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REPORTS OF CASES

IN THE

SUPREME COURT

OF

NEBRASKA.

JANUARY TERM, 1896.

VOLUME XLVII.

D. A. CAMPBELL,
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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.

1896.

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(Laws 1893, chapter 16, page 150.)

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

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

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

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

Approved March 9, A. D. 1893.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NEBRASKA.

JANUARY TERM, A. D. 1896.

PRESENT:

HON. A. M. POST, CHIEF JUSTICE.
HON. T. O. C. HARRISON, } JUDGES.
HON. T. L. NORVAL, }
HON. ROBERT RYAN, }
HON. JOHN M. RAGAN, } COMMISSIONERS.
HON. FRANK IRVINE, }

STATE INSURANCE COMPANY OF DES MOINES, IOWA, V. BUCKSTAFF BROTHERS MANUFACTURING COMPANY.

FILED FEBRUARY 4, 1896. No. 7641.

1. **Record for Review:** BILL OF EXCEPTIONS: STIPULATIONS. A written stipulation of facts or mode of proof filed in a cause forms no part of the record, unless made so by a bill of exceptions.

2. ———: ———: ———. Nor can such stipulation make a part of the record in which the same is filed the bill of exceptions settled and allowed in another cause.

3. **Absence of Question for Review:** AFFIRMANCE. Where the petition in error presents no question for review, the judgment of the trial court will be affirmed.

ERROR from the district court of Lancaster county. Tried below before HALL, J. Heard on motion of defendant in error to affirm the judgment of the trial court. *Motion sustained.*

Charles O. Whedon, for the motion.

Jacob Fawcett, contra.

PER CURIAM.

This cause was submitted on the motion of the defendant in error to affirm the judgment of the trial court. We have held, where an examination of the record of a cause brought to this court for review discloses that the petition in error presents no question for consideration on a motion to dismiss the proceedings, the cause will be considered on its merits, and the judgment affirmed. (*Upton v. Cady*, 38 Neb., 209; *Erck v. Omaha Nat. Bank*, 43 Neb., 613.) The rule stated above is a salutary one, and its enforcement will tend to discourage the bringing of cases to this court for delay merely.

The petition in error herein contained forty-eight assignments, of which four question the sufficiency of the evidence to support the verdict; three attack the rulings of the court upon the admission of testimony; two relate to challenges of jurors; twenty-seven are predicated upon the giving and refusing of that number of instructions, while but one instruction is copied into the transcript; six are based upon submitting to the jury special findings from 1 to 6 inclusive, and no such findings have been certified up; one that the verdict is contrary to the fifteenth instruction, no such instruction being in the record; and one that

the court erred in overruling the motion for a new trial. Of course we must disregard the assignments which are foreign to the record, and it is obvious that not one of the other errors assigned can be considered without reference to a bill of exceptions containing the evidence adduced on the trial in the court below and preserving the rulings complained of and the exceptions thereto. The important inquiry is whether there is any bill of exceptions in this case. In the transcript brought here we find the following stipulation of the parties:

"In the District Court of Lancaster County, State of Nebraska.

"THE BUCKSTAFF BROTHERS MANUFACTURING COMPANY
v.
STATE INSURANCE COMPANY OF DES MOINES. } Stipulation.

"It is hereby stipulated and agreed that this case be submitted to the jury now in the box in the case of the Buckstaff Brothers Manufacturing Company *versus* the American Fire Insurance Company of New York, upon the record already made in the said case; the jury to consider all of the oral testimony and exhibits admitted in said case. All of the exhibits admitted or offered in said case are to be taken and considered as applicable to this case; all of the testimony offered, whether oral or written and excluded by the court, shall be considered as offered in this case; and all of the rulings of the court during the trial of said American Fire Insurance Company's case shall be considered as having been made in this case, and all of the exceptions to said testimony and said rulings shall be considered as in this

case; the intention being that this case, when submitted, shall be upon the same record in all respects, with the same rights and exceptions to both parties as in said case of Buckstaff Brothers Manufacturing Company *versus* the American Fire Insurance Company of New York. It is understood that the defendant makes no defense by reason of insufficiency of proofs of loss, and no further testimony is to be introduced in this case, excepting only the insurance policy sued on. This case is to be submitted upon the instructions of the court to be given to the jury, and it is understood that the instructions asked for by both parties in said American Fire Insurance Company case shall be considered as asked for by the respective parties in this case.

"BUCKSTAFF BROTHERS MANUFACTURING COMPANY,

"By CHAS. O. WHEDON, *Its Attorney.*

"STATE INSURANCE COMPANY,

"By J. FAWCETT, *Its Attorney.*"

It appears that a bill of exceptions was settled and allowed in the case mentioned in the foregoing stipulation, and it is argued that the same should be treated and considered as a part of the record in the case at bar. Clearly there is nothing in the above stipulation which will justify such a conclusion, although such may have been the intention of the parties when they entered into the same. It was contemplated that other and additional testimony should be adduced in this case than was given in the case of the American Fire Insurance Company, namely, the policy herein declared upon. A proper bill of exceptions in that case, therefore, would not include all the evidence in the case at bar. There is no order of

court making any portion of the record in the case to which reference has been made a part of the record herein. If the bill of exceptions of what transpired in such other action is to be considered a part of this record, it is such solely by reason of the stipulation alluded to, since it is not entitled in this suit, nor was it signed and allowed herein. If such stipulation is not itself properly a part of this record, then it is plain that it cannot be considered by us for any purpose whatever. The bill of exceptions in one cause cannot properly preserve and bring into the record what transpired in another suit between different parties, so that we could not expect to find in the bill of exceptions in the case of the American Fire Insurance Company the evidence adduced and rulings made during the trial in this cause. It is true the written stipulation provides that this case should be submitted to and decided by the court below upon the same record as to the rulings of the court and upon the same testimony as in the other case, save only the policy in suit; but there is nothing to show that this agreement was acted upon by the litigants and the court. On the contrary, the record affirmatively shows that the cause was submitted to the jury impaneled in the other case by "agreement in open court," from which the inference may be indulged that the written stipulation was ignored by the parties, and not considered by the court. The steps requisite to preserve the evidence upon which the jury found their verdict and the rulings of the court during the trial have not been taken. This could be accomplished only by a bill of exceptions duly settled in the mode required by statute. A stipulation of the attorneys in a cause is no more part of the record than

a deposition or any other evidence which may have been improperly included in the transcript. Matters which are not properly part of the record cannot be made so by being improperly inserted in the transcript. A stipulation of facts or mode of proof cannot take the place of a bill of exceptions. (*Credit Foncier of America v. Rogers*, 8 Neb., 34; *State v. Knapp*, 8 Neb., 436; *Herbison v. Taylor*, 29 Neb., 217; *McCarn v. Cooley*, 30 Neb., 552.) This stipulation could have been brought into the record by a bill of exceptions; but that not having been done, it is not properly before the court, and hence it cannot be considered.

It is said, in argument, the stipulation was entered into "to relieve the court, counsel and clients, and the interested public, of the repetition of an endless amount of time, labor, and expense." The motive was indeed a laudable one, and it is to be regretted that the failure to make the stipulation a part of the record prevents us from determining whether the judgment was right or wrong. The court, however, is not to blame, since this question of practice had already been settled by repeated decisions. Nor was it necessary, under the views herein expressed, as counsel suppose, that the ponderous and voluminous bill of exceptions in the case of the American Fire Insurance Company should be duplicated at an enormous and needless expense, in order to have preserved the rights of the parties. No reason occurs to us why it might not have been brought into this record, without copying, by settling of a brief bill of exceptions herein making it a part thereof by referring to, and identifying, the same in such a manner that there could possibly be no mistake as to what is referred to. Even if this were not so,

yet the matter of labor and expense involved in duplicating the bill of exceptions is no reason why we should consider as parts of this record the stipulation set out above and the bill of exceptions in another cause, when they have not been made so in the mode prescribed by statute. Inasmuch as no bill of exceptions has been allowed in this case, the errors relied upon for a reversal cannot be reviewed, and the motion to affirm the judgment must be sustained.

AFFIRMED.

OMAHA LOAN & TRUST COMPANY, APPELLEE, V. RICHARD HOGEBOOM ET AL., IMPLEADED WITH CHARLES F. TUTTLE, APPELLANT.

FILED FEBRUARY 4, 1896. No. 8026.

Appeal: RECORD FOR REVIEW: LACHES. The record of the trial court in all appellate proceedings imports absolute verity. If such record is incomplete or incorrect, the remedy is by appropriate proceeding to secure a correction thereof in the lower court.

MOTION by appellee to dismiss appeal from a decree of the district court of Sarpy county on the ground that it was not taken in time. *Motion sustained.*

F. A. Brogan, for the motion.

Charles F. Tuttle, contra.

POST, C. J.

This is a motion by the Omaha Loan & Trust Company, the appellee, to dismiss the appeal on

the ground that it was not taken within the prescribed period of six months after the date of the final decree. Two transcripts have been filed in this court, both showing a decree rendered March 27, 1895, but differing in this: that one, viz., that filed by the appellant, is accompanied by a caption in which appears the following recital: "And afterward, on the 2d day of April, 1895, there was filed in the office of the clerk of the district court a decree, and the same became of record in journal 'F,' page 603, in words and figures following."

It is contended by appellant that the necessary and only inference from the foregoing recital is that the decree was not in fact entered until April 2, and that, following *Bickel v. Dutcher*, 35 Neb., 761, and *Ward v. Urmson*, 40 Neb., 695, the appeal taken October 1, following, was within the statutory time. The statement of the caption regarding the date of the filing of the decree does not purport to be a part of the record of the district court, but is a mere recital superadded by the clerk, and indicating, if it is to be regarded for any purpose, that the draft of the decree previously rendered and entered of record was, on the day named, lodged in the clerk's office and placed with the files of the court. It was said in *Bickel v. Dutcher* that the time for appeal begins to run against the appellant whenever it is within his power to comply with the statute regulating appeals by procuring a transcript of the proceedings of the district court; but in neither of the cases cited was it intimated that this court would look outside of the record of the trial court for the date of the order or decree appealed from. It is true that affidavits were received, but without objection, in *Bickel v. Dutcher*, tending to prove that the

decree was rendered on a day other than that shown by the record. They were not, however, seriously urged or considered for the purpose of contradicting the record of the district court, and the decision in that case, as shown by the opinion, rests upon entirely different grounds. In *State v. Hopewell*, 35 Neb., 822, it was held that the record of the trial court is, on appeal to this court, conclusive evidence of the date of the order or decree appealed from; and if the record is incorrect, the remedy is by direct proceeding to secure a correction thereof in that court. Like views are expressed also in *Haggerty v. Walker*, 21 Neb., 596, *Worley v. Shong*, 35 Neb., 311, and *McAllister v. State*, 81 Ind., 256. The rule recognized in the cases cited is without doubt applicable to the case at bar. It follows that the appeal was not taken within the statutory time, and that the motion to dismiss must be sustained.

MOTION TO DISMISS SUSTAINED.

RYAN & WALSH V. DOUGLAS COUNTY, IMPLEADED WITH COWIN & MCHUGH ET AL., APPELLANTS, AND NATIONAL BANK OF COMMERCE, APPELLEE.

FILED FEBRUARY 4, 1896. No. 5759.

1. **Contracts:** DEFINITION OF "DUE." The term "due" is employed to express distinct ideas. In some connections it is held to mean a debt immediately payable. In others it signifies a state of indebtedness merely, without reference to the time of payment; but does not include contingent liabilities which may ripen into absolute indebtedness upon the future performance of contract obligations.

2. **Construction of Assignment of Interests Due Contractors for County Building:** ATTORNEYS' LIENS. R. & W., being engaged as contractors in the construction of a public building for D. county, executed an assignment as follows: "To the Board of County Commissioners: For value received we hereby assign all our interest in warrants or vouchers due us from said county to the Bank of Commerce, and hereby authorize said bank to receipt for said warrants or vouchers in our name, and to pay all warrants or vouchers to the Bank of Commerce." *Held*, Not to include money subsequently earned by R. & W. in the performance of their contract with the county.

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

Cowin & McHugh, J. J. O'Connor, and *Brome, Andrews & Sheean*, for appellants.

E. J. Cornish, contra.

POST, C. J.

In the year 1887 the firm of Ryan & Walsh, by written contract, undertook the erection, for Douglas county, of a building described as a county hospital, the stipulated price therefor being $120,033. Soon after the commencement of the work, a controversy arose between the contractors and the county, involving the construction of the plans and specifications for said building. During the progress of the work difficulties multiplied so that Ryan & Walsh, in order to protect themselves in their disputes with the county, consulted Hon. John C. Cowin of the Omaha bar, upon whose advice they appear to have acted until some time in the year 1888. In the year last named Mr. Cowin associated with himself Mr. W. D. McHugh, in the firm name of Cowin & McHugh, and thereafter said firm repre-

sented Ryan & Walsh in said controversy. On the completion of the building in the month of February, 1890, Ryan & Walsh, under the advice of Cowin & McHugh, presented a bill for $69,404.09, being the amount of the balance claimed by them, and which included the sum of $50,612.09 for extra work and material done and furnished at the special instance and request of the county. The county board, after a protracted investigation, made an order allowing the sum of $17,951.57 in full of said demand, and from which an appeal was by the claimants taken to the district court for Douglas county. Ryan & Walsh, in the meantime being pressed for funds with which to carry on their work and to meet their obligations incurred for material, gave numerous written orders upon the county directing payment out of money earned by them under said contract. Among the orders thus given was one in favor of the Bank of Commerce, as follows:

"OMAHA, 2—9, 1889.

"To the Board of County Commissioners of Douglas County: For value received we hereby assign all our interest in warrants or vouchers due us from said county to the Bank of Commerce, and hereby authorize said bank to receipt for said vouchers or warrants in our name, and to pay all warrants or vouchers to the Bank of Commerce.

"WALSH & RYAN.
"DENNIS CUNNINGHAM.
"JERRY RYAN."

It was deemed advisable by the bank, in order to protect its rights under the foregoing assignment, to join in the appeal of Ryan & Walsh, and the necessary bond and notice were accordingly given by it. Issue being

joined in the district court, a trial was had therein at the February, 1891, term, resulting in a verdict and judgment for Ryan & Walsh in the sum of $37,571.20. On the 27th day of February, 1891, Cowin & McHugh filed notice of an attorney's lien upon said judgment in the sum of $4,000, being a general balance claimed for their services in said cause. On the 20th day of November, 1891, they filed a second notice, in which they claimed a further lien in the sum of $1,000, being $150 for money advanced in the prosecution of said cause, and $850 for services rendered since the date of the lien first mentioned; and on the 27th day of June, 1891, J. J. O'Connor gave written notice of an attorney's lien in said cause on account of services rendered Ryan & Walsh, in the sum of $5,000. The situation was further complicated by suits of creditors, other than those above named, to enforce payment on account of the orders or partial assignments held by them in which the county had been enjoined from paying, and Ryan & Walsh from receiving, any part of the money adjudged due the latter. In view of the many conflicting claims, Ryan & Walsh, who were then insolvent, on the 20th day of November, 1891, by their attorneys, Cowin & McHugh, instituted proceedings in the nature of a bill of interpleader to which the county and the several claimants of the fund in dispute, eighteen in number, were made parties. Upon the issues joined by the answers of the defendants named in said proceeding there was a final decree determining the rights of the parties in the premises, but which at this time concerns us only so far as it relates to the claims of Cowin & McHugh, O'Connor, and the Bank of Commerce. The

answer of the bank is unfortunately not found in the record, but, judging from the decree of the district court, its contention therein was that the effect of the order or assignment above set out was to create in its favor a first lien for advancements made, *and to be made*, to Ryan & Walsh of all money then due, or to be thereafter earned by them under their contract with the county. In that view the court evidently concurred, since it is in the third finding recited:

"That on said 19th day of February, 1889, the said plaintiffs sold, assigned, transferred, and set over to the said Bank of Commerce, by an instrument in writing bearing that date, all their right, title, and interest in and to all moneys, warrants, or vouchers due or to become due to the said plaintiffs from the said county of Douglas under and by virtue of said contract between said plaintiff and said county of Douglas, and authorized the said Bank of Commerce to receipt for all vouchers or warrants in the name of said plaintiffs, and instructed the defendant, the county of Douglas, to pay all warrants or vouchers due or to become due to said plaintiffs from said county of Douglas under said contract to the said Bank of Commerce, said instrument being intended between the parties as collateral security merely to the indebtedness then owing and which thereafter might be contracted by said plaintiffs with the said Bank of Commerce; that the board of county commissioners were duly notified of said order or assignment and the same was filed with the board of county commissioners of Douglas county on the 20th day of March, A. D. 1889."

The indebtedness of Ryan & Walsh to the bank at that time approximated $20,000, and there were

delivered to it by the county clerk, subsequent to the date of said assignment, five warrants drawn to Ryan & Walsh, aggregating $17,946.93, and dated, respectively, February 20, March 16, May 20, July 20, and September 7, 1889. The bank also, according to the finding of the court relying upon said assignment, advanced to Ryan & Walsh the further sum of $35,144.12, which was used by them in carrying on the work under their contract with the county, and which sum is now due and wholly unpaid. The court, upon the foregoing findings and evidence, ordered the amount due on the judgment against the county to be applied, first, in satisfaction of the indebtedness of Ryan & Walsh to the bank; second, that the balance should be distributed *pro rata* among the other assignees of said firm; and from which order and decree Cowin & McHugh and O'Connor have appealed to this court.

The question first suggested on this appeal is the effect of the instrument, upon which the bank rests its claim, to the fund in controversy. That an order payable out of a particular fund operates as an equitable assignment thereof *pro tanto* is conceded by appellants; nor can it be doubted that an assignment of money to become due by the terms of an existing contract is valid and enforceable in equity. (*Field v. City of New York*, 6 N. Y., 179; *Devlin v. City of New York*, 63 N. Y., 15; *Ruple v. Bindley*, 91 Pa. St., 299; *Bates v. Richards Lumber Co.*, 57 N. W. Rep. [Minn.], 218; *Krapp v. Eldridge*, 33 Kan., 106.) But does the assignment in this instance, by its terms, include money subsequently earned by Ryan & Walsh in the prosecution of the work in which they were then engaged? We think not. Counsel for the bank, in

the brief submitted by them, refer to no authority in support of the conclusion of the district court, and our own investigation has been equally unproductive of that result. The cases examined, on the other hand, tend strongly to support the opposing view. The language of the assignment is "all our interest in warrants or vouchers due us from said county." The word "due," according to the consensus of judicial opinion, has a double meaning, viz., (1) that the debt or obligation to which it applies has by contract or operation of law become immediately payable; (2) a simple indebtedness, without reference to the time of payment, in which it is synonymous with "owing," and includes all debts, whether payable *in præsenti* or *in futuro*.

In *Allen v. Patterson*, 7 N. Y., 476, it was alleged that there was due from the defendant on account for goods sold and delivered the sum of $371.01. On affirming an order overruling a demurrer to the complaint it was said: "Counsel insist that the statement that there was 'due,' etc., did not amount to a statement that the debt had become payable; that it meant no more than the statement that the defendant is 'indebted,' etc.; and that if the word 'due' had two significations, the plaintiff could not select between them and impute to it the one which suits his purpose best," and, after citing with approval the opinion of Judge Story in *United States v. State Bank of North Carolina*, 6 Pet. [U. S.], 29*, holding that the word "due" is used both to express the mere state of indebtment and to indicate that the debt had in fact become payable, it was said: "In the latter sense I think the word 'due' was used by the pleader in the complaint."

District Township of Jasper v. District Township of Sheridan, 47 Ia., 183, was an action for the recovery of money as agreed between the parties, on the change of district boundaries, for the division of school funds due the first Monday in April. The fund in controversy was derived from taxes previously assessed, but which were payable at a later date. In disposing of the question the court say: "It is claimed by the defendant that a fund is due when the time arrives in which payment is enforceable, and it must be admitted that this is the ordinary meaning of the word; but while that is so, there is certainly another meaning somewhat broader."

In *Foster v. Singer*, 69 Wis., 392, the defendant was served with garnishee process in an action against Phillips, an employe, under a statute which authorized the appropriation by that means of debts "due or to become due" to the execution defendant. The garnishee summons was served August 28, and the controversy involved the salary of the defendant for that month, which, according to the evidence, was payable monthly at the end of each month. It was held that the salary for August was not on the day of the service "money due" within the meaning of the statute, since the defendant could not have maintained an action therefor against the garnishee. It was further held that it was not "money to become due," since the contract was an entirety, and to entitle Phillips, the defendant, to recover, it was necessary for him to work the entire month. In the opinion by Taylor, J., we find this language: "If Phillips had quit work on the 29th, he could not have recovered any part of his wages for the month. The debt, therefore, would only become

due upon the contingency that Phillips continued to work for the garnishee for the entire month."

In *Bishop v. Young*, 17 Wis., 46*, it was also sought to charge the defendant as garnishee; but his liability was shown to be contingent upon the completion by Grant, the attachment defendant, as contractor, of certain buildings then in course of construction. Grant, among other conditions, had stipulated to complete the buildings by a given date, and in case of his failure, to pay to Young damage at a given rate during the period of his default. In affirming the judgment below for the defendant it is said: "The 'property, moneys, and credits' here spoken of are such as are in the hands of the garnishee which belong to the principal debtor. And the 'debts due or to become due' evidently relate to such as the garnishee owes absolutely, though payable in the future. We have no idea the statute intended to include in the language 'to become due' a debt which might possibly become due upon the performance of a contract by the defendant in attachment." (See, also, as supporting the views above expressed, *Scudder v. Coryell*, 5 Hals. [N. J.], 340; *Hoyt v. Hoyt*, 1 Harr. [N. J.], 138; *Looney v. Hughes*, 26 N. Y., 514; *Fowler v. Hoffman*, 31 Mich., 219.)

