; *Ellis v. Glaser*, 61 N. W. Rep. [Mich], 649; *Westbrook v. Miller*, 56 Mich., 151; *Malonny v. Mahar*, 1 Mich., 26; *Britton v. Ferry*, 14 Mich., 53; *Continental Improvement Co. v. Phelps*, 47 Mich., 299; *Pease v. Peck*, 18 How. [U. S.], 565; *Coutant v. People*, 11 Wend. [N. Y.], 511; *Jackson v. Washington County*, 34 Neb., 688; *State v. Smith*, 35 Neb., 24.)

Section 503, Criminal Code, provides that at least one hundred days shall intervene between the sentence and the day of execution. Where an error has been made in computing this time, the court has a right to set aside the judgment and resentence the prisoner. The imprisonment pending the date of execution, though solitary confinement, is no part of the sentence of the law, but merely incidental to the keeping of the prisoner. In case a mistake in the time has been made the court may set aside the sentence and resentence the prisoner. (*State v. Shea*, 95 Mo., 85; *Lacy v. State*, 15 Wis., 15; *State v. Shaw*, 23 Ia., 316; *State v. Nicholson*, 14 La. Ann., 798; *Daniels v. Commonwealth*, 7 Pa. St., 371; *King v. Kenworthy*, 1 Barn. & C. [Eng.], 711; *Benedict v. State*, 12 Wis., 348; *Beal v. Commonwealth*, 25 Pa. St., 11; *People v. Riley*, 48 Cal., 549; *State v. Child*, 42 Kan., 611; *State v. Redman*, 17 Ia., 329; *State v. Knouse*, 33 Ia., 365; *State v. Tweedy*, 11 Ia., 350; *People v. Olwell*, 28 Cal., 456; *Sutcliffe v. State*, 18 O., 469; *Dodge v. People*, 4 Neb., 220; *Bohanan v. State*, 18 Neb., 57.)

Judgment for a longer term than that authorized by law may be corrected and affirmed where the record discloses no other error. (*Vaughan v. State*, 83 Ala., 55; *Webster v. Commonwealth*, 5 Cush. [Mass.], 407; Chitty, Criminal Law, 722; *Dodge v. People*, 4 Neb., 226; *In re Jones*, 35 Neb., 499; *State v. Treszevant*, 20 S. Car., 363; *State v. Hoyt*, 47 Conn., 542.)

In *Kinsler v. Territory*, 1 Wyo. Ter., 112, the prisoner was sentenced to be hanged. On the day following the sentence the court discovered an informality therein, vacated the sentence, and pronounced a new one. It was held that there was no error in the proceedings.

The court has a right to vacate or modify its judgment in a criminal as well as in a civil case during the term; and the plea of being once in jeopardy will not avail defendant upon the theory that he has served part of the punishment

imposed upon him. (2 Coke, Littleton, p. 260*a*; *Regina v. Fitzgerald*, 1 Salk. [Eng.], 401; *Turner v. Barnaby*, 2 Salk. [Eng.], 567*; *King v. Price*, 6 East [Eng.], 327; *Darling v. Gurney*, 2 Dowl. [Eng.], 101; *Tilden v. Johnson*, 6 Cush. [Mass.], 354; *Fay v. Wenzell*, 8 Cush. [Mass]., 315; *Stickney v. Davis*, 17 Pick. [Mass.], 169; Wharton, Criminal Pleading & Practice, sec. 913; *Commonwealth v. Foster*, 122 Mass., 323; *Brown v. Rice*, 57 Me., 57; *Jobe v. State*, 28 Ga., 235; *Lee v. State*, 32 O. St., 115; *Basset v. United States*, 9 Wall. [U. S.], 38; *Miller v. Finkle*, 1 Park. Cr. Cas. [N. Y.], 374; *Wright v. State*, 5 Ind., 527.)

Where the verdict is insufficient and does not properly respond to the indictment, and the defendant appeals, the judgment may be reversed and the cause remanded for a new trial. (*Marshall v. Commonwealth*, 5 Gratt. [Va.], 663; *State v. Moran*, 7 Ia., 236; *Wilson v. State*, 20 O., 26; *State v. Sutton*, 4 Gill [Md.], 494; *People v. Olcott*, 2 Johns. Cas. [N. Y.], 301; *State v. Callendine*, 8 Ia., 288; *Dodge v. People*, 4 Neb., 220; *State v. Knouse*, 33 Ia., 365; *State v. Redman*, 17 Ia., 329.)

Where there is error in the record the plaintiff in error should not be discharged but the case should be remanded for trial. (*State v. Schuchardt*, 18 Neb., 454; *Conklin v. State*, 25 Neb., 784; *Jackson v. State*, 15 So. Rep. [Ala.], 351.)

The instructions of the court correctly define malice. (*Milton v. State*, 6 Neb., 143; *Carr v. State*, 23 Neb., 749.)

The weight to be given evidence is a question entirely for the jury to determine. (*Seling v. State*, 18 Neb., 548; *Whitman v. State*, 42 Neb., 841; *Palmer v. People*, 4 Neb., 68; *Monroe v. State*, 10 Neb., 448; Bishop, New Criminal Procedure, sec. 1274.)

It is incompetent to show that the character and disposition of the deceased was quarrelsome where there was no evidence to establish a quarrel at the time of the homicide. (*Keener v. State*, 18 Ga., 194; *Quesenberry v. State*, 3 Stew.

& Port. [Ala.], 309; *Doyal v. State*, 70 Ga., 134; *Gardner v. State*, 90 Ga., 312; Wharton, Criminal Evidence, sec. 84; *People v. Lamb*, 2 Keyes [N. Y.], 360.)

It is within the discretion of the court to limit the number of witnesses upon the question of the character of the prisoner. (*Mathews v. State*, 19 Neb., 330; 1 Greenleaf, Evidence, sec. 65; Bishop, New Criminal Procedure, sec. 1136; *Mergentheim v. State*, 107 Ind., 567; *State v. Whitton*, 68 Mo., 91; *Bunnell v. Butler*, 23 Conn., 65; *Commonwealth v. Webster*, 5 Cush. [Mass.], 324; *Wesley v. State*, 37 Miss., 327; *People v. Sweeney*, 133 N. Y., 609; *Coleman v. State*, 59 Miss., 490; *Jackson v. State*, 76 Ga., 562.)

POST, J.

The plaintiff in error Barney McGinn was at the September, 1893, term of the district court for Douglas county adjudged guilty of the crime of murder in the first degree, which judgment has been removed into this court for review by means of a petition in error, to which further reference will hereafter be made. The prisoner is by the information charged with feloniously and maliciously wounding, with intent to kill, one Edward McKenna on the 29th day of July, 1893, from which he, the said McKenna, died two days later, on the 31st day of July. It is unnecessary to examine at length the evidence adduced in support of the allegations of the information. It is sufficient for the purpose of this investigation that the dates of the assault and the death of the deceased were proved as charged by the state. The jury, at the close of the trial, returned a general verdict of murder in the first degree without assessing the penalty therefor, to which exception was taken both by way of motion for a new trial and in arrest of judgment, and which suggests the first questions presented for our consideration.

Prior to the act approved April 8, 1893, entitled "An

act to amend section No. three (3) of the Criminal Code," etc. (Session Laws, 1893, p. 385, ch. 44), the only penalty for murder in the first degree was death by hanging; but by section 1 of the act above mentioned section 3 of the Criminal Code was so amended as to read thus: "And upon conviction thereof shall suffer death or shall be imprisoned in the penitentiary during life, in the discretion of the jury." By section 2 of said act the original section is repealed with a saving clause in the following language: "*Provided, however*, That such repeal shall not be construed to apply to any offenses committed prior to the taking effect of this act, nor shall the same affect any convictions or prosecutions held under said original section." (Session Laws, 1893, p. 386, sec. 2, ch. 44.) The contention of counsel for the prisoner is that the act of 1893 took effect previous to the date charged in the information; hence the district court should have required the jury to fix the penalty, and that it accordingly erred in receiving the verdict over their objections. The constitutional provision which bears upon the subject is found in section 24 of article 3, as follows: "No act shall take effect until three calendar months after the adjournment of the session at which it passed, unless in case of emergency, to be expressed in the preamble or body of the act, the legislature shall, by a vote of two-thirds of all the members elected to each house, otherwise direct." The twenty-third session of the legislature adjourned on the day the act in question was approved, to-wit, April 8, 1893; therefore the precise question presented is, when did the constitutional period of three calendar months after the adjournment of that session terminate? The term "month" at common law, whether employed in statutes or contracts, unless a different meaning was apparent from the context, was held to mean a lunar month of twenty-eight days, except in ecclesiastical affairs, and as applicable to commercial paper. (Chase's Blackstone, Commentaries, 141*; Bishop,

Contracts, sec. 1339; *Migotti v. Colvill*, 4 L. R., C. P. D. [Eng.], 233; *Lacon v. Hooper*, 6 T. R. [Eng.], 224; *Churchill v. Merchants Bank*, 19 Pick. [Mass.], 532; *Guaranty Trust & Safe Deposit Co. v. Green Cove S. & M. R. Co.*, 139 U. S. 137.) In this country many of the earlier cases follow the rule of the common law. (*Vide Ellis' Case*, 8 N. J. Law, 286; *Loring v. Halling*, 15 Johns. [N. Y.], 19; *Stackhouse v. Halsey*, 3 Johns. Ch. [N. Y.], 74; *Redmond v. Glover*, Dud. [Ga.], 107.) Later cases have, as a rule, construed the word "month," when it does not appear to have been used in a different sense, to mean a calendar month. (*Glore v. Hare*, 4 Neb., 132; *Brown v. Williams*, 34 Neb., 376, and cases cited.) In order to avoid the confusion arising from conflicting constructions of the term, thirty-five states and territories have by legislative enactment declared the term "month," when used without qualification, to mean a calendar month; and in England the common law rule was abolished by statute in 1850. (13 and 14 Vic., c. 21.)