The rule distinctly recognized by the authorities is that the term "money due," etc., implies such an obligation as will, by the effluence of time alone, ripen into a cause of action, and in no reported case, we believe, have like expressions been held to include property having a potential existence only.

The reasoning in *Bishop v. Young* is quite as applicable to the case before us. Here the fund, which is the subject of the controversy, is the

product of the labor and skill of the contractors subsequent to the assignment relied upon, and had at the time in question no actual existence. Further liability of the county under the contract was conjectural merely and contingent upon the performance by Ryan & Walsh of their stipulated obligations. It was not, in any legal sense of the term, "money due;" and the assignment was accordingly ineffectual for the purpose of transferring the title thereof to the bank. It follows that the appellants, for the value of the services rendered by them for Ryan & Walsh in the matter of the claim against the county, are entitled to liens upon the judgment recovered which is enforceable in this proceeding. The bank, it should be noted, relied upon its alleged paramount title to the proceeds of the judgment without contesting seriously the value placed upon the appellants' services.

As to the claim of Cowin & McHugh, it is sufficient to say that their employment began in the year 1887, and that the foundation for the claim, afterward successfully prosecuted against the county, was laid by their construction of the plans and specifications, together with their advice during the progress of the work. The bills for extras, which were contested by the county on the ground that they were provided for by the contract, included 200 different items, requiring much time and labor in the preparation of the cause for trial. The trial which resulted in the judgment for Ryan & Walsh was begun February 10 and continued without interruption until March 3. Subsequently a bill of exceptions, consisting of 1,900 pages of type-written matter, was served upon Cowin & McHugh, which, after examination and approval

by them, was allowed by the presiding judge. The county, intending to have the judgment reviewed in this court, at once procured a transcript of the record of the district court to accompany its petition in error. However, about that time the county board, after argument by Cowin & McHugh, abandoned the proposed proceedings in error, and which determination was expressed by an appropriate resolution. Also, as illustrating the character and value of the services rendered by appellants, it may be mentioned that the motion for a new trial submitted by the county attorney contained 287 assignments, mostly relating to rulings during the course of the trial; and, as already appears, the amount recovered exceeds the allowance of the county board by more than $20,000. None of the witnesses examined upon that subject, including Hon. T. J. Mahoney, who represented the county throughout the entire controversy, place the services of counsel for Ryan & Walsh at less than $5,000, while the average estimate thereof greatly exceeds that sum. The claim of Cowin & McHugh cannot, upon the record before us, be said to be unreasonable. Indeed, a finding in their favor much greater than the amount of their claim would be warranted by the evidence.

The solution of the questions presented by O'Connor's claim is attended with more difficulty. It is, in the first place, not clear from the evidence whether his appearance in the district court was for Ryan & Walsh or Walsh alone. Previous to the alleged employment the members of the firm named, consisting of Jerry Ryan, Edward Walsh, and Dennis Cunningham, had become involved in controversies with each other, culminating in a

suit by Ryan against his copartners, in which O'Connor appeared as attorney for Walsh, and which resulted in an order restraining the latter from certain threatened acts in the name of the firm. According to the testimony of both Ryan and Cunningham, Cowin & McHugh were the only attorneys authorized to represent the said firm, and O'Connor's appearance in the district court was as the representative of Walsh individually; but, in the absence of record evidence to support that contention, the actual appearance of Mr. O'Connor in the name of the firm, and his active participation in the trial, of which the partners were all aware, raises a presumption of employment by the firm too strong to be thus overcome. That proceeding was prosecuted in the name and for the benefit of the firm, and the law implies a promise to pay the reasonable value of the service rendered by appellant therein. It is, however, as we have seen, conclusively shown by the record that Cowin & McHugh prepared the cause for trial and were responsible for its management during every stage of its progress to judgment. The office of O'Connor was that of an assistant only for the purpose of the trial, and $1,000 will, it is believed, under the circumstances of the case, liberally compensate him for his services.

The decree of the district court will accordingly be reversed with directions to proceed in accordance with this opinion, or, should appellants elect within thirty days from this date, a final order will be entered here so modifying the decree as to allow the appellants Cowin & McHugh the sum of $5,000, and interest from February 23, 1891, and to J. J. O'Connor $1,000, with interest from the date last named, said amounts to be first liens

upon the fund in controversy and to prorate with each other.

REVERSED.

BAUM IRON COMPANY V. LOUIS BURG.

FILED FEBRUARY 4, 1896. No. 5855.

1. **Examination of Witnesses:** LEADING QUESTIONS: REVIEW. The extent to which leading questions may be allowed rests in the discretion of the trial court, and the rulings in that respect will not, in the absence of an abuse of discretion, be disturbed by this court.
2. **Contracts:** RESCISSION. A contract cannot be rescinded in part on account of fraud, and ratified in part. It is the duty of the injured party in such case to rescind the contract as a whole or not at all.
3. **Review:** HARMLESS ERROR. A judgment will not be reversed on account of error not prejudicial to the complaining party.

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

The issues are stated in the opinion.

Kennedy & Learned, for plaintiff in error:

There was error in receiving in evidence the answers to leading questions. (*Swan v. Swan*, 15 Neb., 453; *Obernalte v. Edgar*, 28 Neb., 70; *St. Paul Fire & Marine Ins. Co. v. Gotthelf*, 35 Neb., 357.)

In criticising the instructions reference was made to the following cases: *McDowell v. Thomas*, 4 Neb., 542; *Harrow Spring Co. v. Whipple Harrow Co.*, 51 N. W. Rep. [Mich], 197; *Cockburn v. Ashland Lumber Co.*, 12 N. W. Rep. [Wis], 49; *Winans v.*

Sierra Lumber Co., 4 Pac. Rep. [Cal.], 952; *Halstead Lumber Co. v. Sutton*, 26 Pac. Rep. [Kan.], 444; *Trigg v. Clay*, 13 S. E. Rep. [Va.], 434; *Appeal of Brush Electric Co.*, 11 Atl. Rep. [Pa.], 654; *Imperial Coal & Coke Co. v. Port Royal Coal & Coke Co.*, 20 Atl. Rep. [Pa.], 937.

Bartlett, Baldrige & De Bord, contra.

POST, C. J.

This was an action by the defendant in error Louis Burg, doing business as the L. Burg Manufacturing Company, against the plaintiff in error, the Baum Iron Company, in the district court for Douglas county. The cause of action alleged is a quantity of hickory axles, amounting, at the contract price, to $282.87; also, certain double-trees and wagon-hounds, amounting to $4.25, making a total demand of $287.12. It is alleged that as one of the conditions of the contract with respect to the said property it was mutually agreed that it should be examined and accepted on behalf of the defendant below by one Hatrick at Farmington, Iowa, at which point it was to be delivered on the cars billed to the defendant at Omaha, in this state, and that his selection should be final and binding upon the parties. It is further alleged that the property above described was selected by said Hatrick pursuant to said agreement and shipped to the defendant below, by whom it was received June 10, 1890. The allegations of the petition are denied by the answer, accompanied by a counter-claim in which it is charged that the plaintiff below agreed to furnish to the defendant therein at Farmington, Iowa, certain wagon timbers of substantially the character described in

the petition, to be strictly No. 1 in quality and sound in every particular; that the plaintiff, in order to cheat and defraud the defendant, falsely and fraudulently represented said Hatrick, a resident of Farmington and a stranger to the plaintiff, to be a capable and impartial person to select such material in its (defendant's) behalf; that he, Hatrick, was not impartial, but, on the contrary, immediately conspired with the plaintiff to cheat and defraud the defendant by the selection of unsound material, and that in pursuance thereof, said conspirators selected and shipped to the defendant material corresponding in size to that purchased, but which was unsound and worm-eaten, by reason of which it was wholly unfit for use, and of no value whatever; that on discovering the fraud so practiced upon it, the defendant notified the plaintiff that it held said material subject to his (plaintiff's) order and subject to freight charges paid thereon, and that upon the plaintiff's refusal to remove said material it was sold on his account by the defendant for the sum of $232.65, and which, less the sum of $101.84, charges for freight, drayage, and cost of handling, has been applied upon the demand against the plaintiff hereafter mentioned; that the material so contracted for was necessary for the use of the defendant in its business, and by reason of the plaintiff's default it has been damaged in the sum of $240. There is a further counter-claim for $95.75 on account of material which, as alleged, the plaintiff has failed to deliver in accordance with his agreement to that effect. There is also a prayer for judgment for the amounts above named less $130.81, the net proceeds of the material sold on plaintiff's account. The reply is in effect a

general denial. A trial was had, resulting in a verdict and judgment for the plaintiff therein for $332.62, and which has been removed into this court for review by petition in error of the unsuccessful party.

The first assignment to which our attention is directed by the brief of counsel for the plaintiff in error is that the district court erred in receiving in evidence the answers to certain leading questions. The extent to which leading questions may be allowed is a subject which rests in the discretion of the trial court, and as we have frequently had occasion to hold, its rulings in that respect will not, in the absence of a clear abuse of discretion, be disturbed by this court. (*Obernalte v. Edgar*, 28 Neb., 70; *St. Paul Fire & Marine Ins. Co. v. Gotthelf*, 35 Neb., 357.) The other assignments all relate to the giving and refusing of instructions.

The court, on its own motion, gave the following, to which exception was taken: "Fraud is not to be presumed, but must be established by the evidence. In the consideration of the question whether or not fraud was practiced upon the defendant in the selection of the axles in question, you must consider all the facts and circumstances attending the transaction and surrounding the parties as they appear from the evidence. While fraud is not to be presumed, it can seldom be established by direct evidence, and in considering the question you must consider all the evidence in regard to the acts of the parties and circumstances of the case. If you find from a consideration of all the evidence that the selection of the axles was fraudulent, or that Hatrick acted fraudulently or dishonestly in making such selec-

tion, then his selection cannot bind the defendant as to such material as the evidence shows you to have been unfit for the purpose for which they were sold." The criticism of counsel is directed to the concluding paragraph of the foregoing instruction, and is, we think, not wholly unmerited. Practically, the answer charges a rescission of the contract on account of the alleged fraud and conspiracy between the plaintiff below and Hatrick. The fraud alleged, if available, is a complete defense, and not alone as to so much of the material selected as proved worthless or unsound. It was, moreover, the defendant's duty, assuming the fraud to have been proved as alleged, to rescind the contract as a whole or not at all. (*Raymond v. Bearnard*, 12 Johns. [N. Y.], 274; *Hendricks v. Goodrich*, 15 Wis., 679*; *Bainter v. Fults*, 15 Kan., 323; *Higham v. Harris*, 108 Ind., 246.) It does not follow, however, that the error assigned is prejudicial, calling for a reversal of the judgment. An inspection of the record discloses that the question of fraud was fairly submitted to the jury, and the amount of the verdict plainly indicates that that defense was rejected as a whole. The defendant could not, therefore, have been prejudiced by the instruction complained of, and the giving of it was harmless error, not calling for the reversal of the judgment.

Counsel also vigorously assail instruction No. 10, given at the request of the plaintiff below, as follows: "The plaintiff asks the court to instruct the jury that there is no dispute, either in the pleadings or between the parties in this case, that one Henry Hatrick was selected by the plaintiff and defendant to make selection of the axles in controversy, and that the defendant only seeks to

avoid the selection made by said Hatrick on the ground of fraud and conspiracy between the said Hatrick and the plaintiff, to cheat and defraud the defendant in making such selection. You are instructed that the burden of proof is upon the defendant as to such fraud, and if it has not proved the fraud alleged to the satisfaction of the jury, then the selection of Hatrick is final." As a statement of the issues made by the pleadings this instruction is not strictly accurate. It does, however, correctly state the only proposition about which there was any controversy at the close of the trial, and for that reason presents no ground for complaint on the part of the plaintiff in error.

Complaint is made of the refusal of certain instructions requested by the defendant below, but they were, in so far as they state the law of the case, embodied in those given by the court on its own motion.

We discover in the record no substantial error, and the judgment is accordingly

AFFIRMED.

MARY T. HYDE V. L. H. KENT.

FILED FEBRUARY 4, 1896. No. 5963.

1. **District Court:** ADJOURNMENT FOR TERM: REVIEW. This court will not presume the adjournment *sine die* of a term of the district court from the fact that a period of twenty-three days has intervened since a given day thereof.
2. **Order Setting Aside Judgment:** SUMMONS: REVIEW. Action of the district court in setting aside a judgment and quashing the summons irregularly issued and served, on motion and objection of the defendant at the same term, approved.

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

Harwood, Ames & Pettis, for plaintiff in error.

William E. Healey, contra.

POST, C. J.

We learn from the record of this cause that on the 19th day of April, 1892, which was a day of the February, 1892, term of the district court for Douglas county, the plaintiff in error recovered a judgment therein by default against the defendant in error in the sum of $1,118 and costs. On the 11th day of May, following, the defendant entered in said cause his objection to the jurisdiction of the court as follows:

"MARY T. HYDE
v.
L. H. KENT.

"L. H. Kent, named above, defendant, appearing specially and only for the purpose of objecting to the jurisdiction of the court, and for the stating herein of such objection to the jurisdiction of the court the affidavit of said L. H. Kent, filed herewith, together with all the matters and things therein contained, are herein referred to and made a part hereof."

The record discloses no ruling upon the foregoing objection, except as hereafter shown, and on December 10 of the same year a motion to quash the summons was interposed by the defendant as follows:

"MARY T. HYDE
v.
L. H. KENT.

"The defendant, appearing specially and for the

purpose of this motion only, objects to the jurisdiction of the court and moves that the pretended service herein of summons be quashed, and for the stating herein of such objection to the jurisdiction of the court, and the reasons for the quashing of said pretended service, the affidavit of said L. H. Kent, filed herein upon May 11, 1892, is referred to and made a part hereof."

Afterward, during the January, 1893, term, to-wit, on January 6, an order was entered setting aside the judgment above mentioned, in which it is recited that the defendant's objection to the jurisdiction of the court had been previously submitted and taken under advisement, and "that from a consideration of the evidence the court finds that the return of the sheriff of service of summons is untrue and that no proper service of summons was made upon the defendant." Exception was in due form taken to the order last named, and which is renewed in this court by proper assignment of error. The objection made to the service is that the summons issued February 6, and served February 13, named February 7 as the answer day. That such objection, if made in season, should have been sustained, is conceded by the plaintiff in error, and is apparent from an inspection of the record, since the summons was, by its command, made returnable the day after it was issued, and was served six days subsequent to the answer day therein named; but it is argued that the district court was without authority to entertain the objection when presented by motion at a term subsequent to that at which the judgment was rendered. It is, however, unnecessary to consider the merits of that proposition, for the reason that it is without any support in the record.

The judgment was, as already appears, rendered April 19, which was a day of the February, 1892, term, while the first objection to the jurisdiction of the court, accompanied by the evidence which was finally submitted to the court, was filed May 11, following, there being nothing to indicate whether the last named day was during the same or a subsequent term. That this court may presume the adjournment *sine die* of a term of the district court from the lapse of time alone is apparent both from reason and authority. (*Conway v. Grimes*, 46 Neb., 288.) It would be useless at this time, if indeed it were possible, to determine the length of time necessary to raise such a presumption. It is sufficient that an adjournment will not be presumed from the time (twenty-three days) intervening between the date of the judgment and the entering of the defendant's objection to process by which it was sought to obtain jurisdiction of the court over his person. Plaintiff also relies upon the rule asserted in *Wilson v. Shipman*, 34 Neb., 573, viz., that all presumptions are in favor of the veracity of the return of the sheriff when assailed in this manner, and that in order to disprove the recitals thereof their falsity must be affirmatively shown. But that rule can have no application to the case at bar, for the reason that the irregularity, for which the judgment was set aside, appears affirmatively from the transcript of the original summons and accompanying return, as well as from the affidavits of the defendant.

Our examination has been confined to the subjects discussed in the briefs of counsel, which do not include the question whether the ruling complained of is a final order, within the meaning of the Code, which may be reviewed upon petition in

error pending further proceedings in the case by the district court. Upon that question it is, for reasons stated, needless to express any opinion. There is no error in the record, and the order of the district court must be

AFFIRMED.

JAMES MONROE ET AL., APPELLEES, V. CHARLES E. HANSON ET AL., IMPLEADED WITH W. J. COOPER & COLE BROS., APPELLANTS.

FILED FEBRUARY 4, 1896. No. 6043.

1. **Review:** EVIDENCE. The findings of a trial court which are sustained by sufficient evidence will not be disturbed on appeal to this court.

2. **Vendor and Vendee:** POSSESSION: NOTICE. Possession of real estate is ordinarily notice of a claim of right, and is notice to all the world of the rights or interest the person holding possesion may have in the property over which it is exercised.

3. **Judgments:** PARTIES. It is a general rule that an adjudication in an action affects only those who are parties to the action, or in privity with them.

4. **Limitation of Actions:** MECHANICS' LIENS. An action in which it is sought, as the relief demanded by the plaintiff or a cross-petitioner, to foreclose a mechanic's lien against the rights or interest of any person in the property covered thereby must have been commenced within two years from the date of filing the lien, or it is barred, so far as the right to foreclose the lien is concerned, by limitation.

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

The opinion contains a statement of the case.

Lamb, Ricketts & Wilson, for appellants:

The title of Nora M. Jones was litigated by Moore & Jones in the name of Robert A. Moore and Charles E. Hanson, and she is bound by the decree of this court in the former case. (*Tarleton v. Johnson*, 25 Ala., 300; *Claflin v. Fletcher*, 7 Fed. Rep., 851; *Burns v. Gavin*, 118 Ind., 320; *Parr v. State*, 17 Atl. Rep. [Md.], 1020.)

The suit in which the decree of foreclosure of the mechanic's lien of appellants was rendered was properly brought against the person holding the legal title of record of this property, and if other persons are afterwards discovered to own or have an interest in the property they may be foreclosed in equity whenever their interest is discovered. (*Galpin v. Abbott*, 6 Mich., 17; *Child v. Baker*, 24 Neb., 188; *White v. Denman*, 1 O. St., 110; *Parret v. Shaubhut*, 5 Minn., 258; *Tate v. Lawrence*, 11 Heisk. [Tenn.], 503; *Pringle v. Dunn*, 37 Wis., 464; *Carter v. Champion*, 8 Conn., 549; *Isham v. Bennington Iron Co.*, 19 Vt., 230.)

If a deed to a purchaser of an equity of redemption has not been duly recorded at the time of the bringing of the bill, such purchaser is not a necessary party so far as to render the proceedings invalid in any event; and he is not a necessary party even unless he shows affirmatively that at the trial that was had the plaintiff had either actual or constructive notice of the conveyance of the property before suit brought. (*Leonard v. New York Bay Co.*, 28 N. J. Eq., 192; *Kipp v. Brandt*, 49 How. Pr. [N. Y.], 358; *Woods v. Love*, 27 Mich., 308; *Aldrich v. Stephens*, 49 Cal., 676; *Houghton v. Kneeland*, 7 Wis., 244*.)

If the nominal holder of the equity of redemp-

tion or the holder of an equitable title is not made a party in a suit of foreclosure, he may be proceeded against in a subsequent suit and his interest foreclosed. (*Merriman v. Hyde*, 9 Neb., 113; *Dodge v. Omaha & S. W. R. Co.*, 20 Neb., 276.)

P. A. Moore, contra.

HARRISON, J.

This is an action instituted May 7, 1891, by James Monroe to foreclose a mortgage on lot 371, in Kearney, Buffalo county, Nebraska. Charles E. Hanson, Nora M. Jones, W. J. Cooper & Cole Bros., and some others were made defendants. W. J. Cooper & Cole Bros. filed a cross-petition in which it was pleaded that they, between the 1st day of October, 1886, and the 1st day of January, 1887, pursuant to a contract entered into with Charles E. Hanson, the owner of the lot described, furnished the material and placed in a brick building, then in process of erection thereon, the necessary apparatus or appliances for heating the same by steam, and on January 31, 1887, filed and perfected a lien upon the premises for the balance due them on account, $523; that one Walter Knutzen, who had a mechanic's lien on the premises involved in the present action, commenced suit to foreclose it June 4, 1887, in which W. J. Cooper & Cole Bros. were made parties and filed a cross-petition on June 27, 1887, asking a foreclosure of their lien, which was denied them in the trial court, but in an appeal to this court the decree was reversed and they were accorded a foreclosure. Their petition in the case at bar prayed the establishment of their lien as a first and prior one, and its foreclosure. To this

answer and cross-petition Nora M. Jones of defendants pleaded that on the 7th day of January, 1887, by purchase from R. A. Moore, then owner of the premises involved in this suit, she became the owner and immediately assumed possession of them, and has at all times since retained the ownership and possession; that the deed to her of the property bore date of January 8, 1887, and was recorded June 7, 1887, and that no action had ever been commenced against her to foreclose the lien of W. J. Cooper & Cole Bros., nor had its foreclosure ever been sought in any action in which she was a party; that more than two years have elapsed since their lien was filed, and any action for its enforcement is barred by limitation. The trial court decided the issues between W. J. Cooper & Cole Bros. and Nora M. Jones in favor of Mrs. Jones and rendered a decree accordingly, from which the lien-holders have appealed to this court.

It appeared in the trial of the present case, and is undisputed, that on June 4, 1887, Knutzen commenced an action to foreclose a mechanic's lien on the premises involved in the case now under consideration; that appellants herein were parties to that action, filed their cross-petition to foreclose their lien, were defeated in the trial court, but on appeal to this court were successful and obtained the relief sought. Nora M. Jones was not made a party to the Knutzen suit, nor was she served with process therein. The premises involved were transferred by Charles E. Hanson to R. A. Moore, and by Moore to Mrs. Jones prior to the time the Knutzen case was commenced.