It is said by counsel for the prisoner, referring to the facts of this case, that "the authorities, without exception, support our contention that three calendar months should be computed as commencing to run on the 9th day of April and terminating on the 8th day of July," and as that proposition presents the issue to be determined, we will proceed to examine some of the cases cited as bearing upon the subject. In *Glore v. Hare*, *supra*, it was held that an appeal taken on the 22d day of August from a judgment rendered February 21 is not within the six months prescribed by the act governing appeals to this court. In *Brown v. Williams*, *supra*, a note executed on the 2d day of January was held within the exception contained in section 44 (Compiled Statutes, ch. 6) of the assignment law, being a debt created within nine calendar months previous to a general assignment made on the 2d day of October following. In *Snyder v. Warren*, 2 Cow. [N. Y.], 518, fif-

teen calendar months were computed from August 15, 1822, to November 15, 1823. In *McGuire v. Ulrich*, 2 Abb. Pr. [N. Y.], 28, the statute required one month's notice to quit before suit brought. The notice was given April 18, and it was held that a calendar month had intervened before the commencement of the action, to-wit, May 25. In *Guaranty Trust & Safe Deposit Co. v. Green Cove S. & M. R. Co.*, *supra*, the first publication of notice was made August 9, the answer day named being December 1, following. After computing the time at 114 days, the court say the time is "more than four lunar months, but eight days less than four calendar months."

We now come to a class of cases having a more direct bearing upon the question at issue. In *Commonwealth v. Maxwell*, 3 Casey [Pa.], 444, the statute provided that in case of vacancy in the office of judge of common pleas, a successor should be chosen "at the first general election which shall happen more than three calendar months after the vacancy shall occur." The presiding judge died July 15, 1856, and the general election for that year occurred October 14. It was held that the statutory period had not intervened, and that the respondent, who was chosen at the election held on the day last mentioned, was not entitled to the office. In *Minard v. Burtis*, 83 Wis., 267, we observe this language: "It is also said that the notice was not given one calendar month before the action was commenced; that, having been given April 4, it would not be complete until June 1. We cannot adopt this view. If given the proper number of days before action brought, as contained in the calendar month in which it was given, as in this case, it was sufficient." The leading case of *Lester v. Garland*, 15 Ves. Ch. [Eng.], 248, arose under the will of Sir John Lester, providing that the testator's sister, Sarah Pointer, should within six calendar months after his death give security that she would not at any time intermarry with A, or that in case she did so inter-

marry, that she would within six calendar months thereafter pay certain bequests therein made. The testator died January 12 and the security given July 12 was held to satisfy the requirements of the will, Grant, M. R., saying: "The question is whether the day of Sir John Lester's death is to be included in the six months or to be excluded. If the day is included she did not, if it is excluded she did, give the required security before the end of the last day of the six months; and therefore did comply sufficiently with the conditions." *Hardy v. Ryle*, 9 Barn. & C. [Eng.], 603, was an action against a justice of the peace for illegally detaining the plaintiff after the expiration of his term of imprisonment. The defendant relied upon a statute of limitations which required the action to be brought "within six calendar months after the act committed." The court, after a review of the authorities, say: "The question * * * depends upon this: whether the 14th day of December, the last day of the plaintiff's imprisonment, is to be included or excluded. * * * If it is to be included, the action was not commenced in time; if it is to be excluded, it was." *South Stratfordshire Tramway Co. v. Sickness & Accident Assurance Association*, 1 Q. B. Div., 1891 [Eng.], 402, was an action on a policy of insurance for twelve calendar months, from November 24, 1888. It is said that November 25, 1887, was the first and November 24, 1888, the last day covered by the policy. And to the same effect are *Young v. Higgon*, 6 M. & W. [Eng.], 49; *Watson v. Pears*, 2 Campb. [Eng.], 294; *Ratcliffe v. Bartholomew*, 1 Q. B. Div., 1892 [Eng.], 161; *Gross v. Fowler*, 21 Cal., 393; *Savings & Loan Society v. Thompson*, 32 Cal., 347. But perhaps the most satisfactory of reported cases is *Migotti v. Colvill*, 4 L. R., C. P. D. [Eng.], 233, which was an action against the governor of the Middlesex House of Correction for false imprisonment. It appears that the plaintiff was on the 31st day of October sentenced to imprisonment for the period of one calendar

month, and to the further term of fourteen days, to commence on the expiration of the first sentence. The decision turned upon the question when the first sentence terminated, and Lord Denman, after an exhaustive examination of the subject, concludes as follows: "On the whole, I am of opinion that a sentence of imprisonment for one calendar month passed on any given day of any given month is to be held to begin to run from the first moment of that day and to expire upon arriving at the first moment of the corresponding day in the succeeding month. If there be no such corresponding day by reason of the succeeding month not having so many days as in the preceding month, then, by analogy to the law established in the case of bills of exchange, I think the calendar month should be held to have expired at the last moment of its last day." The other judges, Cotton, Bramwell, and Brett, concur in separate opinions, the latter using the following language: "I am of opinion that the term a 'calendar month' is a legal and technical term, and that we are bound to interpret its legal and technical meaning. The meaning of the phrase is that in computing time by calendar months the time must be reckoned by looking at the calendar and not by counting days, and that one calendar month's imprisonment is to be calculated from the day of imprisonment to the day numerically corresponding to that day in the following month, less one." It is true the precise question was not presented in every case cited, as the same result would in some instances have been reached by extending the period to the end of the month; but they are nevertheless instructive as tending to sustain the assertion of counsel that in no case, except in *Minard v. Burtis, supra,* was the rule applied by the district court contended for. The natural and necessary deduction from the authorities above cited is that the term "calendar month," as used in the constitution, had, prior to the adoption of that instrument in 1875, received a definite interpretation, and is to be com-

puted not by counting days but by looking at the calendar, and terminates with the day numerically corresponding to the day of its commencement, less one, in the following month; and such is evidently the sense in which it is employed in the constitution.

The authorities are not, as will be observed, harmonious upon the question whether the first day—in this instance, the day of the adjournment of the legislature—is to be included in the prescribed period. That question is, however, not an open one in this state. Indeed, it is clear that section 895 of the Code of Civil Procedure, providing that "the time within which an act is to be done as herein provided shall be computed by excluding the first day and including the last," was intended to establish a uniform rule, applicable to the construction of statutes as well as to matters of practice. (*Monell v. Terwilliger*, 8 Neb., 360; *McGavock v. Pollack*, 13 Neb., 535; *Spencer v. Haug*, 45 Minn., 231.) It follows that the period of three calendar months after the adjournment of the legislature of 1893 terminated at midnight of the 8th day of July of that year. It follows, too, that the act amendatory of the Criminal Code relating to the penalty for murder in the first degree was the law of the state on the 29th day of July and should have governed in the trial of this cause. The attorney general, however, relies upon a practical construction of the provision under consideration adverse to the view above stated. That contention has for its basis the opinion of Hon. George H. Hastings, attorney general, in response to an inquiry addressed to him by the secretary of state on the 29th day of April, 1891. We have examined with care the opinion referred to, but are unable to accept the conclusion of the learned author, for reasons already appearing. A practical exposition of a constitutional provision by the officers charged with its execution is, as said by us in *State v. Holcomb*, 46 Neb., 88, entitled to great weight, and will, in case of doubt or ambiguity,

especially when long acquiesced in, generally be adopted by the courts; but that rule can have no application to the case at bar. There is not alone an absence of evidence tending to prove that the construction of the attorney general was acquiesced in by the executive officers or the people of the state, but it is a fact, verified by the records of this court and of which we are required to take notice, that the question has, ever since the date of the opinion mentioned, been the subject of judicial controversy.

Of the many questions presented during the able and instructive arguments with which we have been favored in this case it is necessary to notice two only in addition to those already examined, and which are both included in the proposition that it is our duty to discharge the plaintiff in error instead of remanding the cause for trial *de novo*. It is asserted by counsel that the plaintiff has been once in jeopardy within the meaning of the bill of rights, and that the trial then had is a bar to further prosecution for the crime charged. If the question were an open one to be determined by the application of fundamental principles, the argument of counsel could not be lightly disregarded. Indeed, we can conceive of no course of reasoning which does not lead logically to the conclusion contended for. As said by Mr. Bishop (1 Bishop, Criminal Law, 1044): "The court is the power that brings the jeopardy upon him [the prisoner], and when the constitution declares that this power shall not put him in jeopardy twice, it is mockery to say that it may bring him into as many jeopardies as it will, provided it violates the law each time." But the author, at sections 998 and 999 of the same volume, admits the contrary to be the firmly established rule. To attempt an examination of the cases holding that the accused, in a criminal prosecution, by procuring a reversal of the judgment of conviction, waives his right to object to a second trial on the ground that he has been once put in jeopardy, would be a work of supererogation. It is sufficient that

the question has been definitely determined by this court in *Bohanan v. State*, 18 Neb., 57. (See, also, *United States v. Harman*, 68 Fed. Rep., 472.)

The other contention, that the prisoner should be discharged, is based upon the following facts: On the 29th day of December, 1893, the district court, on overruling the motion for a new trial, pronounced its judgment by which the prisoner was to be executed on the 6th day of April following, and in the meantime remain in solitary confinement in the jail of Douglas county. On the next day, to-wit, December 30, he was again brought into court and an order made setting aside the judgment previously entered and a second sentence pronounced by which April 13, 1894, was named as the day of execution. The second sentence, like the first, provided that the prisoner should, from the date thereof until the day of his execution, be confined in the jail of Douglas county. It is argued that the second sentence is not irregular merely, but absolutely void, for the reason that the punishment prescribed by the first had been suffered in part by the prisoner, and the power of the court over the subject thereby exhausted. In the brief of counsel for the prisoner his position is thus tersely stated: "The solitary confinement imposed upon the prisoner was as much a part of his sentence as was his execution. The only authority that the sheriff had to imprison him during that day and until called into court the following day was the sentence pronounced on the 29th of December. All previous commitments had expired. Their purpose had been served. The judgment and sentence of the court were the only authority on which the imprisonment could be legally justified from the 29th to the 30th of December, and the imprisonment of plaintiff in error under that sentence from the 29th to the 30th of December was the infliction of a part of the punishment covered by the sentence and a part, too, that the court had legal authority to impose." That argument, although plausible, is

not convincing. The first sentence was, it is conceded, irregular, the time intervening between the date thereof and the day of execution being less than one hundred days, as prescribed by law (Criminal Code, sec. 503); but having reached the conclusion that the verdict was also irregular and should have been set aside on the motion of the prisoner, the power of the district court to correct its judgments in prosecutions for felonies will not now be examined.