At the time the property was so transferred,

and continuing to and including the time of the pendency of the Knutzen suit, E. B. Jones, the husband of Nora M. Jones, was in partnership with R. A. Moore in the law and real estate business, and it is claimed for appellants that the evidence discloses the purchase of this property from Hanson for the partnership, and that the conveyance to Mrs. Jones was not to her in her own right, but in trust for her husband, and that he, although not appearing on the record in the Knutzen case as a party thereto, was the real party interested, and litigated his rights and as against this particular lien through the names and defenses of R. A. Moore and Charles E. Hanson, both parties to that suit, and, having so proceeded, is bound by the judgment therein. We need not further discuss this contention than to say that the facts established by the testimony warranted the trial court in finding that the property was sold to Nora M. Jones by Moore and conveyed to her not in trust for her husband, but as her individual and separate property, and this finding being sustained by sufficient evidence, will not be disturbed.

It is contended by counsel for appellants that "the suit in which the decree of foreclosure of the appellants' mechanic's lien was rendered was properly brought against the person holding the legal title of record of this property, and that if other persons are afterwards discovered to own or have an interest in the property, they may be foreclosed in equity whenever their interest is discovered;" also, "if a deed to a purchaser of an equity of redemption has not been duly recorded at the time of the bringing of the bill, such party is not a necessary party so far as to render the proceed-

ings invalid in any event, and he is not a necessary party even unless he shows affirmatively that at the trial that was had the plaintiff had either actual or constructive notice of the conveyance of the property before suit brought;" and further, "if the nominal holder of the equity of redemption or the holder of an equitable title is not made a party in a suit of foreclosure, he may be proceeded against in a subsequent suit and his interest foreclosed." The evidence disclosed that Mrs. Jones purchased the property January 7, 1887; that it was conveyed to her by deed dated January 8, 1887, but which was not recorded until June 7, 1887, or three days subsequent to June 4, 1887, the date of the commencement of the first action, or the Knutzen case, by which name we have designated it to distinguish from the case at bar. The deed of conveyance from Moore to Mrs. Jones was not, or could not be, produced at the trial of the case and the record of the same was introduced. On the margin of the page of the book in and on which it was copied appeared the following statement:

"Original instrument was presented for correction on November 30, 1892, and the record was corrected by adding the name of H. C. Andrews as a witness thereto. H. H. SEELEY,

"County Clerk."

It is urged for appellants that it appeared from this that the record of the conveyance, as it existed on June 7, 1887, was of a deed which was not properly executed and was not notice of the rights of the grantee; that "the registration of a deed defectively executed is not notice." If the recitals of this entry on the margin of the page of the book in which the deed was recorded can properly be

said to be evidence of anything, they would seem to indicate that in recording the instrument the clerk had omitted the name of the witness and it had been presented for the purpose of having the correction made, the omission supplied, and probably the failure of the officer to properly record the instrument could not be allowed to prejudice the rights of the party presenting it for record. We need not decide this question, however, but may pass it without expressing our opinion, as it was fully established by the evidence that Mrs. Jones, when she purchased the property, immediately entered into the possession thereof and was in possession of it and collecting the rents at the time the Knutzen suit was commenced and the cross-petition of W. J. Cooper & Cole Bros. was filed therein, and during and after its pendency and trial. The continued possession of Mrs. Jones was notice to all the world of her rights in the premises (*Lipp v. South Omaha Land Syndicate*, 24 Neb., 692); and if either the plaintiff or cross-petitioner desired to affect her rights by the decree and judgment in the action, she should have been made a party to and brought into the suit, and as it was not done, she was not bound or her interests affected by it. It is the general rule that no person can be affected by any judicial proceedings to which he is not a party, and a judgment takes effect only between the parties and gives no rights to or against third persons. (1 Freeman, Judgments, sec. 154.) So a foreclosure is only effectual against those interested in the title who were parties. (2 Ballard's Annual on the Law of Real Property, sec. 547; 2 Jones, Mortgages, secs. 1397-1406; *Merriman v. Hyde*, 9 Neb., 113.) "A person who is not a party to a suit

ordinarily is not bound by the adjudication, nor is a suit deemed commenced against one until he is made a party to it." (*Green v. Sanford*, 34 Neb., 366; *Dodge v. Omaha & S. W. R. Co.*, 20 Neb., 276.)

In reference to the right to institute the action against a person not a party to the prior suit, in which foreclosure of a mechanic's lien was sought, or in a subsequent action as a cross-petitioner, to litigate the rights of such person and foreclose the lien as to the interest of such person in the property affected thereby, it may be said that the subsequent action in which the foreclosure of the lien is demanded, either by the lien-holder as plaintiff or as cross-petitioner, must be commenced within the life of the lien, or within two years after the time of its filing. The lien of W. J. Cooper & Cole Bros. was filed January 31, 1887. The suit in which they filed their cross-petition praying that the lien be established against the rights of Nora M. Jones was not commenced until May 7, 1891, more than four years after the lien was filed, and the right of action thereon as to her or her interest in the property was barred by limitation. (*Squier v. Parker*, 56 Ia., 409; *Green v. Sanford*, 34 Neb., 363; *Burlingim v. Cooper* 36 Neb., 73; *Pickens v. Polk*, 42 Neb., 267; *Ballard v. Thompson*, 40 Neb., 529.) The judgment of the district court is

AFFIRMED.

JAMES J. FELBER V. A. M. GOODING, ADMINISTRATOR.

FILED FEBRUARY 4, 1896. No. 6056.

Review: BILL OF EXCEPTIONS: AUTHENTICATION. The matters contained in what purports to be a bill of exceptions need not be examined or considered in this court unless such document is authenticated by a certificate of the clerk of the proper district court, identifying it.

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

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

Barnes & Tyler, contra.

HARRISON, J.

The defendant in error was appointed administrator of the estate of Henry Felber, deceased, by the county court of Cedar county, and, upon presentation and examination of his final report as such administrator, it was, as to certain items therein, disallowed, from which determination of the matters adjudicated the administrator appealed to the district court. A trial of the points in controversy resulted in their decision favorable to the administrator. From this, error proceedings have been prosecuted to this court on behalf of one of the heirs of Henry Felber, deceased, who had objected to the allowance of the report of the administrator in the county court, and contested the questions involved in the hearing upon appeal.

To understand and properly determine any of

the questions raised by the assignments of error and discussed in the brief of the complaining party, necessitates an examinaton of the evidence introduced before the trial court. In the record there is what purports to be a bill of exceptions as allowed by the trial judge, but the only authentication by the clerk of the district court of any portion of the papers presented here is as follows: "I, John J. Goebel, clerk of the district court in and for said county, do hereby certify that the within and foregoing is a true and correct copy of the 'objections of James J. Felber, motion for new trial, and last journal entry,' as the same are on file and of record in my office at Hartington, Nebraska." From this it will readily be seen that there is a very small part of the files of the case in this court authenticated by the certificate of the clerk of the district court, as required by law, and that the bill of exceptions is not included. It is indispensably necessary that a bill of exceptions be properly authenticated. If not, it will not be examined or considered. (Code Civil Procedure, sec. 587*b*; *Martin v. Fillmore County*, 44 Neb., 719; *Yenney v. Central City Bank*, 44 Neb., 402; *Moore v. Waterman*, 40 Neb., 498.) As the adjudication of points discussed and contended for by plaintiff in error must be governed by conclusions formed from an examination of the evidence, and the bill of exceptions containing the testimony is not authenticated in such a manner as to present it here for examination, it follows that the assignments of error are not supported, must be overruled, and the judgment or decree of the district court

AFFIRMED.

HENRY HORNBERGER V. STATE OF NEBRASKA.

FILED FEBRUARY 4, 1896. No. 8030.

1. **Intoxicating Liquors:** UNLAWFUL SALE: INFORMATION. *Held*, That the information was framed under section 20, chapter 50, Compiled Statutes, and charges a single offense, namely, that the accused kept intoxicating liquors in his place of business for the purpose of sale without a license or permit.

2. ———: ———: EVIDENCE. The unlawful intent with which the liquors were kept may be presumed from the fact of their sale in violation of law.

3. ———: ———: BURDEN OF PROOF. When, under an information for keeping intoxicating liquors for sale, a sale is proved, the burden is upon the accused to show that he held a license or permit from the proper authorities.

4. **Evidence:** RECORD. The existence of a record may be proved by its production, or an authenticated copy thereof. The non-existence of a record may be proved by the testimony of one who is cognizant of such fact.

5. **Intoxicating Liquors:** LICENSES: ORDINANCES. The sale of intoxicating liquors within cities and villages can only be carried on under ordinances duly enacted by the corporate authorities thereof. Until a proper ordinance is adopted, no license or permit for the sale of liquors within such corporate limits can lawfully issue.

6. **Evidence:** INCORPORATION OF VILLAGES. Where a city or village is incorporated by a special act of the territorial legislature, the courts will take judicial notice of such incorporation, in case the legislature has in said act declared it to be a public law.

7. **Criminal Law:** DIRECTING VERDICT. It is not error to refuse to direct a verdict for a defendant in a criminal prosecution, at the close of the testimony for the state, where the evidence before the jury would warrant a conviction.

8. **Harmless Error:** INSTRUCTIONS. A conviction will not be reversed for the giving of an instruction containing harmless error.

9. **Costs:** ATTORNEYS' FEES. An attorney's fee cannot be taxed against a defendant, under section 22, chapter 50, Compiled Statutes, in a case prosecuted by the county attorney.

10. **Criminal Law:** ORDER REMANDING CAUSE FOR JUDGMENT. As the only prejudicial error in the record relates to the entering of judgment upon the verdict, the cause is remanded to the trial court, with directions to enter a proper judgment on the verdict. *Dodge v. People*, 4 Neb., 220, and *Griffen v. State*, 46 Neb., 282, followed.

ERROR to the district court for Sarpy county. Tried below before BLAIR, J.

Schomp & Corson, for plaintiff in error.

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

NORVAL, J.

Plaintiff in error was convicted of keeping intoxicating liquors for the purpose of sale without a license, in violation of law, and was sentenced to pay a fine of $100 and costs of suit, and an attorney's fee of $50 to William R. Patrick. The information under which the prosecution was had, omitting the verification, is as follows:

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

"In the District Court of the Fourth Judicial District of Nebraska, in and for Sarpy County.

"THE STATE OF NEBRASKA, Plaintiff, }
v. }
HENRY HORNBERGER, Defendant. }

"Be it remembered, that Henry C. Lefler, county attorney in and for Sarpy county, and in the fourth judicial district of the state of Nebraska, who prosecutes in the name and by the authority

of the state of Nebraska, comes herein in person into this court at this, the October term, A. D. 1894, thereof, and for the state of Nebraska gives the court to understand and be informed that he has reason to believe, and does believe, that intoxicating liquors, to-wit, beer and whiskey, were unlawfully and willfully kept by one Henry Hornberger in a certain two-story frame building, occupied and conducted as a drug store by the said Henry Hornberger, and situated on lot 8, block 102, in the village of Bellevue, in said county and state, on or about the 26th day of May, 1894; that said liquor above described was intended to be, and was then and there being, by and under the direction of the said Henry Hornberger, unlawfully sold, without a license or druggist's permit having been obtained by said Henry Hornberger for the sale of said liquors above described, according to law, and that within thirty days preceding the 26th day of May, 1894, to-wit, on or about the 23d day of May, 1894, malt and spirituous liquors, to-wit, beer and whiskey, were by said Henry Hornberger sold in said premises above described, without license or druggist's permit, in violation of the provisions of chapter 50 of the Statutes of Nebraska, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Nebraska.

HENRY C. LEFLER,
"County Attorney."

The defendant filed a motion in the court below to quash the information, on the ground that it did not set out the names of the persons to whom the sale of the liquors was alleged to have been made, which motion was overruled, and this decision is assigned as error.

It is, doubtless, true, as counsel for the accused in their brief contend, that in an information for the sale of intoxicating liquors the names of the persons to whom the unlawful sales were made must be alleged, if known, and if unknown, such fact should be averred as an excuse, or the information will be defective. Such is the holding of this court. (*State v. Pischel*, 16 Neb., 608; *Martin v. State*, 30 Neb., 423.) It will be observed that the information herein does not contain such averment, and for that reason would be bad if the prosecution was for the violation of section 11 of chapter 50 of the Compiled Statutes, which makes it a misdemeanor for one to dispose of liquors without a license; but it is clear the information was framed under section 20 of said chapter, which makes it unlawful for any person to keep intoxicating liquors for the purpose of sale without license, and prescribes a penalty therefor. The gravamen of the charge here is not the selling of liquors in violation of law, but the keeping them in his place of business for sale without a license. The averment in the information relating to sales made by the defendant was inserted to show his unlawful intent in keeping the liquors for sale in contravention of the statute. Such unlawful intent may be presumed from the fact of their sale without license. (*Rauschkolb v. State*, 46 Neb., 658.) It was unnecessary to allege the names of the vendees of the liquors, and the motion to quash was properly overruled.

Objection was made to permitting Harry F. Clark to answer the following interrogatory, propounded to him by the state: "Q. You may state to the jury, in your own way, what took place there on that occasion with reference to any intox-

icating liquors of any character." The witness had already testified that he was acquainted with the accused, and to the witness' having been in the defendant's place of business on or about a certain day of May preceding the trial, when the accused and others were present. The criticism that the question was too general in its scope is not tenable. The purpose of the testimony sought to be elicited was relevant and material to the issue to be tried, whatever may be said as to the competency of the answer given by the witness. No objection, however, was made to the answer upon any ground; hence, it is not before us for review.

One John Nolan, the chairman of the board of trustees of the village of Bellevue, the municipality within which the alleged offense was committed, was examined as a witness on behalf of the state, and testified to purchasing and drinking beer in defendant's drug store on the 15th of May. The witness made further answers to questions put by the state, over the objections of the defendant, as follows:

76 Q. You may state to the jury whether or not a license for the sale of liquor, or a druggist's permit for the sale of liquor, was ever issued to the defendant by the board of trustees of the village of Bellevue.

Objected to as incompetent, irrelevant, immaterial, and for the further reason it is not shown that at that time he was chairman of the board of village trustees. Overruled, and defendant excepts.

A. Not since I have been a member.

77 Q. How long have you been a member of the board of trustees of the village of Bellevue?

A. This is my seventh year.

78 Q. Continuously?

A. Yes, sir.

* * * * * * *

84 Q. Mr. Nolan, do you know whether or not the village trustees of Bellevue, by reason of any existing ordinance, are authorized at the present time, or whether or not they were empowered during the month of May last, to issue a license or druggist's permit?

Objected to as incompetent, hearsay, and that the records of the village of Bellevue are the best evidence. Overruled, and defendant excepts.

A. We had no ordinance. There was no ordinance empowering us to grant a permit to sell liquor, or give a license, in force them days.

85 Q. And never has been?

A. Not as I know of since I have been on the board.

86 Q. I will ask you if you know whether or not any application was ever made, by the defendant Hornberger, to the trustees of the village of Bellevue, either for a license or a druggist's permit, during the last year?

Objected to as incompetent, irrelevant, and immaterial. Overruled, and defendant excepts.

A. Not to my knowledge.

The testimony objected to was immaterial, since, after the state had proved a sale of liquors, the *onus* was upon the accused to prove that he had a license or permit from the proper authorities. He not having introduced any evidence tending to establish that he possessed such license or permit, the state was not called upon to establish a negative. (*State v. Cron*, 23 Minn., 140; *State v. Bach*, 36 Minn., 234.) The defendant could not have been in the least prejudiced before the jury

by the admission of the testimony quoted above, merely because the state made a stronger case than it was required to do.

It is contended, in argument, that question 76 was objectionable, in that it did not call for the best evidence. In other words, whether or not a permit or license was issued to the defendant for the sale of intoxicants, the recorded proceedings of the board of trustees were the best evidence of the fact of the issuing or non-issuing of such license or permit. Undoubtedly the journal of the proceedings of such board is admissible in evidence for the purpose suggested; but it is equally clear that it is proper to show that a license was not granted to a particular person by the testimony of the officer whose duty it would be to issue such license, if one were granted.

The contention is made that the testimony of Nolan as to the non-existence of an ordinance of the village authorizing the granting of liquor licenses or druggists' permits was incompetent and immaterial, for the reason such right is conferred by statute, and such power is not derived from ordinances. In this counsel is in error. They must have overlooked *State v. Andrews*, 11 Neb., 523, where it was held that "the traffic in liquors within the limits of cities and villages can only be carried on under ordinances duly passed by the corporate authorities thereof. Until this is done, no application can be made and no other step taken towards the procurement of a license to sell liquors within the limits of such corporation." If the village of Bellevue had not, by ordinance duly enacted, empowered its board of trustees to license and regulate the sale of intoxicating liquors within the limits of the village, it requires no ar-

gument to show that the keeping of liquors by the accused for sale within said corporation was without sanction of law. An ordinance, or a certified copy thereof, is the best evidence of its contents; but the non-existence of an ordinance of necessity cannot be proved in that mode. It can be established by the testimony of the person who is cognizant of such fact, or it may be presumed by the absence of entry in the record of licenses. There is a marked difference between testifying to the existence of a record and the absence of it. (*Gutta Percha & Rubber Co. v. Village of Ogallala*, 40 Neb., 775; *Smith v. First Nat. Bank of Chadron*, 45 Neb., 444.)

Complaint is made of the overruling of the defendant's motion to dismiss, at the close of the state's testimony, on the ground no case had been made out against the prisoner. It is conceded in the brief that the prosecution, when it closed its case, had proven that the accused had intoxicating liquors in his possession when arrested, which were seized under a search warrant; and further, had the state rested after showing the arrest of defendant and the seizure of the liquors, the burden would have been upon him, under the statute, to have shown that such liquors were kept for a lawful purpose, and not in violation of law; but it is argued that inasmuch as the state assumed the *onus* of proving that the defendant had no permit or license from the board of trustees of the village of Bellevue to sell intoxicating liquors, it became necessary for the state to establish that fact beyond a reasonable doubt, and that the prosecution failed in that regard; therefore the defendant was entitled to a peremptory instruction to the jury to return a verdict of acquittal. This

argument is based upon the erroneous assumption that the state had failed to establish that no license or permit had been issued to the defendant by the board of trustees. It was not only proven that no such license or permit was issued, but that none could have been granted, since the corporate authorities of the village never had been authorized by ordinance so to do.

It is said there is no competent evidence in the record of the incorporation of the village of Bellevue, and if it is unincorporated, the county board of Sarpy county alone possessed the power to grant a license or permit to sell intoxicating liquors, and since the state failed to show that one was not issued by such board, there can be no conviction. It is true no articles of incorporation and no legislative enactment incorporating Bellevue were put in evidence, but this is not fatal to the prosecution. It was shown upon the trial that said municipality elected village officers annually for years, during which time the powers of a village had been exercised by a board of trustees. Sufficient was established to show that Bellevue was, at least, a *de facto* corporation. (*Arapahoe Village v. Albee*, 24 Neb., 242.) Further, we know, although not proven upon the trial, that Bellevue was incorporated by special act passed by the territorial legislature and approved March 15, 1855. (Session Laws, 1855, p. 382.) Its incorporation has been subsequently recognized by the legislature by the passage of amendments to its charter and changing the geographical limits of the municipality. (See Session Laws, 1855, p. 423; Session Laws, 1855-56, p. 171; Session Laws, 1858, p. 339; Session Laws, 1859-60, p. 109; Session Laws, 1860-61, p. 173; Session Laws, 1861-62, p. 135; Ses-

sion Laws, 1869, p. 269.) The foregoing acts are not, strictly speaking, private in their character, but are generally known and regarded as public local laws. By section 8 of "An act to amend an act entitled 'An act to incorporate Bellevue city'" (Session Laws, 1862, p. 135) it is provided: "This act and the act to which this is amendatory are hereby declared to be public acts," etc. Thus it will be observed that the legislature has declared the act incorporating Bellevue and the acts amendatory thereto to be public laws, and the courts will take judicial notice of such laws without proof of their existence. (*Bowie v. City of Kansas City*, 51 Mo., 454; *Town of Butler v. Robinson*, 75 Mo., 192.) The rule is stated thus in 1 Dillon, Municipal Corporations [3d ed.], sec. 83: "Courts will judicially notice the charter or incorporating act of a municipal corporation without being specially pleaded, not only when it is declared to be a public statute, but when it is public or general in its nature or purposes, though there be no express provision to that effect." (See 1 Beach, Public Corporations, sec. 74.) In *Hard v. City of Decorah*, 43 Ia., 313, Day, J., in delivering the opinion of the court, observes: "Where a town or city is incorporated by special act of the legislature, the statute partakes of the nature of a public act, and courts take judicial notice of it." This doctrine is fully sustained by the authorities. (*Prell v. McDonald*, 7 Kan., 426; *City of Solomon v. Hughes*, 24 Kan., 211; *Case v. Mayor of Mobile*, 30 Ala., 538; *State v. Mayor of Murfreesboro*, 30 Tenn., 216; *Stier v. City of Oskaloosa*, 41 Ia., 353; *State v. Tosney*, 26 Minn., 262; *Perryman v. City of Greenville*, 51 Ala., 507; *Village of Winooski v. Gokey*, 49 Vt., 282; *Doyle*

v. Village of Bradford, 90 Ill., 416; *Beaty v. Knowler*, 4 Pet. [U. S.], 152.)