This court in *Re Fuller*, 34 Neb., 581, held that the term of imprisonment of one sentenced to the penitentiary runs from the date of sentence and not from the date of his delivery to the warden; but that was a construction of section 518 of the Criminal Code, and not involving the question now under consideration. It is by section 547 provided, in substance, that the death penalty shall be inflicted in the immediate vicinity of the jail in an inclosure to be prepared under the direction of the sheriff. Although the confinement of the prisoner from the time of sentence until the day of his execution is a practice which has prevailed from time immemorial as a necessary incident to the judgment, it is, strictly speaking, no part thereof, and the power of the court in that regard does not rest upon any positive provision of statute. The precise question appears to have been seldom raised and the cases cited cannot be said to sustain the proposition contended for. In *People v. Meservey*, 76 Mich., 223, as well as *People v. Kelly*, 79 Mich., 320, the sentence was imprisonment in the penitentiary, and in accordance with the rule adopted by this court in Fuller's case, *supra*, was held to have commenced on the day it was imposed. In *Re Tyson*, 13 Colo., 482, the statute of 1889 provided that all persons convicted of crimes punishable by death should be delivered to the warden of the penitentiary and by him kept in solitary confinement until the day of execution. The statute in force at the time of the homicide, like ours, provided merely that every person convicted of murder in the first degree should suffer death. Tyson

having been convicted of murder in the first degree, was delivered to the warden under the act of 1889, whereupon he sought his discharge by means of a writ of *habeas corpus*, alleging that the provision for solitary confinement was in the nature of an *ex post facto* law. In disposing of that contention the court say: "Aside from this, the defendant is imprisoned for the purpose only that he may be produced at the time set for his execution, the confinement being no part of the punishment, but simply an incident connected therewith, referable to penal administration as its primary object." The same statute was before the supreme court of the United States in *Medley, Petitioner*, 134 U. S., 160, where it was held, but without controverting the proposition that the imprisonment is not a part of the sentence proper, that the provision therein for solitary confinement was in the nature of an *ex post facto* law as to crimes previously committed. We are satisfied with the reasoning of the Colorado court and do not hesitate to adopt the conclusion reached by it, so far as applicable to the facts of the case before us.

Although it has been our endeavor to examine the merits of the question presented, we must not be understood as conceding it to be an open one at this time. We have, on the other hand, no reason to doubt the soundness of the practice long prevailing in this state by which one committed to the penitentiary is, by procuring a reversal of the judgment of conviction, considered to have waived his right to insist that the partial execution of the sentence is a bar to further prosecution; and such, while not expressly decided, logically follows from the rule asserted in *Bohanan v. State*. The judgment is reversed and the cause remanded for further proceedings by the district court.

REVERSED.

MICHAEL SHAFER v. R. S. BRIGGS.

FILED NOVEMBER 19, 1895. No. 5635.

Review: INSTRUCTIONS: CRITICISM. In this case the verdict, upon the issues joined, was sustained by sufficient evidence, and since, aside from this point, the argument on behalf of plaintiff has been confined to mere unmerited criticisms of some matters which appear in the record, and others which do not, and no substantial error has been discovered in the record of the trial in the district court, its judgment is affirmed.

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

H. Wade Gillis, for plaintiff in error.

Charles T. Dickinson, contra.

RYAN, C.

There was a judgment in favor of the defendant in this cause in the district court of Burt county for one cent and costs. By proceedings in error the original plaintiff seeks a reversal of this judgment. The plaintiff's claim of $20.60, for the pasturage of certain cattle in the year 1891, was admitted in the answer of the defendant. Affirmatively, the defendant alleged the undertaking of plaintiff to pasture and care for sixteen head of cattle entrusted to him for that purpose during the summer of 1891, and that by reason of the loss of one of these cattle the defendant has been damaged in the sum of $25, and by reason of plaintiff's failure to provide suitable care, pasturage, and water the remaining cattle had suffered deterioration in value, to the damage of the defendant in the sum of $75. There was a prayer in the answer for judgment in favor of the defendant. The affirmative matters set up in this answer were denied by plaintiff's reply. There was no brief submitted by the

defendant in error. We shall therefore consider the alleged errors presented by the plaintiff in the order in which they are found in his brief. It would be of no use to give even a synopsis of the evidence, and it must answer every purpose to say that a greater verdict in favor of the defendant would have been justified by the proofs.

It is urged that the court refused to mark the instructions "given," and that plaintiff excepted to the refusal to so mark them. It is unfortunate for the contention that there was a refusal and an exception thereto, that the record does not show either. We have had no difficulty in determining from the record what instructions were, in fact, given. We shall therefore treat them as though marked as required by the statute.

The only remaining arguments are those directed against mere inaccuracies of expression, which in no way tended to mislead the jury, and against the language following, which it is asserted was used in an instruction given: "If you find that the plaintiff did undertake to care for defendant's cattle, as he explained, and caused the leakage of the leaking of the tanks in the pasture, in which defendant's cattle were placed, the cattle of defendant were kept from getting water," etc. It is unnecessary to reproduce the language further, for the criticisms are merely of forms of expression and not of matters of substance. It is fortunate that on the plaintiff's motion an order was procured in compliance with which the original instructions are now found in the record in this case. By reference to these it is found that the words given as being "as he explained" were in reality "as abv. explained." We cannot assume that the writer of this abbreviation did not read it correctly, using the word "above" instead of the abbreviation "abv." The clerk of the district court, no doubt innocently, made the mistake; yet it is but a mistake in transcribing. The language "and caused the leakage of the leaking of the tanks" is next attacked as unintelligible and therefore