We must not be understood as holding that courts will take judicial notice of the organization of cities and villages under the general laws of the state authorizing cities and villages to become incorporated, as this question is not before us. What we do decide is that where a city or village is incorporated by special act of the territorial legislature, we will take judicial notice of its incorporation, when the legislature has in said act declared it to be a public statute. We are mindful of the fact that the legislative enactments already mentioned incorporate "Bellevue city." We know judicially that Bellevue contains a population of less than 1,500 and more than 200. Therefore, by virtue of section 40 of the act of the legislature of 1879, entitled "An act to provide for the organization, government, and powers of cities and villages" (Session Laws, 1879, p. 193), Bellevue became *ipso facto* a village, governed by the provisions of said act. (*State v. Palmer*, 10 Neb., 203; *State v. Holden*, 19 Neb., 249; *State v. Babcock*, 25 Neb., 709.) It follows that its corporate authorities possessed the power to regulate and license the traffic of liquors within the limits of the corporation. There was no error in refusing to direct a nonsuit. If there had been no evidence before the jury sufficient to sustain a conviction, then, and then only, would it have been proper for the court to direct a verdict for the defendant below.

The next assignment of error is predicated upon the first paragraph of the instructions, which is in the following language: "The court instructs the jury that in order to find the defendant guilty it is

only necessary that the jury believe from the evidence, beyond a reasonable doubt, that the defendant, either by himself, his agent, or servant, on the 26th day of May, 1894, or within thirty days preceding that time, in the county of Sarpy and state of Nebraska, kept for sale, without license or permit, beer or whiskey." Two criticisms are made upon this instruction. It is claimed to be erroneous, because it failed to inform the jury that the liquors must have been kept for sale in the corporate limits of Bellevue, in order to constitute the offense charged. Plaintiff in error could not have been prejudiced by this omission, since the evidence was directed to proving that the defendant had the liquors in his place of business in the village of Bellevue, for the purpose of sale, and no testimony was offered to show that he had liquors anywhere else. In the next place this instruction is claimed to be bad, inasmuch as it limited the time within which the offense must be committed to thirty days prior to May 26, 1894. Had the place wherein the liquors were found been described in the information as the residence of the accused, then, under section 20 of chapter 50 of the Compiled Statutes, the limitation stated by the court would have been not only proper, but indispensable; but as the place set forth in the information is not a residence, the thirty days' limitation was unnecessary. It was more favorable to the defendant than he had a right to ask. The information was filed October 3, 1894, and as the penalty provided by law for the crime is not restricted to a fine of less than $100, the state had a right to show that the offense was committed at any time within eighteen months prior to the filing of the information. The error in the instruction was harmless. (*Jolly v. State*, 43 Neb., 857.)

By the third instruction the court told the jury, in effect, that the burden of showing a license or permit was upon the defendant. In this there was no error.

The motion in arrest of judgment is based upon an alleged insufficiency of the information. Having already held that a crime was charged, this assignment requires no further attention.

It is finally insisted that the judgment is contrary to law and is not supported by the findings, in so far as it awarded an attorney's fee of $50 to William R. Patrick, to be paid by the plaintiff in error. Section 22 of said chapter 50 provides: "In case the defendant is acquitted, he shall be discharged and the liquors returned; but if found guilty, in addition to the payment of a fine he shall pay all costs of prosecution, including a reasonable attorney's fee to the prosecuting attorney (in case the county attorney does not prosecute), to be determined by the court, in no case less than twenty-five dollars, which shall be taxed in the costs, and recovered as other costs." It is proper for the trial court under this statute, in case of a conviction, to tax against the defendant a fee of not less than $25, to be paid to the attorney who prosecuted, only where the county attorney does not conduct the prosecution. While the bill of exceptions shows that Mr. Patrick examined the witnesses, it appears from the journal entry in the case that the state was represented on the trial by "Henry C. Lefler, county attorney." This being true, no attorney's fee should have been allowed.

No other error being found in the record, the judgment, in accordance with *Dodge v. People*, 4 Neb., 220, and *Griffen v. State*, 46 Neb., 282, is reversed and the cause remanded to the district

court, with directions to enter the proper judgment on the verdict heretofore returned.

REVERSED AND REMANDED.

JOSHUA WARREN V. FRANK J. SADILEK.

FILED FEBRUARY 4, 1896. No. 5641.

1. **Justice of the Peace: MISCONDUCT OF OFFICER.** A justice of the peace has no jurisdiction to hear and determine an action brought against a public officer for misconduct in office. Rule applied.
2. **Judgment of Reversal Upon Finding of Error.** *Held*, That the findings are sufficient to support the judgment.

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

J. D. Pope, for plaintiff in error.

E. E. McGintie and *A. S. Sands, contra.*

NORVAL, J.

This action was brought by Joshua Warren against Frank J. Sadilek, before a justice of the peace, to recover the sum of $11.44. Plaintiff had judgment for the amount claimed, and defendant prosecuted error to the district court, where a judgment of reversal was entered and the action dismissed. Plaintiff brings the case to this court on error.

The main question presented by the record for decision is whether the justice of the peace had jurisdiction of the subject-matter of the action.

Section 907 of the Code of Civil Procedure provides that "justices shall not have cognizance of any action: * * * Third—In actions against justices of the peace or other officers for misconduct in office, except in cases provided for in this title." This statute specifically prohibits one justice of the peace from adjudicating upon the official misconduct of another justice of the peace or other public officer. Therefore, if this action is predicated upon the official misconduct of the defendant while in office, as is claimed by the defendant, the justice had no power to hear and determine the same; and the judgment of the justice was properly reversed for want of jurisdiction to render it. The bill of particulars alleges, in substance and effect, that the defendant was and is the county treasurer of Saline county; that on the 28th day of July, 1891, there was due from the plaintiff as taxes on personal property for the year 1889 the sum of $49.20; that on said day demand was made upon plaintiff for said money, through the defendant's tax collector, which sum the plaintiff paid on the following day and received credit therefor in payment of his said taxes; that afterwards the defendant issued a distress warrant for the said sum of $49.20 against plaintiff for his personal taxes of 1889, which writ was levied upon certain personal property of plaintiff on July 31, 1891, and to prevent the sale thereof under said levy plaintiff paid the defendant, under protest, the amount demanded by him, to-wit, $60.67, the same being the above amount of taxes for the year 1889, and $11.47 costs, fees, and charges made under said writ; and that subsequently defendant returned to plaintiff the sum of $49.23. This action is to recover the amount aforesaid paid as fees

and costs. Do these facts show that the gist of the action is the official misconduct of the defendant as county treasurer? We must answer the question in the affirmative. It is disclosed that he received and collected the moneys from the plaintiff, not as an individual, but in his official capacity. The taxes upon which the distress warrant was issued had already been paid, and to release his property from the levy, the plaintiff was compelled to pay them again, as well as more than $11 for costs. The taxes having been previously received by the county treasurer, he was not entitled to fees or costs. If the acts of the defendant do not establish official misconduct, or, as expressed in the statute, "misconduct in office," then it is scarcely possible for a cause of action against a county treasurer for official misconduct to ever accrue. It is of the official acts and conduct of the defendant, and not his personal actions, of which complaint is made. *Neihardt v. Kilmer*, 12 Neb., 36, is not in point. As the fact alleged constitutes misconduct in office, the justice had no jurisdiction of the action.

It is insisted that the finding of the district court is insufficient to sustain the judgment of reversal. The finding was that error existed as alleged in the petition in error. This pleading contained four assignments, viz.:

1. The bill of particulars fails to state a cause of action.

2. The justice court had no jurisdiction to hear and determine the action.

3. The action is brought for alleged misconduct in office of the defendant as county treasurer, and said justice court is expressly prohibited by law from assuming jurisdiction to hear and determine said cause.

4. The judgment of the justice court is wholly without jurisdiction of the subject-matter, and void.

The general finding by the district court of error in the record was sufficient, without specifying which assignment of the petition in error was sustained. (*Haller v. Blaco*, 14 Neb., 196.) The judgment of the court below is

AFFIRMED.

BURLINGTON & MISSOURI RIVER RAILROAD COMPANY IN NEBRASKA V. LAURA MARTIN, ADMINISTRATRIX.

FILED FEBRUARY 4, 1896. No. 6009.

1. Appeal: PARTIES. The parties to a judgment, or their privies, alone can prosecute an appeal or petition in error.
2. ———: ———: DISMISSAL. A petition in error will be dismissed where it is prosecuted by one who has no interest in the controversy, and against whom no judgment has been entered.

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

W. S. Morlan, *Marquett & Deweese*, and *F. E. Bishop*, for plaintiff in error.

John Doniphan and *Batty & Dungan*, *contra*.

NORVAL, J.

A suit was instituted in the district court of Adams county by Laura Martin, administratrix of the estate of James Martin, deceased, against the Burlington & Missouri River Railroad Company in Nebraska to recover damages for negligently

causing the death of her husband. After the petition and answer were filed, by order of the court below, the Chicago, Burlington & Quincy Railroad Company was substituted as party defendant in the cause, instead of the corporation first above named. Upon the trial a verdict was returned in favor of the plaintiff against the substituted defendant for $5,000, which was followed by a judgment for a like sum, to reverse which the Burlington & Missouri River railroad in Nebraska has prosecuted a petition in error, in its own name, to this court.

The proceedings must be dismissed, since it does not appear from the record that this plaintiff in error is in any manner interested in the controversy, or affected by the judgment sought to be reviewed. It is disclosed, after the said order of substitution was made, the title of the cause was changed, and all papers thereafter filed therein, and the bill of exceptions, verdict, and judgment were entitled "Laura Martin, Administratrix, Plaintiff, v. Chicago, Burlington & Quincy R. R. Co., Defendant." This plaintiff in error was completely dropped out of the case when the order of substitution was entered, appeared no further therein, and no judgment was rendered against it, therefore there is not anything of which it could complain. Certainly it cannot champion the lost cause of another separate and distinct corporation, not before the court, unless a privity of interest is shown, which is not the case before us so far as we can gather from the record. It is only the parties to a judgment, or their privies, who can prosecute an appeal or petition in error. (Elliott, Appellate Procedure, secs. 132 *et seq.*, and cases there cited.)

DISMISSED.

F. H. GILCREST V. HENRY NANTKER.

FILED FEBRUARY 4, 1896. No. 5984.

New Trial: PETITION. A petition by a plaintiff for a new trial, under section 602 of the Code, after the term at which judgment was rendered, is properly denied where the petition in the original suit fails to state sufficient facts to have supported a judgment in his favor, and where it does not appear that his alleged cause of action is meritorious.

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

R. A. Moore, for plaintiff in error.

References: *Horn v. Queen*, 4 Neb., 108; *Thompson v. Sharp*, 17 Neb., 71; *Luce v. Foster*, 42 Neb., 818; *White v. Gray*, 61 N. W. Rep. [Ia.], 173; *Senn v. Joseph*, 17 So. Rep. [Ala.], 543; *Taylor v. Evans*, 29 S. W. Rep. [Tex.], 172; *Graham v. Reno*, 38 Pac. Rep. [Colo.], 835; *Erskine v. McIlrath*, 62 N. W. Rep. [Minn.], 1130; *Fischer v. Hetherington*, 32 N. Y. Sup., 795; *Beardsley v. Pope*, 32 N. Y. Sup., 926; *Smithson v. Smithson*, 37 Neb., 539; *Clutz v. Carter*, 12 Neb., 113; *Stoll v. Sheldon*, 13 Neb., 207; *Dalton v. West End Street R. Co.*, 34 N. E. Rep. [Mass.], 261; *Harper v. Nat. Life Ins. Co.*, 5 C. C. A., 509.

Marston & Nevius, contra.

NORVAL, J.

This was an action in equity brought in the court below by the plaintiff in error against Henry Nantker to obtain a new trial in a suit at law between the same parties. A general demurrer to the petition was sustained and the cause dismissed. The

original action was to recover damages for alleged deceit and false representations in the sale of a horse by Nantker to Gilcrest. The verdict was for the defendant. Plaintiff's motion for a new trial was overruled, and judgment was rendered for the defendant, which was affirmed by this court at the September, 1894, term, for the reason the petition failed to state a cause of action. The record shows that the district court offered in the original cause to sustain the motion for a new trial and permit the plaintiff to amend his petition, conditioned alone that the costs of the trial should be taxed to the plaintiff. Gilcrest, by his attorney, elected to stand upon his motion, and declined to amend his petition, whereupon said motion was overruled.

The facts set forth in the application for equitable relief against the judgment, briefly stated, are these: That when the motion for a new trial came on for hearing and decision, R. A. Moore, who had represented the plaintiff in the cause from its inception, appeared for said plaintiff and elected for him to stand upon said motion, and not to submit to the order of the court relating to amending of the petition and the taxing of costs; that said election was made without said attorney consulting with his client and while plaintiff was absent from Buffalo county, he being at the time in the city of Omaha, and possessing no knowledge that the motion would be called up in his absence from the county; that on his return from Omaha, and before he had an opportunity to consult with his said attorney, he was taken dangerously ill, and by reason thereof was confined to his bed for the period of two or three months thereafter, and until after the adjournment of the term of court at which the judgment was pronounced; that during said

illness he was prohibited by his physician from consulting with the members of his own family or others upon matters of business, much less his said attorney; that as soon as plaintiff recovered from said illness and was able to converse with his attorney, he was informed by Mr. Moore of the order of the court and the disposition made of the case, whereupon he instructed his attorney that he desired to abide the order of the court made in passing upon the motion for a new trial, and submit to the payment of costs; and the petition for a new trial was soon thereafter prepared and filed. The petition for a new trial was made after the term at which the judgment complained of was rendered, and is based upon paragraph 7 of section 602 of the Code of Civil Procedure, which provides for granting new trials "for unavoidable casualty or misfortune, preventing the party from prosecuting or defending." Whether the facts alleged in the application bring the case within the quoted provision of the statute we do not decide, since it is clear, from other considerations hereafter stated, that the demurrer to the petition was rightfully sustained on another ground. The petition in the original suit did not state a cause of action. This, as already mentioned, was decided in *Gilcrest v. Nantker*, 42 Neb., 564, and wherein the pleading was defective need not be restated. The averments being insufficient to entitle the plaintiff to recover, it is obvious that a new trial, if granted, would have been a barren victory, unless an amended petition was filed. True, plaintiff might have recast his pleading, if the facts would allow him to do so; but his application for a new trial contains no averment that the defects in the petition could be remedied by

amendment, nor that he has a meritorious cause of action, and no fact constituting his alleged cause of action is pleaded. This court has held, where a defendant petitions for a new trial after the term at which judgment was entered, he must plead the facts showing that his alleged defense is meritorious, otherwise his application will be defective. (*Gould v. Loughran*, 19 Neb., 392; *Chicago, B. & Q. R. Co. v. Manning*, 23 Neb., 552; *Osborn v. Gehr*, 29 Neb., 661; *Hartford Fire Ins. Co. v. Meyer*, 30 Neb., 135; *Hughes v. Housel*, 33 Neb., 703; *Petalka v. Fitle*, 33 Neb., 756.) And when a new trial is sought, after the term, by a plaintiff, it must appear that he has a valid cause of action. (*Proctor v. Pettitt*, 25 Neb., 96; *Thompson v. Sharp*, 17 Neb., 69.) Since the application for a new trial fails to disclose that plaintiff has any cause of action against the defendant, the district court did not err in sustaining the demurrer.

The litigation concerning the horse in controversy, "now in the land of shadows,"—so we are advised by the very interesting and able brief of counsel for defendant,—has been protracted and varied. To this plaintiff it has been both expensive and fruitless, and having failed to obtain relief in equity, as well as at law, may we express the hope that the poor old horse may never be the subject of further investigation before any earthly tribunal.

AFFIRMED.

STATE INSURANCE COMPANY OF DES MOINES, IOWA, V. NEW HAMPSHIRE TRUST COMPANY.

FILED FEBRUARY 4, 1896. No. 6033.

1. **Insurance:** MISREPRESENTATIONS. A representation in an application for insurance that no other insurance existed on the property, is not to be deemed false in such a sense as to invalidate the insurance obtained on such application, merely because a former owner of the property, after having parted with his title, effects other insurance thereon in his own favor.

2. ———: ———. Where the application for insurance, and the policy issued thereon by an insurance company doing business in a sister state bear the same date, it will not be inferred in the absence of evidence upon that point, that the officers of the insurance company at its home office were influenced by misrepresentations contained in the application to approve a risk, which, had they known of such misrepresentation, they would not have approved.

3. ———: ———: RIGHTS OF MORTGAGEE. Where, by the terms of the policy of insurance, the loss, if any, is payable to a mortgagee as his interest appears at the time of the loss, the right of such mortgagee to maintain an action for such loss is not necessarily defeated by such misrepresentation in the application for insurance, as, by the terms of the contract between the insurer and the insured, would defeat the right of the insured to maintain an action on his own behalf.

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

See opinion for statement of the case.

Charles Offutt, for plaintiff in error:

The policy was forfeited by taking subsequent insurance on the same premises. (2 May, Insurance [2d ed.], sec. 364; *Phœnix Ins. Co. v. Copeland*, 8 So. Rep. [Ala.], 48; *German Ins. Co. v. Heiduk*, 30

Neb., 288; *Reed v. Equitable Fire & Marine Ins. Co.*, 24 Atl. Rep. [R. I.], 833; *Zimmerman v. Home Ins. Co.*, 42 N. W. Rep. [Ia.], 462.)

The policy was forfeited by an undisclosed mortgage existing at the time of the application. (1 Wood, Fire Insurance, sec. 168; *Byers v. Farmers Ins. Co.*, 35 O. St., 606; *Hutchins v. Cleveland Mutual Ins. Co.*, 11 O. St., 477; *Hayward v. New England Mutual Fire Ins. Co.*, 10 Cush. [Mass.], 444; *Brown v. People's Mutual Ins. Co.*, 11 Cush. [Mass.], 280; *Jacobs v. Eagle Mutual Fire Ins. Co.*, 7 Allen [Mass.], 132; *Falis v. Conway Mutual Fire Ins. Co.*, 7 Allen [Mass.], 46; *Indiana Ins. Co. v. Brehm*, 88 Ind., 578; *Ryan v. Springfield Fire & Marine Ins. Co.*, 46 Wis., 671; *Smith v. Columbia Ins. Co.*, 17 Pa. St., 253; *O'Brien v. Home Ins. Co.*, 79 Wis., 399; *Addison v. Kentucky & Louisville Ins. Co.*, 7 B. Mon. [Ky.], 470; *Westchester Fire Ins. Co. v. Weaver*, 70 Md., 536; *Patten v. Merchants & Farmers Mutual Fire Ins. Co.*, 38 N. H., 338.)

The policy was forfeited by the fact that the insured, Brown, held only the naked legal title, while the real and beneficial owner was Haselwood. (*Farmers & Drovers Ins. Co. v. Curry*, 13 Bush [Ky.], 312; *Miller v. Amazon Ins. Co.*, 46 Mich, 463; *Fitchburg Savings Bank v. Amazon Ins. Co.*, 125 Mass., 431; *Garver v. Hawkeye Ins. Co.*, 69 Ia., 202; *Davis v. Iowa State Ins. Co.*, 67 Ia., 494; *Westchester Fire Ins. Co. v. Weaver*, 17 Atl. Rep. [Md.], 401; *Dowd v. American Fire Ins. Co. of Philadelphia*, 41 Hun [N. Y.], 139; *McLeod v. Citizens Ins. Co.*, 3 Rus. & C. [N. S.], 156; *Ross v. Citizens Ins. Co.*, 19 N. B., 126; *Scottish Union & Nat. Ins. Co. v. Petty*, 21 Fla., 399; *Brown v. Commercial Fire Ins. Co.*, 86 Ala., 189; *Wineland v. Security Ins. Co.*, 53 Md., 276; *Waller v. Northern Assurance Co.*, 10 Fed. Rep., 232; *McFet-*

ridge v. Phœnix Ins. Co., 54 N. W. Rep. [Wis.], 326; *Mt. Leonard Milling Co. v. Liverpool & London & Globe Ins. Co.*, 25 Mo. App., 259; *Collins v. St. Paul Fire & Marine Ins. Co.*, 44 Minn., 440; *Crescent Ins. Co. v. Camp*, 71 Tex., 503; *Clay Fire & Marine Ins. Co. v. Huron Salt & Lumber Mfg. Co.*, 31 Mich., 346; *Agricultural Ins. Co. v. Montague*, 38 Mich., 548.)

The policy was forfeited by using the insured building as a military armory, drill room, and storage depot. (*Kuntz v. Niagara District Fire Ins. Co.*, 16 U. C. C. P., 573; *Indiana Ins. Co. v. Brehm*, 88 Ind., 578; *Hobby v. Dana*, 17 Barb. [N. Y.], 111; *Hervey v. Mutual Fire Ins. Co.*, 11 U. C. C. P., 394; *Mooney v. Imperial Ins. Co.*, 3 Mont. Sup. Ct., 339; *Kyte v. Commercial Union Assurance Co.*, 21 N. E. Rep. [Mass.], 361.)

C. E. Holland, contra.

References to question of subsequent insurance: *Niagara Fire Ins. Co. v. Scammon*, 28 N. E. Rep. [Ill.], 919; 2 May, Insurance, sec. 372; 2 Wood Insurance, sec. 377; *Ætna Fire Ins. Co. v. Tyler*, 16 Wend. [N. Y.], 385; *Mutual Safety Ins. Co. v. Hone*, 2 N. Y., 235; *Burton v. Gore District Mutual Ins. Co.*, 14 U. C. Q. B., 342.

References to question relating to undisclosed mortgages: *Wilson v. Minnesota Farmers Mutual Fire Association*, 36 Minn., 112; *Bartlett v. Firemen's Fund Ins. Co.*, 77 Ia., 155; *Breckinridge v. American Central Ins. Co.*, 87 Mo., 62; *Phenix Ins. Co. v. La Pointe*, 118 Ill., 384; *Harriman v. Queen Ins. Co.*, 49 Wis., 71; *Fame Ins. Co. v. Mann*, 4 Bradw. [Ill.], 485; *Wheeler v. Traders Ins. Co.*, 62 N. H., 326; *Ayres v. Home Ins. Co.*, 21 Ia., 185; *German Ins. Co. v. Miller*, 39 Ill. App., 633; *Leach v. Republic Fire Ins. Co.*, 58 N. H., 245; *McNamara v. Dakota Fire &*

Marine Ins. Co., 47 N. W. Rep. [S. Dak.], 288; *People's Mutual Fire Ins. Co. v. Bowersox*, 5 O. C. C., 444; *Wich v. Equitable Fire & Marine Ins. Co.*, 2 Colo. App., 484; *Sexton v. Montgomery County Mutual Ins. Co.*, 9 Barb. [N. Y.], 191.

References to the question relating to the use of the insured building as a military armory, drill room, and storage depot: *Thayer v. Providence-Washington Ins. Co.*, 70 Me., 531; *Stennett v. Pennsylvania Fire Ins. Co.*, 68 Ia., 674; *Northrup v. Mississippi Valley Ins. Co.*, 47 Mo., 435; *Anthony v. German-American Ins. Co.*, 48 Mo. App., 65; *Hahn v. Guardian Assurance Co.*, 32 Pac. Rep. [Ore.], 683; *Williams v. People's Fire Ins. Co.*, 57 N. Y., 274; *Gamwell v. Merchants & Farmers Mutual Fire Ins. Co.*, 12 Cush. [Mass.], 167; *Lattomus v. Farmers Mutual Fire Ins. Co.*, 3 Hous. [Del.], 404.

There cannot be fraudulent concealment where an applicant for insurance is not questioned as to the contents of the application. (*Campbell v. American Fire Ins. Co.*, 40 N. W. Rep. [Wis.], 661; *Dohn v. Farmers Joint-Stock Ins. Co.*, 5 Lans. [N. Y.], 275.)

Though the facts were sufficient to constitute a forfeiture, if the agent knew the facts when he issued the policy, the company is estopped from setting up the same as a defense. (*Commercial Ins. Co. v. Ives*, 56 Ill., 402; *Home Mutual Fire Ins. Co. v. Garfield*, 60 Ill., 124; *Gerhauser v. North British & Mercantile Ins. Co.*, 7 Nev., 174; *Planters Mutual Ins. Co. v. Deford*, 38 Md., 382; *Field v. Ins. Co. of North America*, 6 Biss. [U. S.], 121; *Russell v. State Ins. Co.*, 55 Mo., 585; *Michigan State Ins. Co. v. Lewis*, 30 Mich., 41; *Richards v. Washington Fire & Marine Ins. Co.*, 60 Mich., 420; *Andes Ins. Co. v. Shipman*, 77 Ill., 189; *Lycoming Ins. Co. v. Jackson*, 83 Ill., 302; *Liverpool, London & Globe Ins. Co. v.*

McGuire, 52 Miss., 227; *Carr v. Hibernia Ins. Co.*, 2 Mo. App., 466; *Aurora Fire & Marine Ins. Co. v. Kranich*, 36 Mich., 289; *Mers v. Franklin Ins. Co.*, 68 Mo., 127; *Weeks v. Lycoming Fire Ins. Co.*, 7 Ins. L. J. [Vt.], 552; *Siltz v. Hawkeye Ins. Co.*, 16 Ins. L. J. [Ia.], 106; *Graham v. Ontario Mutual Ins. Co.*, 14 Ont., 358; *Gould v. Dwelling-House Ins. Co.*, 134 Pa., 570; *Planters & Merchants Ins. Co. v. Thurston*, 93 Ala., 255; *Pelzer Mfg Co. v. Sun Fire Office*, 15 S. E. Rep. [S. Car.], 562; *Jemison v. State Ins. Co.*, 52 N. W. Rep. [Ia.], 185; *Mowry v. Agricultural Ins. Co.*, 18 N. Y. Sup., 834; *Soli v. Farmers Mutual Ins. Co.*, 52 N. W. Rep. [Minn.], 979.)

RYAN, C.

There was a verdict, with a judgment thereon, for the defendant in error in this case, in the district court of Seward county. This judgment, on March 24, 1892, was rendered for the sum of $2,124 and costs. The policy upon which plaintiff in error was found liable was issued to J. D. Brown on March 15, 1890. The property insured—a brick building—was totally destroyed by fire on January 16, 1891. The defenses specially pleaded were that in the application for the above insurance it had been falsely represented that Brown was the sole, undisputed owner of the property to be insured; that, likewise, it was falsely represented that there was no other insurance on the property; that in said application it was falsely represented that the building to be insured was used solely as a livery barn, whereas, in fact, the upper story thereof was used for an armory; and that by the said application there had not been disclosed the existence of a mortgage upon the premises therein described. These averments of the answer were

supplemented by others to the effect that the plaintiff in error had been deceived by the above described false representations and omission, and so had been induced to insure the property described.

In respect to the alleged false representations as to the ownership of the insured property, the bill of exceptions shows that there was introduced in evidence the record of a warranty deed from James A. Haselwood and his wife to the aforesaid Brown, whereby was conveyed the real property on which was the insured building. The plaintiff in error offered the above named James A. Haselwood as a witness, and from him elicited the oral statements that the above deed was a trust deed; that the witness still owned in fee-simple the property therein described; and that he had held possession of, and had collected the rents arising from, the said property ever since the making of the aforesaid conveyance. It would be extremely dangerous for this court to assume, upon evidence of this nature, that the jury wrongfully found that the deed attacked was operative according to its terms. The policy sued upon provided that the loss, if any occurred during the term covered by it, should be payable to the New Hampshire Trust Company, mortgagee, as its interest might appear at the time of such loss. When the policy sued upon was applied for and issued, there was in existence no policy of insurance upon the same property, but, something like nine months afterward, James A. Haselwood procured to be issued by the Farmers & Merchants Insurance Company of Lincoln another policy in his own favor. This last policy was of the date of June 11, 1891. The warranty deed above referred to had been executed by

James A. Haselwood and his wife on February 25, 1889, and had been filed for record two days thereafter; so that, if this deed was effective to pass title, as the jury must have assumed that it was, Mr. Haselwood, at the time he procured the insurance in his own favor, had no interest whatever in the property insured. It was not shown that Brown was at all cognizant of Haselwood's attempt to effect insurance in his own behalf, much less does the evidence disclose any approval of this attempt; hence Brown's rights were not impaired by it.

By the failure in the application to state that the building was used for an armory there was no such prejudice as was pleaded in respect thereto; for it was proved beyond question that in the armory there were kept no explosives or inflammable substances, and the keeping of these in said armory was what in the answer was alleged to have increased the risk. The testimony of insurance agents, that armories are usually classified as extra hazardous risks, was simply as to their judgment of what the action of insurance companies, ordinarily, would be in case such a risk was offered. In this case the written application, in which the building to be insured was described as a livery barn, was introduced in evidence. If this application could have subserved any purpose in procuring the issuance of a policy, it must have been, if this *quasi*-expert testimony was material, by influencing the officers of the company, at Des Moines, to accept the proffered risk. There was no attempt to show that the policy was issued by reason of the presentation of this application at the home office; hence there was no competent proof that the alleged misdescription therein was misleading

in view of the testimony of the aforesaid insurance agents. The averment of the answer that, without consent of the plaintiff in error, the upper story of the insured building was in January, 1891, and up to the time of the fire, changed so as to become an armory, had no support in the evidence. It was shown, beyond question, that this use as an armory existed from the erection of the building in 1887; hence the sole question presented on this branch of the case by pleadings and evidence has already been disposed of by the above discussion.

The mortgagee, to whom was payable the loss by the terms of the policy, was the original plaintiff in this case. The amount secured to be paid to this mortgagee was $2,000, with interest thereon. This mortgage was dated March 13, 1888, and it was filed for record the day following. The mortgage, which was not disclosed in the application for insurance, was made to J. H. Culver on March 13, 1888, to secure the payment of $755. This mortgage was filed for record on March 23, 1888. The application, from which was omitted all mention of this last named mortgage, was dated March 15, 1890, and the policy thereon claimed to have issued was of the same date. The only mention of the defendant in error to be found in all these insurance transactions occurs in the policy sued upon, and is in the following words: "Loss, if any, is payable to the New Hampshire Trust Company, mortgagee, as their interest may appear at the time of loss." In this policy it was provided with respect to mortgaged premises that, "if the same or any part thereof is incumbered by mortgage, lien, contract of sale, or otherwise, * * * or any existing incumbrance at the time of making application is not set forth in the application,

* * * then, and in every such case, this policy shall be void." In *Phenix Ins. Co. of Brooklyn v. Omaha Loan & Trust Co.*, 41 Neb., 834, it was held that by issuing a policy of insurance an insurer was bound to make good such loss and damage as should be caused to the insured property by fire, but that the conditions upon which the payment should be made, as between the insurer and the insured, did not necessarily qualify the right of mortgagee to collect payment under a mortgage slip, which provided that the payment of loss should be made to such mortgagee as his interest appeared at the time of such loss. Under such a provision the contract of insurance, in so far as it related to the right of a mortgagee to recover, was held to be a separate and independent contract from the one which governed the right of the insured in that respect, and the cases cited fully sustain this distinction. It therefore results from the doctrine of the case last cited that the right of the defendant in error to recover the amount of loss as its interest as mortgagee was, at the time of the fire, not defeated by the fact that, as between the insurer and the insured, there had been an omission in the application to describe or refer to the mortgage to Culver, or by the fact that there was a like omission of mention of the use of the building for an armory. In this connection it is deemed appropriate to observe that the evidence justified the amount of the verdict returned by the jury, for there was due as interest the amount of the verdict in excess of $2,000. There is presented by the record no other questions which we can examine, for, if upon the instruction there were such questions, they could not be considered, on account of the manner in which the instructions

are grouped in the petition in error. The judgment of the district court is

AFFIRMED.

PER CURIAM.*

Upon consideration of a motion for a rehearing there was found in the brief submitted by the plaintiff in error such weight of argument that, without receding from the views expressed in the opinion as to the analogy afforded by the case of *Phenix Ins. Co. of Brooklyn v. Omaha Loan & Trust Co.*, 41 Neb., 834, it is by the court deemed advisable to say that this question will be determined as an original one whenever its consideration becomes necessary. The motion for rehearing is overruled, however, because from what has been noted in the opinion it is evident that the application for insurance in no degree influenced the issue of the policy, and hence the representation as to the non-existence of a mortgage on the insured property was immaterial.

REHEARING DENIED.

A. B. SANDERS V. WILLIAM WEDEKING ET AL.

FILED FEBRUARY 4, 1896. No. 6105.

Negotiable Instruments: INDORSEE: NOTICE OF USURY: REVIEW. The special verdicts in this case are found upon examination to be sustained by sufficient evidence. The judgment upon a general verdict, in accord with the special findings, is affirmed.

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

*April 21, 1896.

J. D. Pope, for plaintiff in error.

Billings & Billings and *O. M. Quackenbush*, *contra*.

RYAN, C.

This action was brought by plaintiff in error as indorsee upon a promissory note for $200 made by the defendants in error to the People's Bank of Tobias. The defense of usury was sustained by the findings and verdict of the jury, and the sole question presented for our determination is, whether or not these findings and this judgment adverse to the plaintiff in error were sustained by sufficient evidence. When the note was given, Worden A. Sanders, a son of the plaintiff in error, was assistant cashier of the bank above named, though it appears that his duties as such assistant cashier admitted of his devoting attention to his trade of a jeweler in a building different from that in which the banking business was conducted. He was, however, in the bank when the cashier, Stanley Larsen, made the loan to the defendants in error, which is conceded, in its inception, to have been usurious. It was the custom of this bank to loan at usurious rates, and the assistant cashier was aware of this, for, upon being asked at what rate this bank made loans, he told one of the defendants in error that it was two per cent a month on short time, but that if a man took lots of money for six months, it would be cheaper. When the cashier of the bank was arranging for this particular loan, the assistant cashier was near by in the same room, and, as one of the defendants testified, he was within hearing distance of the conversation, carried on, as it was, in an ordinary tone of voice by each party. Immediately after this note

was taken, it was transferred by the following indorsement: "Pay to A. B. Sanders, without recourse on me. Stanley Larsen, Cas." The payment for the transfer of this note, it was testified without contradiction, was made by Worden A. Sanders. Whether this payment was with his own means, whereby he became the owner of this note and afterwards transferred it to his father, or whether he bought with means of his father in his hands, were propositions contested and submitted to the jury, which by special verdict found the latter established by the proofs. The fact that the indorsement was made by the cashier directly to A. B. Sanders would seem entitled to some weight, as indicating that in this purchasing Worden A. Sanders was acting as the agent of his father. He, however, denied that this was the case, and testified that his father had loaned him $600 to be reloaned by Worden as his own, and that having bought this note with a part of this money, he caused it to be indorsed to his father, direct, in part payment of said $600 which he was owing.

D. H. Conant, who was county judge when the case was tried in the county court, testified in the district court that, on the trial before him, plaintiff in error had testified that his son had purchased the note for the plaintiff in error. In this Mr. Conant was corroborated by one of the defendants in error. On these two propositions of facts—First, that Worden A. Sanders, at the time of the purchase of the note, had knowledge of such facts that the defense of usury against him could properly be shown; and, second, that this bound his father, for whom he was acting as agent—there was sufficient evidence to sustain the verdict of

the jury. There is presented by the record no other question, and the judgment of the district court is

AFFIRMED.

COLUMBUS C. WELLS V. STATE OF NEBRASKA.

FILED FEBRUARY 4, 1896. No. 8135.

1. **Instructions: ASSAULT.** To render the failure to give an instruction prejudicially erroneous, it is not sufficient that correct abstract propositions of law are therein embodied, but in addition it is requisite that such propositions be applicable to facts, at least in some degree, inferable from the evidence.
2. **Conviction for Assault.** Evidence examined and found sufficient to sustain the verdict.

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

Reavis & Reavis, 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, by a jury, found guilty of an assault in manner and form as charged in the information. This information was filed in the district court of Richardson county, and thereby the offense charged was that Columbus C. Wells, "upon one Oscar Larabee, then and there being, unlawfully, purposely, feloniously, and of his deliberate malice, did make an assault with a dangerous weapon, to-wit, a hammer, * * * with

intent * * * and thereby him, the said Oscar Larabee, unlawfully, purposely, feloniously, and of his deliberate malice, to inflict upon said Oscar Larabee great bodily injury," etc.

In the brief submitted on behalf of the plaintiff in error there are argued but two questions. Of these, one is that the verdict is not sustained by sufficient evidence. There is no room for doubt that Wells struck Larabee, at least twice, with a hammer, at the time and place described in the information. That there was such provocation that Larabee would have been entitled to but little sympathy if his punishment had been greater than it was, there can be no question; and yet this provocation was only by the use of insulting language, uttered at such a distance that it was necessary for the accused to take several steps that he might be able to show his resentment. When these steps had been taken it cannot be determined with certainty from the bill of exceptions which party first laid hands upon the other. There was sufficient evidence, however, to justify the jury in returning the verdict which it did return, and we cannot, therefore, set it aside as being without sufficient support.

In the brief the other ground of criticism is thus stated: "The court told the jury, in general terms, that they might convict the defendant of a simple assault, but failed to explain to the jury the legal meaning of the word 'assault' when used in that connection." One of the definitions of this word suggested by plaintiff in error is that given in Rapalje & Lawrence's Law Dictionary, to-wit: "In criminal law, assault is (1) an attempt unlawfully to apply any actual force, however small, to the person of another, directly or indi-

rectly; (2) the act of using such a gesture towards another person as to give him reasonable grounds to believe that the person using the gesture meant to apply actual force to his person." Counsel for plaintiff in error, in the course of their argument to establish their contention that the word "assault" should by the court have been defined without request, say: "Courts are supposed to know their duties,—a violent presumption in many cases,—and it is not incumbent on the defendant in a criminal case to ask the court to tell the jury what elements enter into a given transaction, as constituents thereof, to make it a crime." With the confident belief that we shall be able to show by a fair examination of the record that plaintiff in error has no just cause to complain that his rights were prejudiced by the district court in the trial of this case, we shall first consider the instruction which it is claimed should have been supplemented by a definition of the word "assault." It was in this language: "The court instructs the jury that, if they believe from the evidence beyond a reasonable doubt that defendant, not acting in self-defense, made an assault upon the prosecuting witness with the hammer, as alleged in the information, with no intention of feloniously inflicting great bodily injury upon the said prosecuting witness, then the jury may find the defendant guilty of an assault." As has already been stated, there was sufficient evidence to sustain the verdict of "guilty of an assault in manner and form as charged in the information." The evidence shows that plaintiff in error struck the prosecuting witness, at least twice, with a hammer. There were, therefore, no such conditions shown by the proofs that, under

the above quoted definition, a mere assault could have been inferred. If, under these conditions, the court had instructed the jury, as it is contended on behalf of the defendant in error that it should have done, following most text-writers, there would have been given an instruction to the effect that "an assault is the unlawful attempt, coupled with the present ability, to do injury to another." As this definition was not applicable to the facts proved, in any view of the case, it was not erroneous to omit to give this or an equivalent instruction. An assault with intent to commit great bodily injury is punishable by imprisonment in the penitentiary for not less than one nor more than five years. (Session Laws, 1889, ch. 34, sec, 1.) Notwithstanding a verdict of guilty of the above described offense, the judgment of the court was that Columbus C. Wells pay a fine of $15 and costs of the prosecution. For a mere assault it was discretionary with the court to impose a fine to the extent of $100, or to commit the defendant to the county jail for a period not exceeding three months. A fine of but $15 was certainly not excessive for a mere assault, and, no matter what instruction as to what constituted an assault might have been given, the jury could not have dealt as leniently with the prisoner as did the court in treating his offense as a mere assault. Whatever error was committed was not such as to afford plaintiff in error any just cause of complaint. The judgment of the district court is

AFFIRMED.

SAMUEL M. BARKER V. CHARLES K. DAVIES.

FILED FEBRUARY 4, 1896. NO. 5997.

1. **Review:** PLEADING: MOTION FOR NEW TRIAL. By failure to mention, in a motion for a new trial the ruling upon a motion to make more specific and certain the averments of a pleading, the party complaining waives his right to have reviewed the ruling complained of.
2. **Sales:** WAIVER OF STRICT PERFORMANCE: INSTRUCTIONS. Instructions *held* correct, which, while recognizing a defendant's right to insist upon the strict performance of the terms upon which a sale of personal property was alleged to have been made, nevertheless, consistently with the evidence introduced, permitted the jury to consider whether or not such strict performance had been waived by the party sought to be charged.

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

The facts are stated by the commissioner.

Albert & Reeder and *Norval Bros. & Lowley*, for plaintiff in error:

A defendant has the right to insist that all of the facts essential to the existence of a cause of action against him and in plaintiff's favor be stated in the petition. (*Bell v. Sherer*, 12 Neb., 409; *First Nat. Bank of Dorchester v. Smith*, 36 Neb., 199.)

If the defendant refused to take all the hay and straw, the plaintiff would be entitled to recover for what was actually delivered and proper damages, if any, sustained for breach of the contract in declining to take the rest. (*Wallingford v. Burr*, 15 Neb., 204; *Holmes v. Bailey* 16 Neb., 300; *Jeroulds v. Brown*, 15 Atl. Rep. [N. H.], 123.)

M. Whitmoyer and *John Patterson, contra.*

RYAN, C.

This action was brought in the district court of Merrick county by the defendant in error to recover the purchase price of certain produce sold to, and the reasonable value of certain services performed for, the plaintiff in error. There was an answer by which there were denied the purchase and delivery of the hay and straw hereinafter referred to, and in addition, by way of counter-claim, there was alleged a payment of $96.05, as well as the existence of damages to the amount of $100, caused by the alleged failure by plaintiff in error to cut and properly put up certain hay. By reply these affirmative matters were denied. There was a judgment in favor of defendant in error for the sum of $197.82.

The first question argued involves the overruling of a motion to make more definite and certain the averments of the petition. As this ruling was not referred to in the motion for a new trial, it cannot now be considered.

In the petition it was alleged that the defendant in error had sold and delivered to plaintiff in error 100 tons of hay at the agreed price of $2 per ton, and 70 tons of straw at the same price per ton. These items were controverted by a general denial contained in the answer. In respect to the hay and straw there seems to have been but little disagreement in the evidence that this was to be baled by the plaintiff in error, and that, after this baling was done, it was to be delivered on board the cars at a designated near-by railroad siding. It also seems clear that such of the hay as was baled was delivered as agreed. There was, however, quite a large amount of hay, and all the straw, which Mr.