misleading. We cannot state that there was originally a mistake, but it appears that, reading the type-written words only, there was the inaccuracy which above appears to exist. Following the word "leakage" there appears in the transcript, as having been written with a pen, the words "that because," so that, as now disclosed by the transcript, the language was, "caused the leakage, that because of the leaking of the tanks," etc. By reference to the original instruction we find that the words "that because" were therein as now shown in the transcript. The final criticism of a portion of the language already quoted is in the following paragraph: "The court says plaintiff must respond in damages because he allowed defendant's cattle to get in the mud, when by the following, 'of the tanks in the pasture in which the cattle were placed,' the court puts the whole herd into a tank, and this may have caused the leakage of the leaking." These captious criticisms have been noticed with perhaps more patience than they deserve, because, when all the facts are stated, it is easily seen how unjustly the presiding judge has been criticised. It is true that in some parts of his instructions more accurate language might have been used, and yet it is a fact that the plaintiff's counsel, with all his zeal, and with some apparent feeling, has been unable to point out a single error in any matter of substance. The judgment of the district court is

AFFIRMED.

ALVA CHAMBERS V. STATE OF NEBRASKA.

FILED NOVEMBER 19, 1895. No. 7789.

1. **Rape.** The word "abuse," in the sense in which it is used in section 12 of the Criminal Code, is synonymous with the word "ravish." Following *Palin v. State*, 38 Neb., 862.

2. ———: INSTRUCTIONS. An instruction, in effect that carnal abuse does not necessarily mean abuse by sexual intercourse, attempted or accomplished, *held* erroneous.

ERROR to the district court for Douglas county. Tried below before SCOTT, J.

Robert W. Richardson, for plaintiff in error.

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

RYAN, C.

It is provided in section 12 of our Criminal Code that: "If any male person of the age of eighteen years or upwards shall carnally know or abuse any female child under the age of fifteen years with her consent, every such person so offending shall be held guilty of rape." The plaintiff in error was convicted in the district court of Douglas county of carnally abusing a female child under the age of five years and was sentenced to imprisonment in the penitentiary for a term of twenty years. On the trial the jury was instructed that "Carnal abuse does not necessarily mean abuse by sexual intercourse or by attempted sexual intercourse." In *Palin v. State*, 38 Neb., 862, it was held that the word "abuse," in the sense it is used in section 12 of the Criminal Code, is synonymous with "ravish." In *Dawkins v. State*, 58 Ala., 376, it was held that "the term 'abuse' in the statute punishing carnal knowledge, or abuse in attempting to have carnal knowledge, of a female child under ten years, must be limited in its meaning to injuries to the genital organs in the attempt at carnal knowledge falling short of actual penetration. It was not intended to mean other forcible or wrongful ill-usage such as might support an indictment for assault with intent to ravish." The language of the Alabama statute, to which reference was made in the above quoted syllabus of the

case, was as follows: "Any person who has carnal knowledge of any female under the age of ten years, or abuses such female in the attempt to have carnal knowledge of her, must, on conviction, be punished," etc. (Alabama Code, 1876, sec. 4306.) Within itself this statute provides that the abuse must be in the attempt to have carnal knowledge of a female, yet, strangely enough, we find that the word "abuse" is often defined as a mere attempt at carnal knowledge, and the case of *Dawkins v. State, supra,* is cited as authorizing this as a correct general definition of the word. (*Vide* Desty, American Criminal Law, sec. 135; Rapalje & Lawrence's Law Dictionary; Bouvier's Law Dictionary; Black's Law Dictionary.) The definition adopted in *Palin v. State, supra,* has, we think, support in authority more satisfactory than those definitions which follow *Dawkins v. State.* In view of either class of definitions of the word "abuse," however, the language of the instruction above quoted was without warrant. The judgment of the district court is therefore reversed and the cause is remanded to the district court.

REVERSED AND REMANDED.

WILLIAM H. DOLAN ET AL. V. ROSA MCLAUGHLIN ET AL.

FILED NOVEMBER 19, 1895. No. 5901.

1. **Intoxicating Liquors:** ACTION ON SALOON-KEEPERS' BONDS: INSTRUCTIONS. Where, in a petition, it was alleged, and the proofs therewith corresponded, against two licensed saloon-keepers and the sureties on their bonds that the surviving members of a family had been deprived of their means of support by the death of the head of the family, which death took place while such head of the family was in a deranged and stupid state, superinduced by periods of intoxication at intervals extending over a period of five months' time, the last of which period of

intoxication had been two weeks after any liquor had been sold, and that to some of the fits of intoxication the principals contributed by sales of liquor, *held*, a misleading error to instruct the jury that "where several liquor dealers furnish intoxicating liquors, the use of which results in intoxication and damage, each dealer is equally liable, and that, in case one dealer furnishes the first draught while the user thereof is perfectly sober, and the liquor which intensified and completed the intoxication was furnished by other parties, the dealer furnishing the first draught is equally liable with the others for the damage resulting from such intoxication."

2. ———: ———: ———. In an action for damages against licensed liquor dealers and the sureties on their bonds for loss of support caused by the death of the head of the family alleged to have been brought about by intoxicating liquors sold by such dealers, where there had been introduced evidence tending to show that at least one sale was of a liquid not intoxicating, it was erroneous to instruct the jury that, "where it is shown that the person was sold or furnished liquor at a licensed saloon, the presumption is that such liquor was intoxicating."

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

The opinion contains a statement of the case.