Barker never had baled, it would seem, because he thought it was not fit for baling. There was ample evidence from which the jury was justified in finding that Mr. Barker used the unbaled part of the hay and straw in maintaining and caring for his stock, at a place where no railroad shipment was necessary. On this branch of the case the sole point made is indicated by the second instruction asked by the plaintiff in error, which was refused by the court. This instruction was in the following language: "The plaintiff claims, among other things, $200 for 100 tons of hay which he alleges he sold and delivered to the defendant. If you find that this 100 tons of hay was a part of a larger amount, and that said 100 tons was not set apart or designated or separated from the balance of the said larger amount, and that only a part of said 100 tons was actually delivered according to the agreement, and for the amount so delivered he should be allowed $2 per ton." This instruction was properly refused, for, though the defendant in error did not load on the cars a portion of the hay, this was solely due to the fact that this hay was not baled by the other party. There was no question of a *quantum meruit* made in the case. On the part of the defendant in error the claim was that he had sold 100 tons of hay at $2 per ton. This was met by a simple denial. The proof was that $2 per ton was the agreed price. For a failure to place on board the cars no counter-claim or rebate was urged. Under these circumstances we think the following instruction, though complained of by the plaintiff in error, embodied the correct principle applicable to the evidence as submitted to the jury:

"9. The jury is instructed that if, from the evi-

dence in this case, they believe that in the year 1889 plaintiff sold to the defendant 100 tons of hay in the stack for the agreed price of $2 per ton, and that, by the terms of sale, defendant was to bale it, and the plaintiff, after such baling, was to haul it to the railroad station and put it on board the cars, and that thereafter the defendant, on receiving returns of the sale of the hay, was to pay for it; and if the jury further from the evidence believe that by the terms of sale the 100 tons sold formed a part of 165 tons, or any greater number of tons in stack, and that the particular stacks which the defendant was to get were not identified or separated from the other stacks, then the right to select the stacks sold was in the defendant, and if he afterwards selected the stacks which he would take, by using a part thereof, or otherwise marking the stacks, so as to identify them, then the property in the stacks so selected or marked would vest in the defendant, and he would be liable to pay the plaintiff therefor at the rate of $2 per ton, although the hay was not baled by the defendant or hauled to the cars by the plaintiff. In such case the plaintiff would not be under obligation to haul it until it was baled. The defendant would be entitled to such time for baling as would be reasonably necessary for that purpose if no time was fixed by the terms of sale, and if a time was fixed, then such time should govern the time within which the baling was to be done. On the other hand, if the jury from the evidence believe that defendant made a selection of only a part of the 100 tons of hay, then he would only be liable to the plaintiff for the amount selected at the agreed price." It is unnecessary to quote the instruction given in relation to the straw, for the

principle stated therein was the same as is found in the above instruction relative to the hay.

To entitle himself to a credit of $96.05 the plaintiff in error introduced in evidence a check signed by himself for said amount, payable to the defendant in error, across which were stamped by the drawee the words: "First National Bank. Paid March 29th, 1890. Columbus, Nebraska." There was in connection with this check but little satisfactory testimony given by Mr. Barker, who admitted that it was not charged to the defendant in error in his account with him, but said that when he began to look over his papers with reference to making a defense he found this particular check marked "paid," and he believed it to have been given in payment upon account with the defendant in error, but would not swear positively that such was the case. The testimony of the defendant in error and of Alfred Davies was that this check was made by Mr. Barker upon his own motion to C. K. Davies in payment for certain property purchased of Alfred, because Alfred was then a minor, and Mr. Barker did not wish to depend upon his indorsement as evidencing the receipt of the money by Alfred upon the said check. With the conclusion reached by the jury upon consideration of this evidence we cannot interfere.

It is urged that the verdict was not sustained by sufficient evidence, but in regard to this, also, we must disagree with the plaintiff in error. There was ample evidence showing that both the hay and the straw were taken and used by the plaintiff in error, and that the condition of payments was correctly shown by the proofs offered by the defendant in error. The judgment of the district court is therefore

AFFIRMED.

JOSEPH P. MANNING V. WILLIAM J. CONNELL ET AL.

FILED FEBRUARY 4, 1896. No. 6069.

Temporary Injunction: FINAL ORDER: REVIEW. The orders sought to be reviewed upon petition in error, being only for the dissolution of a temporary restraining order, and in denial of a temporary injunction, it is *held* that neither of these is a final order, and this proceeding is therefore dismissed. Following *Bartram v. Sherman*, 46 Neb., 713.

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

David Van Etten, for plaintiff in error.

Connell & Ives, contra.

RYAN, C.

In the district court of Douglas county plaintiff obtained the following temporary restraining order: "Upon reading the petition of plaintiff in the foregoing action, duly verified, and for good cause shown, it is ordered that the application of the plaintiff, Joseph P. Manning, for an order of injunction as prayed in said action be, and the same is hereby, set for hearing on Saturday, the 21st day of January, 1893, at 10 o'clock in the forenoon of that day, or as soon thereafter as the same can be heard, at court room No. 1 at the court house in the said county of Douglas, and that notice of the hearing of this order be given to defendant by Thursday, January 19, 1893; and it is hereby further ordered by the court that a restraining order be, and the same is hereby, allowed, restraining and enjoining the said defendants, and their

agents, servants, employes, and representatives, as prayed in said petition, to be and continue in full force and effect until the hearing and final determination of the application of said plaintiff for said order of injunction herein, and until the further order of court in that regard, upon plaintiff executing an undertaking in the sum of $500 as required by law." On hearing for the purposes in the above order indicated, the temporary restraining order was vacated and the temporary injunction prayed was refused and denied. By petition in error plaintiff seeks to have the above reviewed as final orders. The quotation of the entire restraining order, supplemented by a full description of the orders sought to be reviewed, shows that this case falls within the rule announced and enforced in *Bartram v. Sherman*, 46 Neb., 713. For the reason that, as indicated, the orders sought to be reviewed are not final, this proceeding is

DISMISSED.

OMAHA & REPUBLICAN VALLEY RAILWAY COMPANY V. MARILLA L. CROW, ADMINISTRATRIX.

FILED FEBRUARY 4, 1896. No. 6054.

1. **Carriers: SHIPPERS OF LIVE STOCK: PASSES: PERSONAL INJURIES.** A shipper of cattle, who, for the purpose of enabling him to care for his stock in transit, receives a drover's pass, is not, while accompanying his stock, entitled to all the rights and privileges of an ordinary passenger for hire, and an instruction to the contrary effect was erroneous.

2. ———: ———: ———. One who ships cattle and undertakes, upon a pass given him for that purpose, to accom-

pany and care for his stock in transit does so under the implied conditions that he will submit to whatever inconveniences are necessarily incident to his undertaking.

3. ———: ———: ———: NEGLIGENCE. In an action for damages from injuries inflicted by an engine upon a shipper of live stock, who was accompanying and caring for such stock under the arrangement above indicated, the question of the existence of negligence, such as would give rise to a cause of action, or of such contributory negligence as would defeat it, is one of fact to be determined by the jury.

ERROR from the district court of Valley county. Tried below before THOMPSON, J.

The opinion contains a statement of the case.

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

Under the evidence there was no breach of legal duty by defendant below towards plaintiff's intestate, and the injury from which he died was caused by his own negligence proximately contributing thereto. It was error to refuse to direct a verdict for defendant. (*Omaha Horse R. Co. v. Doolittle*, 7 Neb., 481; *City of Lincoln v. Gillilan*, 18 Neb., 114; *Missouri P. R. Co. v. Moseley*, 57 Fed. Rep., 922; *Burns v. Boston & L. R. Co.*, 101 Mass., 50; *Clark v. Boston & A. R. Co.*, 128 Mass., 1; *Allyn v. Boston & A. R. Co.*, 105 Mass., 77; *Pennsylvania R. Co. v. Rathgeb*, 32 O. St., 66; *Anderson v. Chicago, B. & Q. R. Co.*, 35 Neb., 95; *Durrell v. Johnson*, 31 Neb., 796; *Chicago, B. & Q. R. Co. v. Barnard*, 32 Neb., 317.)

There was error in the fifth instruction given by the court. (Wood, Railway Law, p. 1075; *Shoemaker v. Kingsbury*, 12 Wall. [U. S.], 376; *Hazard v. Chicago, B. & Q. R. Co.*, 1 Biss. [U. S.], 503.)

At the time of the death of deceased the com-

pany owed him no duty as a passenger. Negligence on part of defendant below in violation of its general duty to the public was not shown, and the company should not be held liable. (*Chicago, B. & Q. R. Co. v. Grablin*, 38 Neb., 90; *State v. Grand Trunk R. Co.*, 58 Me., 176; *Baltimore & P. R. Co. v. Jones*, 95 U. S., 439; *Atchison & N. R. Co. v. Loree*, 4 Neb., 446; *Omaha & R. V. R. Co. v. Clark*, 35 Neb., 867; *Omaha & R. V. R. Co. v. Brady*, 39 Neb., 27; *Hyde v. Missouri P. R. Co.*, 110 Mo., 272; *Louisville & N. R. Co. v. Melton*, 2 Lea [Tenn.], 262.)

References to the question of contributory negligence: *Chicago, R. I. & P. R. Co. v. Houston*, 95 U. S., 697; *Omaha & R. V. R. Co. v. Martin*, 14 Neb., 295; *Schmolze v. Chicago, M. & St. P. R. Co.*, 83 Wis., 659; *Chicago, B. & Q. R. Co. v. Landauer*, 36 Neb., 657; *Baltimore & P. R. Co. v. Jones*, 95 U. S., 439; *Tuttle v. Detroit, G. H. & M. R. Co.*, 122 U. S., 195; *Myers v. Baltimore & O. R. Co.*, 150 Pa. St., 386; *Artz v. Chicago, R. I. & P. R. Co.*, 34 Ia., 153; *Pleasants v. Fant*, 89 U. S., 121; *O'Donnell v. Missouri P. R. Co.*, 7 Mo. App., 190.

A drover in charge of live stock travels under restrictions not applicable to ordinary passengers. His contract to care for the stock limits the liability of the carrier, and he assumes the risk ordinarily incident to such employment. (2 Am. & Eng. Ency. Law, 743, note 8; *Dunn v. Hannibal & St. J. R. Co.*, 68 Mo., 268; *Cragin v. New York C. R. Co.*, 51 N. Y., 61; Hutchinson, Carriers [2d ed.], sec. 322; *Toledo, W. & W. R. Co. v. Black*, 88 Ill., 112; *Connelly v. Eldridge*, 36 N. E. Rep. [Mass.], 469; *Degg v. Midland R. Co.*, 2 H. & N. [Eng.], 773*; *Althorf v. Wolfe*, 22 N. Y., 355; *Mayton v. Texas & P. R. Co.*, 63 Tex., 77; *Wright v. London & N. W. R. Co.*, 1 Q. B. Div. [Eng.], 252; *Plant v. Grand Trunk R. Co.*,

27 Q. B. [U. C.], 78; *Searle v. Lindsay*, 11 C. B., n. s. [Eng.], 429; *Gibson v. Erie R.Co.*, 63 N. Y., 449; *Farwell v. Boston & W. R. Co.*, 4 Met. [Mass.], 49; *Baltimore & O. R. Co. v. Baugh*, 149 U. S., 368; *Brown v. Winona & St. P. R. Co.*, 27 Minn., 162; *Randall v. Baltimore & O. R. Co.*, 109 U. S., 478; *Wilson v. Winona & St. P. R. Co.*, 37 Minn., 326.)

A drover in charge of live stock who uses a pass issued upon the condition that he will bear all the risks of transportation cannot maintain an action for personal injury received by the negligence of the carrier's servants. (*Gallin v. London & N. W. R. Co.*, 10 L. R., Q. B. [Eng], 212; *Alexander v. Toronto & N. R. Co.*, 35 Q. B. [U. C.], 453; *Wells v. New York C. R. Co.*, 24 N. Y., 181; *Perkins v. New York C. R. Co.*, 24 N. Y., 196; *Bissell v. New York C. R. Co.*, 25 N. Y., 442; *Poucher v. New York C. R. Co.*, 49 N. Y., 263; *Annas v. Milwaukee & N. R. Co.*, 67 Wis., 46.)

The contract by which a party assumes the risk of injuries from the negligence of servants to another, indorsed on a free pass, issued without other consideration than that expressed in the written instrument, is not against public policy, and is binding on the person accepting and agreeing to the same, in the absence of willful or gross negligence on part of the carrier or its employes. (*Wescott v. Fargo*, 61 N. Y., 542; *Dorr v. New Jersey Steam Navigation Co.*, 11 N. Y., 485; *Arnold v. Illinois C. R. Co.*, 83 Ill., 273; *Toledo, W. & W. R. Co. v. Beggs*, 85 Ill., 80; *Western & A. R. Co. v. Bishop*, 50 Ga., 465; *McCawley v. Furness R. Co.*, 8 L. R., Q. B. [Eng.], 57; *Hall v. North Eastern R. Co.*, 10 L. R., Q. B. [Eng.], 437; *Duff v. Great Northern R. Co.*, 4 L. R. [Ir.], 178; *Alexander v. Wilmington & R. R. Co.*, 3 Strob. Law

[S. Car.], 594; *Smith v. New York C. R. Co.*, 24 N. Y., 222; *Magnin v. Dinsmore*, 56 N. Y., 168; *Kinney v. Central R. Co.*, 32 N. J. Law, 407; *Griswold v. New York & N. E. R. Co.*, 53 Conn., 371; *Baltimore & O. R. Co. v. Skeels*, 3 W. Va., 556.)

Reese & Gilkeson, contra:

Deceased was a passenger and entitled to all the rights and protection of a passenger for hire at the time he was killed, and the release upon the back of the ticket was void and of no effect. (*New York C. R. Co. v. Lockwood*, 17 Wall. [U. S.], 357; *Steamboat New World v. King*, 16 How. [U. S.], 469; *Philadelphia & R. R. Co. v. Derby*, 14 How. [U. S.], 485; *Missouri P. R. Co. v. Ivey*, 9 S. W. Rep. [Tex.], 346; *Receivers International & G. N. R. Co. v. Armstrong*, 23 S. W. Rep. [Tex.], 236; *Pennsylvania R. Co. v. Henderson*, 51 Pa. St., 315; *Little Rock & F. S. R. Co. v. Miles*, 40 Ark., 298; *Carroll v. Missouri P. R. Co.*, 88 Mo., 239; *Ohio & M. R. Co. v. Selby*, 47 Ind., 471; *Flinn v. Philadelphia, W. & B. R. Co.*, 1 Hous. [Del.], 471; *Indianapolis, B. & W. R. Co. v. Beaver*, 41 Ind., 493; *Wilton v. Middlesex R. Co.*, 125 Mass., 130; *Siegrist v. Arnot*, 10 Mo. App., 197; *Jacobs v. St. Paul & C. R. Co.*, 20 Minn., 125; *Washburn v. Nashville & C. R. Co.*, 3 Head [Tenn.], 638; *Delaware L. & W. R. Co. v. Ashley*, 67 Fed. Rep., 209; *Rose v. Des Moines V. R. Co.*, 39 Ia., 246; *McLean v. Burbank*, 11 Minn., 288; *Cleveland, P. & A. R. Co. v. Curran*, 19 O. St., 1; *Missouri P. R. Co. v. Vandeventer*, 26 Neb., 222; *St. Joseph & G. I. R. Co. v. Palmer*, 38 Neb., 463.)

A person, standing in the proper place, under the circumstances, upon the premises of a railroad company, awaiting an opportunity to board his train, is still a passenger, and the railroad com-

pany is bound to use the same care and caution as to his safety, and is under the same obligation to him as if he were in the car in which he is to be transported. (*Warren v. Fitchburg R. Co.*, 8 Allen [Mass.], 227; *Peniston v. Chicago, St. L. & N. O. R. Co.*, 34 La. Ann., 777; *Dodge v. Boston & Bangor Steamship Co.*, 148 Mass., 207; *Parsons v. New York C. & H. R. R. Co.*, 113 N. Y., 355; *Jeffersonville, M. & I. R. Co. v. Riley*, 39 Ind., 568; *Dice v. Willamette Transportation Co.*, 8 Ore., 60; *Gordon v. Grand Street & N. R. Co.*, 40 Barb. [N. Y.], 546; *Caswell v. Boston & W. R. Co.*, 98 Mass., 194; *Central R. Co. v. Perry*, 58 Ga., 461.)

The question of negligence was for the jury to determine from the evidence. (*Chicago, B. & Q. R. Co. v. Olcson*, 40 Neb., 889; *Omaha & R. V. R. Co. v. Morgan*, 40 Neb., 604; *Chicago, B. & Q. R. Co. v. Wilgus*, 40 Neb., 660; *Chicago, B. & Q. R. Co. v. Landauer*, 36 Neb., 642; *Spellman v. Lincoln Rapid Transit Co.*, 36 Neb., 890; *Missouri P. R. Co. v. Baier*, 37 Neb., 235; *Omaha & R. V. R. Co. v. Chollette*, 33 Neb., 143; *St. Joseph & G. I. R. Co. v. Hedge*, 44 Neb., 448.)

Charles A. Munn, also for defendant in error.

RYAN, C.

In the district court of Valley county there was recovered a verdict in the sum of $5,000, upon which judgment was rendered in favor of the defendant in error. In describing the pleadings and the proceedings in the district court, it will probably avoid confusion to designate the parties according to their relation to the suit in that court, rather than as each is plaintiff in error, or defendant in error, in this court.

The plaintiff, Marilla L. Crow, in her petition

alleged that she was the administratrix of the estate of Jonathan S. Crow, deceased; that the defendant was a common carrier of freight and passengers over a line of railroad between Ord and South Omaha, which it owned; that on March 3, 1892, the said defendant, in consideration of the receipt by it of $126, paid by Jonathan S. Crow, undertook to ship three car loads of cattle and safely carry said Jonathan S. Crow from Ord to South Omaha, but that while said Jonathan S. Crow was being carried in pursuance of said undertaking, and while he was performing his duty in looking after and taking care of said cattle while they were being transported to South Omaha, the said defendant negligently and carelessly ran an engine against, upon, and over said Jonathan S. Crow, and thereby caused his death. There were described in the petition eight children of said decedent, who survived him, and it was alleged that these survivors and the widow of Jonathan S. Crow had sustained damages by his death in the sum of $5,000, for which sum judgment was prayed. The answer was in denial of all the averments of the petition. At the commencement of the trial it was admitted in open court that the plaintiff was the duly qualified administratrix of the estate of Jonathan S. Crow; that said decedent left him surviving the widow and children described in the petition; that said widow and surviving children, at the time of said trial, were the heirs at law of said Jonathan S. Crow, and, as such, were entitled to the benefit of the statutes of Nebraska in that behalf enacted, and that this suit was instituted for their benefit under the statutes. It was also admitted that the age and physical condition of Jonathan S. Crow had been such, just before his

death, that, if plaintiff was at all entitled to recover, the verdict must be for $5,000.

As the defendant offered no evidence whatever, there is but little room for disagreement as to the ultimate facts which must determine this error proceeding. On March 3, 1892, Jonathan S. Crow & Son shipped three car loads of cattle from Ord to South Omaha. For the purpose of taking care of these cattle, Jonathan S. Crow was permitted to accompany his cattle, and, accordingly, there was issued to him a ticket by its terms good only for a continuous passage on the same train. On the back of this ticket were printed conditions required to be, and which were, signed by Mr. Crow, whereby he assumed all risk of accidents, and agreed that the Union Pacific system should not, under any circumstances, be liable for damage of any kind, whether to himself or to the stock which he was to accompany. Under the repeated decisions of this court, we cannot think that this stipulation of release should cut any figure in this case. (*St. Joseph & G. I. R. Co. v. Palmer*, 38 Neb., 463; *Missouri P. R. Co. v. Vandeventer*, 26 Neb., 222.) There was shipped by the same train to South Omaha from Ord other car loads of stock, and these were accompanied by shippers who were neighbors and acquaintances of Mr. Crow. When the train reached Grand Island all these shippers left the caboose and sought to procure a lunch at what had formerly been a lunch stand near, or upon, the line of the Union Pacific railway. When, not being able to procure a lunch, these shippers sought their train, they found it had been placed in the freight yards of said Union Pacific railway, and that both the engine and the caboose had been therefrom de-

tached. It was conclusively shown in evidence that the only safe course open to them under the circumstances was to keep very close to their stock, so as to prevent any of the cattle from getting down in the cars, as they were liable to do. There was no notice usually given when a train like theirs would start, and often it happened that shippers would be compelled to wait for hours near their stock, or run the risk of being left whenever the caboose should be attached. It was testified by different witnesses, and not denied, that if a shipper was not ready to board the caboose immediately after it was attached, he was in imminent danger of being left, for the attaching of the caboose to the train was the signal for its immediate departure from Grand Island.

The testimony shows that the night of March 3, 1892, was dark and foggy at Grand Island; that there was a drizzling rain, and that the electric and other artificial lights had but little tendency toward overcoming the prevailing darkness. The train in which were the cars of stock accompanied by Mr. Crow and his friends was standing upon a track running nearly east and west. At a distance of about eight feet north of this track there was a parallel track, upon which was standing the way car which had been brought from Ord and detached from the cars which the stock shippers were watching. An engine backed along this track from the west and shoved the way car upon a switch. To accomplish this it was necessary to pass the stockmen, who were standing along the north side of one of their cars of stock. Across the rear of the tender of this engine there was a foot-board, which projected over the track about two feet, at a height of about

ten inches above the track traveled by the engine. The space between the cars which the stockmen were watching and the projecting end of the foot-board nearest them was about five feet across. It is not certain there was a light on the rear end of the tender. If there was such a light, its elevation was so great, or the light itself was so dim, that it gave no warning of the movements of the engine which we are about to describe. After the engine had shoved the way car upon the switch eastward, it moved westward beyond where the waiting stockmen were standing. No witness was able to say just how far westward this engine had proceeded before it made a stop and began backing eastward. It is disclosed by the evidence of the surviving stockmen that they first discovered this engine when, in backing eastward, it was within from five to ten feet of them. After this engine had passed westward these stockmen paid no attention to it, and Mr. Crow shifted his position slightly, so that when the engine, without warning given by bell, whistle, or otherwise, backed toward the east he was struck, thrown down, and killed. From the facts which we have detailed it was clearly made to appear that Jonathan S. Crow was properly alongside the car wherein the stock of himself, or of his friends, was contained. The district court, in respect to his relation to the railroad company, gave the instruction numbered five requested by the plaintiff, which was as follows: "The jury are instructed that a drover or a stockman, traveling on a pass, such as was given to Jonathan S. Crow, deceased, in this case, for the purpose of taking care of his stock on the train, is a passenger for hire, and is entitled to the same rights and privileges as other passengers for hire,

riding on ordinary railway tickets." It seems to us that this instruction overstates the liability of railway companies in the class of cases contemplated. An owner of stock, who, for the purpose of taking care of such stock, receives free transportation, does so under such conditions as the duty of caring for his stock may require. If he is entitled to the same rights and privileges as ordinary passengers for hire, he could scarcely be expected to be satisfied to ride in an ordinary caboose. The duty of a railroad company to stop its trains at passenger depots for the purpose of receiving passengers, and of permitting of their alighting safely, would exist under the above rule, and there would be devolved upon the passenger the correlative obligation of remaining at such depot until his train should stop at that place. In such case it would be absolutely impossible for a stockman to pass alongside the cars containing his cattle, and having discovered such as had fallen or lain down, assist them to regain their feet. In the case under consideration the testimony showed, without question, that this was exactly the duty of Mr. Crow in respect to the cattle which he was accompanying to South Omaha. The fact that he was in the freight yard of the railroad company looking after his cattle, and waiting for the departure of the train, is inconsistent with the rule above laid down by the court; for, if this rule was a correct statement of the law which should be held applicable to the facts disclosed by the evidence, Mr. Crow should have awaited the departure of his train at the passenger depot; and it was evidence of negligence for him to venture into the freight yard to care for his stock, or to take passage on his train. The court should have instructed the jury

that, whether or not the deceased was negligent in waiting for the caboose where he did, and whether or not he was guilty of negligence in any respect while so waiting, was a question of fact to be, by the jury, determined upon consideration of all the evidence.

On the part of the railroad company there were requested numerous instructions defining what facts, or group of facts, would constitute contributory negligence, and what enumerated facts would not justify the inference of negligence, among which latter was the failure to ring the bell, or to sound a whistle, within the limits of the freight yard. The refusal of the district court to follow this method of giving instructions has been by this court sanctioned in *Omaha Street R. Co. v. Craig*, 39 Neb., 601, and the Nebraska cases therein cited. Still later, the practice of instructing the jury that certain facts justify, or fail to justify, the inference of negligence has been disapproved in *Omaha & R. V. R. Co. v. Morgan*, 40 Neb., 604; *Chicago, B. & Q. R. Co. v. Oleson*, 40 Neb., 889; *Omaha & R. V. R. Co. v. Chollette*, 41 Neb., 578; *Pray v. Omaha Street R. Co.*, 44 Neb., 167; *Spears v. Chicago, B. & Q. R. Co.*, 43 Neb., 720. The utmost extent to which the district court could properly go was to indicate what facts, if proved, might properly be taken into consideration in determining the presence or absence of negligence. Whether or not the plaintiff's intestate was negligent in the performance of duties which the railroad company had acquiesced in his performing, was a question of fact which should have been submitted, as such, to the jury, in view of the evidence as to what such intestate, of necessity, was required to do, and how he was required to do it, in properly caring for his cattle. In our

view it was not proper to attempt to confer upon Mr. Crow the unlimited rights and privileges of ordinary passengers for hire. While he was for certain purposes a passenger, he was not such in the usual unrestricted sense of that term. His contractual right was to proceed upon the freight train upon which his cattle were shipped from Ord to South Omaha. His duty was to care for his stock in transit, and his rights and privileges as a passenger were limited by the necessity of traveling on the aforesaid freight train, and by the requirement that he should care for his stock. For the reason that, in the instruction quoted, this limitation and requirement, with all their necessary incidents, were ignored, the judgment of the district court is

REVERSED.

HARRISON, J., not sitting.

FIRST NATIONAL BANK OF WILBER V. J. W. RIDPATH.

FILED FEBRUARY 4, 1896. No. 6026.

Principal and Agent: AUTHORITY: EVIDENCE: RATIFICATION. When the extent of an agent's authority is in issue, no special instructions having been given to him, his actual authority to do a particular act in connection with the transaction may be inferred from proof that the principal had authorized or ratified similar acts in connection with past transactions of the same character, and entrusted to the agent under similar circumstances.

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

J. H. Grimm and *E. W. Metcalfe*, for plaintiff in error.

References: Story, Agency, sec. 133; 1 Am. & Eng. Ency. Law, pp. 353-357; *British American Mortgage Co. v. Tibballs*, 63 Ia., 468; *Robinson v. Anderson*, 106 Ind., 152; *Adams v. Nebraska City Nat. Bank*, 4 Neb., 370; *Marseilles Mfg. Co. v. Morgan*, 12 Neb., 66; *Alexander v. Graves*, 25 Neb., 453; *Stump v. Richardson County Bank*, 24 Neb., 522.

Hastings & McGintie, contra.

IRVINE, C.

This was an action of replevin by the plaintiff in error against the defendant in error for certain live stock which the plaintiff in error claimed under a chattel mortgage executed by the defendant in error to Lytle & Maynard, to secure a note which had been sold by Lytle & Maynard to the plaintiff in error. There was a verdict and judgment for the defendant, which the plaintiff seeks to reverse.

The most important assignment of error is that the verdict is not sustained by the evidence. The evidence shows that Ridpath gave to Lytle & Maynard his promissory note for $279.77, May 22, 1891, payable one month after date. This note was sold to the plaintiff bank, and was secured by chattel mortgage on the stock in controversy. Before the note became due it was sent to the Bank of Western by the plaintiff for collection. Lytle & Maynard were both officers of the Bank of Western. Maynard was its president. The evidence tends to show that instead of collecting the note the Bank of Western took a new note, again to the order of Lytle & Maynard, and a new mortgage on the same

property. Ridpath knew nothing of the plaintiff's ownership of the old note. It bears a general indorsement by Lytle & Maynard and nothing indicating its ownership. There is also evidence tending to show that the new note and mortgage passed into the possession of a third party, who endeavored to collect the debt. It also appears from the testimony of the cashier of the plaintiff bank that prior to this transaction the plaintiff had done a good deal of business with the Bank of Western and Lytle & Maynard, and it had been the plaintiff's custom to send notes purchased of Lytle & Maynard or the Bank of Western to the Bank of Western for collection; and that frequently, instead of collecting such notes, the Bank of Western had procured renewal notes and sent them to the plaintiff in lieu of payment. We think this evidence sustains the verdict. Where the authority of an agent is in issue, proof of the exercise by him, with the knowledge of the principal, of similar authority in past transactions may be material in two respects. In the first place, where notice is brought home to the person with whom a contract is made, such evidence tends to show that the agent was acting within the scope of his apparent authority, and so tends to bind the principal, even though actual authority in the particular instance be disproved. In the second place, the exercise of such authority in past transactions known to the principal tends to prove that in the particular transaction in question the agent possessed actual authority, there being no special instructions. Because where an agent under certain circumstances has been permitted to exercise a certain authority, the principal knowing the facts, and a similar transaction is entrusted to him under the same

circumstances as before, and without special instructions, the presumption is his authority is the same. In this case there is no evidence that this particular note was not sent under the same circumstances and with the same authority on the part of the Bank of Western which existed with regard to similar notes which had been sent it. Therefore the jury was justified in inferring from the fact that other notes sent by plaintiff to the Bank of Western had been satisfied by the taking of renewal notes therefor, that the Bank of Western had similar authority in this case. If such authority existed Ridpath should not suffer, if, as seems to be the case, the agent was dishonest and disposed of the new security to a stranger instead of sending it to its principal.

The foregoing considerations really dispose of the merits of the case. The giving of certain instructions requested by the defendant is assigned as error; but the assignment is directed *en masse* against the whole group of instructions, and some are manifestly correct. Error is also assigned upon the giving of the single instruction given by the court of its own motion. It will not be necessary to quote this instruction, because it is in accord with the rule we have already stated in considering the sufficiency of the evidence.

The admission in evidence of the second mortgage is assigned as error. The objection to its receipt was that it was incompetent, immaterial, and irrelevant. The instrument offered was one properly certified by the county clerk as a copy of the instrument on file in his office. It was therefore competent. (Code of Civil Procedure, sec. 408; Compiled Statutes, ch. 32, sec. 14.) It was relevant and material, because there was sufficient in the

parol testimony to identify it as the mortgage which had been given in satisfaction of that on which plaintiff bases its claim.

An argument is made to the effect that no renewal of a mortgage debt, no matter in what form the new debt is evidenced, satisfies the mortgage; but here not only was the evidence of indebtedness changed, but a new security was taken, as the defendant testifies, in satisfaction of the old. This, no doubt, extinguished the existing mortgage.

JUDGMENT AFFIRMED.

HENRY MARTIN ET AL. V. A. AUGUSTA CLARKE.

FILED FEBRUARY 4, 1896. No. 6082.

Review: SUFFICIENCY OF EVIDENCE. This case presents only a question of fact. Evidence *held* sufficient to sustain the verdict.

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

Marston & Nevius, for plaintiffs in error.

Calkins & Pratt, contra.

IRVINE, C.

The defendant in error brought this action against the plaintiffs in error, charging under one count that she had employed plaintiffs in error as her agents to purchase certain land for her; that they falsely represented to her that the lowest price for which the land could be obtained was

$5,000, and that she, relying on said representations, gave them $5,000 wherewith to make the purchase; that in truth and in fact the price asked for said land was only $4,000, whereby plaintiffs in error obtained and converted to their own use $1,000. A second count of the petition charges other acts of fraud; but the court instructed the jury that the second count was not supported by the evidence, so we need not regard it. On the first count there was a verdict for defendant in error.

No complaint is made of any ruling of the district court upon a question of law. The instructions are admitted to be correct as statements of law. The argument of the plaintiffs in error is that the verdict is not sustained by the evidence in this: that the evidence fails to show that the plaintiffs in error were agents of or employed by the defendant in error at the time of the transaction complained of. In this particular it is also claimed that certain instructions should not have been given, because not based on any evidence. It will be fruitless to recite the evidence in this opinion, as the question is entirely one of fact. We have examined the record carefully, and think that while the evidence on the point in question is not direct or very strong, it is sufficient to justify the jury in finding that a fiduciary relationship existed between the parties.

JUDGMENT AFFIRMED.

JABEZ C. CROOKER, GUARDIAN, v. MARION W. C. SMITH.

FILED FEBRUARY 4, 1896. No. 6010.

1. **Guardian and Ward:** REMOVAL OF GUARDIAN. The county court has power to remove a guardian, upon notice, when he has become incapable of discharging his trust or evidently unsuited therefor. (Compiled Statutes, ch. 34, sec. 28.)
2. ———: ———. The disability justifying a removal need not be one arising after the appointment. A guardian may be removed whenever found unsuitable.
3. ———: ———. The word "unsuitable" in the statute applies to any case where the guardian is incapable or not in a situation to properly protect his ward's interests.
4. ———: ———. Corruption or malfeasance is not necessary to authorize the removal of a guardian. Evidence of a failure to properly protect the ward's rights is sufficient proof of "unsuitability."

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

Jabez C. Crooker, pro se.

References: Bingham, Law of Infancy, 172; *Rowan v. Kirkpatrick*, 14 Ill., 1; *Bond v. Lockwood*, 33 Ill., 212; *Davis v. Harkness*, 1 Gil. [Ill.], 173.

Abbott, Selleck & Lane, contra.

References: *In re Johnson*, 54 N. W. Rep. [Ia.], 69; Cooley, Torts, pp. 523, 525; Schouler, Domestic Relations, secs. 316, 348, 352, 354.

IRVINE, C.

This was a proceeding instituted in the county court of Lancaster county for the removal of

Jabez C. Crooker, who had theretofore been appointed guardian of the estate of Marion W. C. Smith, a minor. February 20, 1889, Crooker was appointed guardian, and May 20, 1890, a petition was filed in the county court charging that Crooker had failed to make a report, although he had sold real estate belonging to the ward. The prayer was for an order requiring the guardian to report and account. An order was made requiring the guardian to file his report on or before May 29. On May 28 the report was filed, and subsequently exceptions thereto were filed on behalf of the ward. June 26 there was filed on behalf of the ward a petition praying for the removal of the guardian, the charges made being, in brief, that the guardian had paid out the sum of $103.25 of the ward's estate in discharge of a personal debt of one George D. Smith, and sought to charge the ward therefor; that the ward, although over the age of fourteen years when the appointment was made, and consenting thereto, had since found her relations with her guardian unpleasant, and that she wished him removed. On hearing by the county court it was found that the guardian had not reported in the time required by law; that he had paid out $41.30 without authority of law; that the guardian, because of his age and temperament, was unsuitable for his trust; and that the ward complained of existing unpleasant relations; wherefore it was ordered that the guardian be removed and that his report be allowed except said sum of $41.30. An appeal was taken to the district court, where the matter was again tried, with similar findings, except that the amount found to have been unlawfully paid out was $56.75. A decree was there entered removing the

guardian and rendering judgment for the last named sum. The guardian prosecutes error.

It is first urged that the county court was without authority to remove the guardian; that is, that the proceedings were without jurisdiction. Section 28, chapter 34, Compiled Statutes, provides: "When any guardian, appointed either by the testator or court of probate, shall become insane, or otherwise incapable of discharging his trust, or evidently unsuitable therefor, the court, after notice to such guardian and all others interested, may remove him." This provision is in the chapter having reference to guardians and wards, and the court referred to, when taken with the context, is evidently the court which is now called the "county court," which has succeeded in probate matters and matters of this character to the jurisdiction of the probate court in existence when the statute was passed. The county court had jurisdiction, upon proper notice, to remove the guardian if he had become insane or otherwise incapable of discharging his trust or evidently unsuitable therefor. No question is raised in this case as to the sufficiency of the notice given. We think to construe the language as referring only to disabilities occurring after the appointment of the guardian would be to give it a construction at once strained and impolitic. It never could have been the intent of the legislature that a guardian once appointed should obtain an inalienable vested right to the office. He is an officer of the court charged with duties of a fiduciary character. It is the duty of the court to see that these duties are performed; and it is within the power of the court to remove an incompetent guardian in order to protect the estate of the ward, although such

incompetency existed at the time of the appointment.

The only other question in the case is whether the findings of the court were sustained by the evidence, and whether those findings show that the guardian was unsuitable for discharging his trust. Some of the facts are as follows: The ward was the daughter of George D. Smith and Marion Smith. Marion Smith was seized of a lot in the city of Lincoln. She died, and Crooker, with the consent of the ward,—but this consent obtained at the instance of her father, George D. Smith,—was appointed guardian. Five days thereafter he made application to the district court of Lancaster county to sell the lot in question, alleging that its improvements were in a dilapidated condition and in need of repairs; that there were delinquent taxes thereon; that no personal property had come into his hands, and that the funds to be realized from the sale were necessary for the education and maintenance of the ward. To this petition on the same day there was filed an answer by Smith admitting that the ward's mother had died seized of the title to the lot, but alleging that he had furnished the consideration money and that she held the title in trust for him. On March 3 a stipulation was filed, signed by Smith and by the guardian, whereby it was agreed that Smith had purchased and paid for the lot the title to which had been taken in the name of Smith's wife, the ward's mother; that the estate of the ward therein was two-fifths and that of Smith three-fifths; that a sale should be ordered and out of the proceeds there should be paid to the guardian for the ward two-fifths, and to Smith three-

fifths, less costs, taxes, and assessments. A license to sell was granted on that stipulation; but thereafter a motion was filed showing that the authority to sell on a license granted under such a stipulation was deemed by learned lawyers to be invalid, and that a sale could not be made thereon; wherefore it was stipulated that the license be set aside. Then Smith filed an amended answer claiming only as tenant by curtesy; and on this there was a hearing and license to sell given, fixing the interest of the ward at three-fifths and that of Smith at two-fifths, and directing that the costs, taxes, and assessments be paid out of the ward's share. The license authorized a private sale, and a sale was negotiated with one Veith for $2,700. It was then discovered that there was of record a judgment against Smith for about $280. A cancellation of this was procured for the sum of $103.25. The lot was sold to Veith and the sale confirmed without any disclosure, so far as appears from the record, of the satisfaction of the judgment or its disposition. Veith paid $1,500 in cash and gave two notes, one for $200 and one for $1,000, secured by mortgage, for the balance of the purchase money. Out of the cash payment the costs, taxes, and assessments, and the $103.25 in satisfaction of the judgment were paid, and the remainder was paid to Smith in discharge of his two-thirds interest in the land. The $103.25 was charged to the ward. The guardian retained the two notes and a very small balance in money, representing the ward's interest. Comment on these proceedings is hardly necessary. The guardian, in the first place, entered into a stipulation which he had no right to make, admitting facts which might de-

prive his ward of any beneficial interest in the land. The vice of this proceeding was so apparent that the parties thereto were compelled on their own motion to set it aside, because no one who took counsel on the matter would purchase the lot on such a record. The proceedings by which the ward's interest was finally determined, and the taxes and assessments ordered paid out of that interest, are not here reviewable; but in pursuance of those proceedings the guardian by private arrangement disposed of a portion of his ward's interest in the proceeds by discharging a judgment which was not even an apparent lien on his ward's estate. It was a judgment against Smith, in whom the title had never been, and could not be a lien unless it might be upon Smith's life estate. Having done this, while the proceedings were to obtain money for the maintenance and education of his ward, he gave practically all the money realized to the father in satisfaction of his life estate, and retained for his ward only the evidences of indebtedness. He failed within the time required by law to report these proceedings to the county court, and did not report at all until compelled by order of the court to do so.

From the brief filed by the guardian it is evident that he considers the findings of the county and district courts as equivalent to a conviction of corrupt practice on his part. The findings have no such effect, and this opinion has no such effect. The record merely shows that, perhaps through inadvertence or otherwise innocently, the guardian had failed to properly care for the interests of the ward. He had done several things to her disadvantage which he had no right to do. We

think the word "unsuitable" in the statute is very broad in its meaning, and applies to every case where the guardian for any reason is shown not to be capable of or not in a situation to suitably protect his ward's interests. Judged by this test the evidence amply warranted the county and district courts in their findings.

JUDGMENT AFFIRMED.

HUMPHREY SMITH, APPELLEE, V. JAMES B. JONES ET AL., APPELLANTS.

FILED FEBRUARY 4, 1896. NO. 5996.

1. **Attorney and Client:** RELEASE OF DEBTOR. An attorney employed to collect a debt has not by virtue of his general employment authority to release a debtor except upon payment of the full amount of the debt in money.
2. ———: ———. Evidence examined, and *held* insufficient to authorize attorneys to make a contract as claimed by plaintiff for the release of a judgment.

APPEAL from the district court of Custer county. Heard below before NEVILLE, J.

Darnall & Kirkpatrick, for appellants.

O'Neill & Morgan, contra.

IRVINE, C.

This was an action by the appellee against Jones, the sheriff of Custer county, Foster, his deputy, and the Farmers & Merchants Insurance Company to restrain the defendants from the enforcement of a judgment of a justice of the

peace obtained by the insurance company against Smith. Relief against the judgment was sought on the ground that after the judgment was rendered (quoting the petition), "The Farmers & Merchants Insurance Company acknowledged the payment of said judgment and receipted for same in the following words and figures, to-wit:

"'BROKEN BOW, Sept. 8, 1890.

Received of Humphrey Smith, two dollars, one-half costs Farmers & Merchants Insurance Co. v. Smith, also application for $3,000 insurance, in consideration of which we agree to release judgment in this case.

"'KIRKPATRICK & HOLCOMB,
"'*Attorneys for Plaintiff.*'"

The evidence shows that after the judgment was obtained an agreement was entered into between Smith and Kirkpatrick & Holcomb, attorneys for the insurance company, whereby the judgment was to be released on payment by Smith of one-half the costs, estimated at $2, and the taking out of new insurance to the amount of $3,000. Smith paid the $2 and made application for insurance. The company wrote the policy and sent it to the attorneys, but it was never delivered to Smith, for the reason that he failed to pay the premium thereon. It will be observed that the instrument which plaintiff counts upon as evidence of the satisfaction of the judgment is not, in form, a release of the judgment, but an agreement to release, whether in consideration of the application for insurance or in consideration of the insurance is doubtful from the terms of the instrument. There is a conflict in the evidence as to whether the judgment was to be released on Smith's making application for the insurance, or

whether it was to be released only on his payment of the premium; but the evidence in support of the former view is very slight. In any event, the conflict is not material. The attorneys, by the undisputed evidence, had no express authority to release the judgment except upon the taking out of and paying for the new insurance. They merely had a general employment to collect the debt evidenced by the judgment; and the only subsequent authority obtained was through a letter inclosing the policy, with directions to collect the premium, and sent in response to a submission by the attorneys of a proposition to satisfy the judgment on the actual taking out of new insurance. The ordinary powers of an attorney do not authorize him to execute any discharge of a debtor but upon the actual payment of the full amount of the debt, and that in money only. (*Hamrick v. Combs*, 14 Neb., 381; *Stoll v. Sheldon*, 13 Neb., 207. See, also, *State Bank of Nebraska v. Green*, 8 Neb., 297, and *Luce v. Foster*, 42 Neb., 818.) If the agreement was as Smith claims, it was without authority on the part of the attorneys and was not ratified by the insurance company. It follows that the judgment of the district court granting an injunction as prayed by the plaintiff was erroneous.

REVERSED AND DISMISSED.

GEORGE T. HALL ET AL., APPELLANTS, V. EDWARD HOOPER ET AL., APPELLEES.

FILED FEBRUARY 4, 1896. No. 6028.

1. **Quieting Title:** PARTIES. Any person claiming title to real property in this state, whether in or out of possession, may maintain an action against any person or persons claiming adversely, for the purpose of determining such estate and quieting title. *Foree v. Stubbs*, 41 Neb., 271, followed.

2. ———: ———. Such an action may be maintained by a remainder-man during the continuance of the particular estate.

3. **Execution:** VOID DECREE: QUIETING TITLE. Where a judicial sale and conveyance of land have been made under a void decree, a court of equity will not give affirmative relief to the person whose estate was sought to be divested unless he shows some equitable interest in the land. *Hughes v. Housel*, 33 Neb., 703, followed.

4. **Mortgages:** RIGHTS OF HOLDER OF NOTES. The assignee of notes secured by mortgage, even though the assignment be without consideration, succeeds to the right of the mortgagee to have redemption made as a condition of canceling the mortgage. *Loney v. Courtnay*, 24 Neb., 580, followed.