T. M. Marquett and *E. N. Kauffman*, for plaintiffs in error:

The court erred in giving the tenth paragraph of the instructions asked by plaintiff. (*Elshire v. Schuyler*, 15 Neb., 561; *Ramtz v. Barnes*, 40 O. St., 45; *Emory v. Addis*, 71 Ill., 273; 3 Am. & Eng. Ency. Law, 258.)

Where several persons contribute to the intoxication and injury in a single fit of intoxication, they are jointly liable, but where the injury complained of consists of separable and well-defined individual acts, or where the injury complained of is furnishing liquors during a long period to a person in the habit of becoming intoxicated, the rule is different, and each is only liable for the injury produced by his own acts. (*Hitchner v. Ehlers*, 44 Ia., 40; *La France v.*

Krayer, 42 Ia., 143; *Flint v. Gauer*, 66 Ia., 696; *Ennis v. Shiley*, 47 Ia., 552; *Engleken v. Webber*, 47 Ia., 558; *Jewett v. Wanshura*, 43 Ia., 574; *Richmond v. Shickler*, 57 Ia., 486; *Kirchner v. Myers*, 35 O. St., 85.)

G. M. Lambertson and *F. M. Hall*, also for plaintiffs in error, contending that the tenth instruction is erroneous, cited: *Morley v. Moulton*, 45 Ill. App., 305; *Westphal v. Austin*, 41 Ill. App., 652.

Alfred Hazlett, contra:

The tenth instruction asked by plaintiff stated the law correctly. (*Sellars v. Foster*, 27 Neb., 127; *Roose v. Perkins*, 9 Neb., 304; *Elshire v. Schuyler*, 15 Neb., 561; *McClay v. Mangan*, 18 Neb., 44; *Wardell v. McConnell*, 23 Neb., 152; *Jones v. Bates*, 26 Neb., 693.)

Where a number of persons furnished intoxicating drink to another, and the drunkenness continued until death, and the person who took the drinks died from the effects of the drunkenness, all those furnishing liquor to produce it are liable. (*Roose v. Perkins*, 9 Neb., 304; *Wardell v. McConnell*, 23 Neb., 152; *Jones v. Bates*, 26 Neb., 693; *Greenlee v. Schoenheit*, 23 Neb., 669; *McManigal v. Seaton*, 23 Neb., 549.)

Griggs, Rinaker & Bibb, also for defendants in error.

RYAN, C.

This action was originally brought in the district court of Gage county by Rosa McLaughlin on her own behalf, as widow of John McLaughlin, and on behalf of the minor children of said John McLaughlin. The defendants were the members of the firm of John J. Patterson & Co. and the sureties on the bond of said firm given in compliance with the requirements of chapter 50, Compiled Statutes. Subsequently an amended petition was filed in which as defendants were added the names of William H.

Dolan as principal and J. H. Reynolds and E. P. Reynolds, Jr., as sureties on a bond of the same general nature as that originally sued upon. The manner in which the principals named caused damage to the plaintiff and her children is thus described in the amended petition. "On the 20th day of October, 1890, and on divers other days thereafter, before and up to the 23d day of March, 1891, the said John McLaughlin, now deceased, became intoxicated and continued to drink heavily, and frequently went into a fit of intoxication and drunkenness for ten days in succession, and thereby spent his time on these days in the saloons and places of business of said defendants John J. Patterson & Co. and William H. Dolan, above named, in the city of Wymore, sometimes being in the place of business of the said John J. Patterson & Co., and at other times in the place of business of the said William H. Dolan, and would frequent the business houses of the said defendants, respectively, many times during the day and days above mentioned, and during said time, and between the said dates, the said John McLaughlin was addicted to the immoderate use of intoxicating liquors; and the said defendants John J. Patterson & Co. and the said William H. Dolan, during all of said times, did sell, give, and furnish intoxicating liquors to the said John McLaughlin, to such an extent and in such quantities that the said John McLaughlin became and was, during all of said time, an habitual drunkard, and was continually in a state of intoxication, and was thereby rendered unfit to perform labor, and was unable to carry on his business and squandered his money and did not furnish these plaintiffs with any means of support, and the said John J. Patterson & Co. and William H. Dolan, above named, furnished, and continued to furnish, liquor to said John McLaughlin in such quantities so that he became intoxicated; that on the 26th day of November, 1890, the said John McLaughlin, by reason of having drank liquor in the business houses of

the said defendants above named, became beastly drunk and wholly helpless and unable to care for himself in said intoxicated condition, and prior to and subsequent to said 26th day of November, 1890, by reason of said John McLaughlin having received intoxicating drinks from the said defendants above named, was unable to transact his business, and when the said John McLaughlin was under the influence of such liquors as aforesaid sold to him by said defendants John J. Patterson & Co. and William H. Dolan, above named, became irritable and cross and at times was almost devoid of his reason and mental faculties and was a great source of trouble and annoyance to the plaintiffs by reason of the said intoxicating liquor sold to the said John McLaughlin as aforesaid, and the said defendants John J. Patterson & Co. and William H. Dolan continued to sell and furnish liquors to the said John McLaughlin while he was so intoxicated. These plaintiffs further say that on the 6th of April, 1891, the said John McLaughlin, by reason of said intoxication as aforesaid, and while in a stupid and deranged mental condition produced by said continued intoxication, died at the time last aforesaid; that the death of said John McLaughlin was caused from the effects of the liquors sold, given, and furnished him by the said defendants John J. Patterson & Co. and William H. Dolan, above named, and used by the said John McLaughlin." Following the above quoted averments there were allegations as to the age and earning capacity of John McLaughlin, and that his widow and minor children, by his death, had been deprived of the means of support which, had he lived, he would have furnished them. There was a prayer for judgment against all the defendants in the sum of $5,000. From a judgment accordingly rendered in the sum of $4,000, upon a verdict for that amount against all the defendants in the district court, proceedings in error have been prosecuted by William H. Dolan and his sureties alone, all the other parties to the

suit being joined as defendants in error. It is, therefore, only incumbent upon us to consider the separate defenses made on behalf of plaintiffs in error in the district court which were, first, an admission of the execution of the bond set out in the petition, and that William H. Dolan was, from October 20, 1890, till March 23, 1891, engaged in the saloon business in Wymore; and second, a denial of each allegation contained in the amended petition, except such as had been previously admitted. There were still further averments in this answer, such as that John McLaughlin had been before his death, for a long time, an habitual drunkard, and that, in consequence, he had not contributed to the support of his family, etc. As the jury seems to have found adversely to this sort of an avoidance, not to say justification, it may be dismissed from further consideration.

As we understand the petition, the death of John McLaughlin and the subsequent loss of support of his family are the facts from which the damage is claimed to have resulted. It is true that between October 20, 1890, and March 23, 1891, various sales of intoxicating liquors to John McLaughlin were alleged to have been made, but these sales were referred to simply as contributing to his being habitually intoxicated, and perhaps therefrom resulting his diseased condition. There was no claim that between March 23, 1891, and April 6 thereafter, which latter was the day on which McLaughlin died, there had been sold to him any intoxicating liquors, nor that, in this interim, he had used such liquor. The testimony of attending physicians was that death resulted from a general breaking down of the system caused by the use of too much alcoholic stimulants, and this, as we understand it, was what was alleged in the petition.

The court instructed the jury by the tenth instruction as follows: "The court instructs the jury that where several liquor dealers furnish the intoxicating liquors, the use of

which results in intoxication and damage, that each dealer is equally liable, and that in case one dealer furnished the first draught while the user thereof was perfectly sober and the liquor which intensified and completed the intoxication was furnished by other parties, the dealer furnishing the first draught is equally liable with the others for the damage resulting from such intoxication." In a proper case the correctness of this instruction would probably be unquestioned. It, however, applied to a case wherein there may have been produced by the contributory sales of different liquor dealers a state of intoxication from, or by reason of which, directly, the damage complained of resulted. The evidence in the case at bar shows that, as early as 1881, John McLaughlin had suffered from *delirium tremens;* that with the exception of a period of about three years soon thereafter, he had habitually, up to the time of his death, indulged in frequent debauches, and that, in consequence, his general health became impaired. We cannot avoid the conclusion that, as applied to the facts of this case, both as pleaded and proved, the above instruction was probably prejudicial to the plaintiffs in error.

On the trial the proofs were that the greater part of the intoxicating liquors consumed by McLaughlin were sold to him by J. J. Patterson & Co. There were, however, a few instances as to which the testimony was that intoxicating liquors were sold to him in the saloon of William H. Dolan. This was denied by Dolan and his employes when examined as witnesses. Following this was uncontradicted testimony that, in many instances, McLaughlin had been refused whiskey, notwithstanding the fact that he urgently sought to buy and pay for it. Elias N. Whitmarsh, a witness for the plaintiff in the district court, testified that after October 20, 1890, and before 1891 [the date was not more definitely fixed], he saw John McLaughlin at the bar of William H. Dolan drink something, but whether it was water or beer he could not say. This witness said

that the glass out of which this drink was taken looked like a seltzer glass, and that the sale was by Dolan himself. James H. Clapp, one of Dolan's witnesses, testified that, in December, 1890, or January thereafter, he with others was in Dolan's saloon, and that McLaughlin came up with the rest and took something of a light color in a glass, and that when witness asked him what was the matter, McLaughlin answered: "Billy [Dolan], here, is a good boy, but he won't let me have anything but seltzer."

The third paragraph of the instructions given by the court was as follows: "The court instructs the jury that the sale of intoxicating liquors may be proven by circumstantial evidence, and where it is shown that the person was sold or furnished liquor at a licensed saloon, the presumption is that such liquor was intoxicating." Whether or not intoxicating liquors were by Dolan sold to McLaughlin, was the most seriously contested question in this case. The word "liquor" is defined by Webster: "1. Any liquid or fluid substance, as water, milk, blood, sap, juice, and the like. 2. Especially, alcoholic or spirituous fluid, either distilled or fermented;" as, brandy, wine, whiskey, beer, etc. If the witnesses, in describing what liquid had been sold to McLaughlin, had uniformly described it merely as liquor, it might be proper for the jury to assume that it was in that class specifically referred to in the second definition above given; but such was not this case. There was evidence that the liquid furnished by Dolan to McLaughlin, at least on one occasion, was seltzer, and within one of the definitions given above seltzer is clearly embraced. Under these circumstances it was erroneous to instruct the jury that whatever liquor is shown to have been sold in a licensed saloon is presumed to be intoxicating.

There are discussed other questions which need not in this proceeding be considered. The judgment of the district court as against the plaintiffs in error is

REVERSED.