5. **Principal and Agent:** RATIFICATION. A principal who ratifies a contract made for him by another must adopt all the instrumentalities employed by such agent to bring it to a consummation. *Joslin v. Miller*, 14 Neb., 91, followed.

6. ———: ———: HUSBAND AND WIFE. Therefore, where A purchased land and caused it to be conveyed to his wife, he giving at the time of the conveyance a mortgage in own name upon the land to secure a portion of the purchase money, the wife, by accepting the deed, adopted also the mortgage. It became an equitable mortgage upon the land.

7. ———: ———: ———. The fact that the husband was not authorized in writing to act in the matter is immaterial. The statute of frauds is not applicable to such a case.

8. **Estoppel**: CREDITORS' BILL: MORTGAGES. A conveyance was made which was void as against creditors, and, as part of the same transaction, a purchase-money mortgage was executed on the same land. A creditor caused the land to be subjected to the payment of his judgment. A portion of the land was sold, completely satisfying the judgment. The former creditor afterwards became the assignee of the mortgage. *Held*, That he was not estopped by the creditors' bill and proceedings thereon from foreclosing the mortgage upon that portion of the land which had not been subjected to the payment of his judgment.

9. **Quieting Title**: MORTGAGES: OFFER TO REDEEM. A mortgagor, in order to remove the cloud cast upon his title by a sheriff's deed executed in pursuance of a void foreclosure, must offer to pay what is equitably due under the mortgage.

10. ———: ———: ———. When a mortgagor seeks such affirmative relief he is not relieved from the necessity of offering to redeem by the fact that the statute of limitations has barred the mortgagee's right to foreclose. *Merriam v. Goodlett*, 36 Neb., 384, followed.

11. **Limitation of Actions**: MORTGAGES: BILL TO REDEEM. The statute of limitations begins to run against a bill to redeem from the time when, the mortgage having matured, the mortgagee enters into open and notorious possession of the premises under claim of ownership.

12. ———. Whether the period of limitations in such case is four or ten years is not decided.

13. **Adverse Possession**: MORTGAGES: SHERIFFS' DEEDS. A mortgagee, under a mortgage purporting to incumber the fee, sought to foreclose against the fee, bought the land at the foreclosure sale, and the sheriff's deed purported to convey the fee and was immediately recorded. He entered into actual possession of the land. The foreclosure was void. The plaintiffs undertook to annul the deed. They were remainder-men after a life estate, the tenant of which was not a party to the suit. By their petition they admitted that the mortgagee had by the proceedings obtained the life estate; but the proof showed that the proceedings were void as to the life tenant as well as to the plaintiffs. *Held*, That the mortgagee's possession was adverse to the plaintiffs, and not merely for the life estate.

14. **Limitation of Actions**: MORTGAGES: OFFER TO REDEEM. The plaintiffs having undertaken to have both the mortgage and proceedings to foreclose it declared void, and the court having determined that while the foreclosure was void the mortgage was not, an opportunity to amend the petition by offering to redeem was denied, the proof showing that the right to redeem was barred by the statute of limitations.

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

The issues are stated by the commissioner.

R. C. Glanville, R. R. Horth, and *Charles G. Ryan,* for appellants.

References as to plaintiffs' right of action: 2 Washburn, Real Property, p. 495*; Tiedeman, Real Property, sec. 715; *Mettler v. Miller,* 129 Ill., 630; 1 Am. & Eng. Ency. Law, 237; *Ainsfield v. Moore,* 30 Neb., 385.

Reference as to construction and effect of the deed to Mrs. Milton S. Hall: *Dworak v. More,* 25 Neb., 735.

References as to the effect of judicial sales and sheriffs' deeds: *Lang v. Hitchcock,* 99 Ill., 550; *Mettler v. Miller,* 129 Ill., 630; *Kirk v. Bowling,* 20 Neb., 260; *Barrett v. Stradl,* 41 N. W. Rep. [Wis.], 439.

Abbott & Caldwell, contra.

References: *McKesson v. Hawley,* 22 Neb., 692; *Boyd v. Blankman,* 29 Cal., 19; *Moore v. Miller,* 43 Fed. Rep., 347; *Pope v. Hooper,* 6 Neb., 178; *Castner v. Walrod,* 83 Ill., 172; *Carson v. Murray,* 3 Paige Ch. [N. Y.], 483; *Blain v. Harrison,* 11 Ill., 384; *Learned v. Cutler* 18 Pick. [Mass.], 9; *Forbes v. Sweesy,* 8 Neb., 520.

IRVINE, C.

For a proper understanding of this case a statement of the substance of the pleadings is necessary. The appellants, George T. Hall and Mary J. Monroe, in their petition allege that one Mrs. Milton S. Hall was in her lifetime the owner in fee of certain land in Hall county; that she died seized of said land November 24, 1871, leaving surviving her her husband, Milton S. Hall, who is still living, and the plaintiffs, her only children by said Milton S. Hall; and that thereby Milton S. Hall became seized of an estate by curtesy in said premises, and the plaintiffs became owners in fee of the remainder. The petition then alleges certain proceedings and deeds in pursuance thereof, whereunder the defendant Hooper claims to have divested the estate and become the owner in fee of the land. These proceedings are pleaded at length. It is then alleged that all these proceedings were void as to the plaintiffs and their mother for want of jurisdiction of the person, and that they were of no effect to pass any title to Hooper except the life estate of Milton S. Hall, which has not yet been determined. The plaintiffs also aver that they had no notice of the claim of Hooper to the fee of the land until within two years of the commencement of the action. They allege that said proceedings and deeds constitute a cloud upon their title, and pray that the deeds be adjudged void in so far as they purport to convey the estate of the plaintiffs, and that title to the remainder be quieted in plaintiffs. There are certain other averments against the other defendants claiming under a mortgage from Hooper and leading to a prayer that this mortgage be set

aside, but these averments it will not be necessary to notice, as the decision of the case must be based entirely upon the issues between the plaintiffs and Hooper. The answer alleges possession and the exercise of acts of ownership by Hooper since 1872; denies that Mrs. Hall was ever the owner or in possession of the land; denies that the deed under which she claims was ever executed or delivered to her, or that she ever paid any consideration for the property; and, in short, denies most of the allegations of the petition, and closes with a plea of the statute of limitations.

From the pleadings and evidence the facts in regard to the title appear as follows: In 1868 Hooper commenced an action against Milton S. Hall for the recovery of a debt. A writ of attachment was issued and one Peterson was garnished. Peterson, it would be inferred, never answered the order of garnishment, but in 1869, he being indebted to Hall in about the sum of $1,200, conveyed the land in controversy by deed running to "Mrs. Milton S. Hall," and at the same time, and as part of the same transaction, a mortgage was executed to Peterson by "M. S. Hall" to secure notes amounting to $1,006, that being the difference between the estimated value of the land and Peterson's debt to Hall. Mrs. Hall was not present, and it is perfectly clear that the transaction was one between Hall and Peterson for Hall's benefit, Mrs. Hall having no interest therein. Hooper proceeded to judgment in his action against Hall, and caused execution to be levied on the land. He then, in September, 1870, began an action in the nature of a creditors' bill, naming as defendants M. S. Hall, Mrs. Milton S. Hall, and Peterson. The petition in that case alleged the

recovery of the judgment and levy of execution, alleged the attachment and garnishment of Peterson, and charged that the conveyance to Mrs. Hall was the result of a conspiracy between Hall and Peterson to cheat and defraud Hooper. It alleged that Mrs. Milton S. Hall was a fictitious person, and that Hall was the person intended by the deed from Peterson. The prayer was that "Mrs. Milton S. Hall" be declared to mean "M. S. Hall;" that the mortgage to Peterson be declared void against plaintiff, and that the land be subjected to the judgment. There was an attempt by the publication of notice to obtain constructive service upon all the defendants; but as the affidavit for publication made no reference whatever to Mrs. Hall, it may be assumed that the proceedings as to her were absolutely void. Hall and Peterson made default and a decree was entered directing a sale of the land in satisfaction of Hooper's judgment. Under this decree all but forty acres were sold to Hooper, at a price more than sufficient to satisfy his judgment. Subsequently, in 1876, Hooper having become the owner of the notes to secure which Hall had given the mortgage, he brought an action against Hall and his then wife, but not against the heirs of the first Mrs. Hall, he having remarried, to foreclose the mortgage. Service in this case was constructive, but the affidavit for publication is conceded to have been fatally defective. A decree of foreclosure was entered and the remaining forty acres sold under that decree to Hooper. It will be observed that the plaintiffs claim relief solely on the ground that the proceedings were void as to them and their ancestor,—the proceedings on the creditors' bill, because no jurisdiction was obtained as

to Mrs. Hall; the foreclosure proceedings, because no jurisdiction was obtained over any person and the plaintiffs were not even made parties. No offer to redeem from the mortgage is made, because the plaintiffs' theory is that the title being in Mrs. Hall, the mortgage executed by Hall alone created no lien upon her land. In addition to the issues already stated the defendant pleads that plaintiffs are estopped by claiming under the deed to Mrs. Hall from denying the validity of the mortgage executed by Hall as a part of the same transaction. The plaintiffs in reply charge two estoppels. They charge that Hooper is estopped to deny the validity of the conveyance to Mrs. Hall because he claims under a deed purporting to convey her interest. They further charge that the defendant is estopped to assert the validity of the mortgage because of his successful impeachment thereof by the proceedings on the creditors' bill. The district court found "that the plaintiffs have now no cause of action," and dismissed the case. From this decree the plaintiffs appeal. It may be inferred from the use of the word "now" in the finding above quoted, as well as from the direction which the argument has largely taken, that the district court was of the opinion that an action to quiet title would not lie while Hooper was in actual possession of the land. It is clear that plaintiffs, while admitting an estate in Hooper for the life of Hall, could not yet maintain ejectment. If this was the view of the district court it was fully warranted by the case of *State v. Sioux City & P. R. Co.*, 7 Neb., 357, followed by several other cases implying that an action to quiet title will not lie against one in actual possession of the land in controversy. A defendant

in such actual possession is entitled to the rights accorded by an action of ejectment where the plaintiff, claiming the legal title, seeks to oust him from possession. (*Gregory v. Lancaster County Bank*, 16 Neb., 411; *Snowden v. Tyler*, 21 Neb., 199; *Betts v. Sims*, 25 Neb., 166.) The rule stated in these cases is unquestionably correct; but in *State v. Sioux City & P. R. Co.*, *supra*, and some other cases, its limitations were lost sight of. The distinction was not observed between an action to establish title and an action to recover possession of the land. Section 57, chapter 73, Compiled Statutes, provides: "That an action may be brought and prosecuted to final decree, judgment, or order, by any person or persons, whether in actual possession or not, claiming title to real estate, against any person or persons who claim an adverse estate or interest therein, for the purpose of determining such estate or interest and quieting the title to said real estate." Section 59 provides: "Any person or persons having an interest in remainders or reversion in real estate shall be entitled to all the rights and benefits of this act." In *Foree v. Stubbs*, 41 Neb., 271, decided since this case was tried in the district court, the object of this statute was carefully considered. *State v. Sioux City & P. R. Co.* was overruled in so far as it denied a right to proceed to quiet title against one in possession, and the rule established in conformity with the language of the statute. If Hooper was tenant of the life estate, a possessory action could not now be maintained against him; but the plaintiffs could proceed under section 59 to have their estate in remainder established.

It becomes necessary to consider separately the

title to that portion of the land sold under the decree based on the creditors' bill and that portion sold under the decree of foreclosure. Considering first the former portion, the plaintiffs claim solely under the deed from Peterson and because of want of jurisdiction over Mrs. Hall in the proceedings resulting in the sale. The evidence shows beyond all controversy that Mrs. Hall paid no consideration for the land and had no connection with the transaction. It is as clear as anything can be made by human evidence that the conveyance of the land to her was an artifice to divest any lien or claim which might have been obtained by virtue of the garnishment of Peterson in the action against Hall. The plaintiffs merely represent Mrs. Hall. They have no higher claim than she had. They are here seeking the affirmative aid of a court of equity to establish their title. Whatever may be the rights of parties to assert at law the invalidity of a judgment, or at law or in equity to resist its enforcement for want of jurisdiction to render it, it is the firmly established doctrine that a court of equity will not lend its affirmative aid to persons seeking to avoid the enforcement of a void judgment, unless it be made to appear that they have a valid defense thereto. (*Chicago, B. & Q. R. Co. v. Manning*, 23 Neb., 552; *Osborn v. Gehr*, 29 Neb., 661; *Hartford Fire Ins. Co. v. Meyer*, 30 Neb., 135; *Wilson v. Shipman*, 34 Neb., 573; *Janes v. Howell*, 37 Neb., 320; *Pilger v. Torrence*, 42 Neb., 903.) In some of the cases cited the rule was confined to judgments regular on their face; but we can perceive no distinction on principle. The doctrine is based on the broad principle that to obtain relief from a court of equity an equitable right must be shown. Where

a party is without equity in his favor the court will remit him to his legal remedies. If one cannot obtain the aid of a court of equity to prevent the enforcement of a void judgment without showing a defense thereto, it would seem to follow that he cannot, without showing such defense, obtain the assistance of a court of equity to vacate proceedings whereby the judgment has already been enforced; and to apply the rule to the present case the plaintiffs cannot be permitted to set aside the sale made under the void decree without establishing an equity to the land in themselves. (*Hughes v. Housel*, 33 Neb., 703.)

As to the forty-acre tract, the case rests on entirely different principles. Hooper claims title not under the creditors' bill or adversely to the conveyance to Mrs. Hall, but through that conveyance, or, at least, through the foreclosure of the mortgage which was a part of the transaction. Mrs. Hall died before the foreclosure suit was instituted. The plaintiffs were not made parties, and Hall, who was made a party, was not subjected to valid service. The proceedings were therefore wholly without jurisdiction, and the foreclosure and sale were void. The plaintiffs contend that the mortgage was not a lien upon the land beyond Hall's life estate, which fell in subsequent to the execution of the mortgage. This claim is based on the fact that the mortgage was executed by M. S. Hall in his own name, and did not purport even to be the act of Mrs. Hall or that of Hall as her agent. It must be remembered, however, that the conveyance was made to Mrs. Hall in satisfaction of Peterson's debt to Hall, and the mortgage was executed at the same time, and as a part of the same transaction, to

secure the repayment of the excess of the value of the land over Peterson's debt to Hall. The plaintiffs are entitled to Mrs. Hall's rights,—no more. Hooper, on the other hand, by the purchase of the Peterson notes, became vested with Peterson's rights. It is argued that there is no proof that he paid any consideration for the notes. This, however, makes no difference. (*Loney v. Courtnay*, 24 Neb., 580.) Assuming that Hall at the time of the transaction was without any authority to contract on behalf of Mrs. Hall, it is nevertheless the established law that a principal who affirms or ratifies a contract made for him by his agent must adopt all the instrumentalities employed by his agent to bring it to a consummation. (*Joslin v. Miller*, 14 Neb., 91.) The mortgage cannot be sustained as a legal mortgage, because not executed by the owner of the fee; but an application of the principle stated requires that it should be given effect as an equitable mortgage. (*Love v. Sierra Nevada Lake Water & Mining Co.*, 32 Cal., 639; *Miller v. Rutland & W. R. Co.*, 36 Vt., 452.) The rule established by these cases is that a mortgage made by an agent in his own name is binding in equity if the agent had authority and the failure to execute it in the name of the principal resulted from accident or mistake. It is true that Hall had no authority in writing from Mrs. Hall to execute the mortgage, as would seem to be required by section 25, chapter 32, Compiled Statutes; but we do not think that in order to give effect to the equitable principle underlying these decisions the transaction must necessarily be evidenced as required by the statute of frauds. In the Vermont case cited there was no memorandum which to our mind would be sufficient to satisfy the statute. All

that existed was a resolution of the board of directors of the corporation on whose behalf the conveyance was executed. We think the case is within the principle of *Morrow v. Jones*, 41 Neb., 867, where a grantee in a deed absolute in form was held bound through the acceptance of the deed by a defeasance executed by an attorney not in that behalf authorized. The mortgage by Hall must therefore be treated as a valid lien upon the land, as between the parties to the transaction. What the rights of a *bona fide* purchaser would be need not be considered. The case as to the forty-acre tract then resolves itself into this: The mortgagors seek to have their title established against a mortgagee in possession under a sale made to him in the course of void foreclosure proceedings. It is pleaded that Hooper is estopped from setting up title under the foreclosure proceedings by reason of his prior proceedings under the creditors' bill adjudging the mortgage as well as the deed to Mrs. Hall void as against him; but the conveyances attacked by the creditors' bill were not absolutely void. They were only void as against creditors. Hooper was a creditor at the time and he did successfully attack the conveyances; but he satisfied his debt through a sale of the remainder of the land. His debt having been satisfied, the basis on which he obtained the decree in the creditors' bill was destroyed. He was no longer a creditor. He was no longer entitled to attack the conveyances as to the rest of the land. Much less was he estopped from affirming them. Let us suppose that the mortgage had been foreclosed by Peterson himself upon this forty acres. The decree on the creditors' bill would certainly not estop him from

such proceedings. Suppose, on foreclosure by him, Hooper bought the land. He could certainly take good title. Suppose, on the other hand, the land sold in pursuance of the creditors' bill had been bought by a stranger. Hooper would certainly be estopped from setting up the mortgage as against the title of such a stranger acquired under proceedings by Hooper impeaching the mortgage. But Hooper had in the first instance his election to avoid the conveyances or to let them stand. He elected to avoid them as a creditor and subjected a portion of the land to the payment of his debt. The debt was entirely satisfied out of that portion. He was no longer a creditor and could not assert any claim against the remaining portion. He then had the same right to deal with the grantees of the remaining portion on the faith of their ownership as a stranger with notice would have. It is a purely fortuitous circumstance that the same person acquired title to that portion subjected to sale by the creditors' bill and to that portion sold under the mortgage; and no estoppel arises.

The petition having been drawn on the theory that not only were the foreclosure proceedings void, but the mortgage also, no offer was made to redeem from the mortgage. We hold that the mortgage was not void, and therefore the plaintiffs, representing the mortgagor, must, in order to remove the cloud cast by the deed executing the foreclosure sale, offer to pay what is equitably due under the mortgage. (*Loney v. Courtnay, supra.*) The fact that the action was not brought until more than ten years after the mortgage matured does not relieve the plaintiffs from that obligation. (*Merriam v. Goodlett*, 36 Neb., 384.) Al-

though the statute of limitations has prevented a foreclosure of the mortgage, the mortgagor must offer to redeem in order to obtain affirmative relief from a court of equity. In the case last cited the plaintiff was permitted to amend in this court by offering to redeem; but in the case before us it stands admitted that Hooper entered into possession in 1876, much more than ten years before this suit was brought. It has been held that where the lands have remained unoccupied, the statute of limitations does not begin to run against a bill to redeem until tender of money or a refusal to reconvey. (*Wilson v. Richards*, 1 Neb., 342.) But we think, by all the authorities, the statute does begin to run after the debt matures from the time the mortgagee enters into open, notorious, and actual possession under claim of ownership. Even under the old practice, where courts of equity were not bound by, but merely followed the analogy of the statutes of limitations, such was the rule. (*Anonymous, by Lord Hardwicke*, 3 Atk. [Eng.], 313; *Dexter v. Arnold*, 1 Sum. [U. S.], 109; *Knowlton v. Walker*, 13 Wis., 295; *Montgomery v. Chadwick*, 7 Ia., 114.) The action was therefore barred whether the four or the ten-year statute applies, and the defendant pleaded the bar.

It is contended that Hooper is rightfully in possession for the life estate of Milton S. Hall, and that, therefore, the statute has not yet begun to run; but we have already held that under our law this action may be maintained by a remainder-man during the term of a tenant for life. Indeed, as already suggested, if this were not true, the plaintiffs would have no standing in court at this time. The answer made to this is

that Hooper's possession has never become adverse to the plaintiffs on account of such life estate; but as to this forty-acre tract, at least, there is not only no presumption that Hooper's possession is for the life estate of Hall, but it was manifestly from the outset adverse to the plaintiffs under a claim of ownership in fee. The foreclosure proceedings are as much void against Hall as they are against the plaintiffs. The mortgage purports to incumber the fee. Foreclosure was sought against the fee. The sheriff's deed purports to convey the fee. It was recorded the day after its execution. Everything shows that Hooper's possession has been under a claim derived from the foreclosure, and not as life tenant. Amendments are by the Code permitted in furtherance of justice. (Code of Civil Procedure, sec. 144.) We hold the mortgage to have been a valid equitable incumbrance upon the land, and that the plaintiffs are not entitled to relief against it as against the mortgagee, in possession under a void foreclosure sale, without offering to redeem. They have not so offered, and their right to redeem being barred by the statute of limitations, we cannot now permit an amendment for that purpose.

JUDGMENT AFFIRMED.

HARRISON, J., not sitting.

STATE OF NEBRASKA, EX REL. EDWARD PETRY, V. GEORGE W. LEIDIGH.

FILED FEBRUARY 18, 1896. No. 8242.

1. **Habeas Corpus:** REVIEW. Errors and irregularities of the trial court in a criminal prosecution must be corrected by direct proceeding for a review of the final judgment or order complained of. The writ of *habeas corpus* is never allowed as a substitute for an appeal or writ of error.
2. **Extradition:** RIGHT TO TRY FUGITIVE FOR EXTRADITABLE OFFENSES. A fugitive from justice surrendered by one state upon the demand of another may, notwithstanding his objection, be prosecuted by the latter for any extraditable offense committed within its borders without first having had an opportunity to return to the state by which he was surrendered. (*Lascelles v. Georgia*, 148 U. S., 537.)
3. ———: CONSTITUTIONAL LAW. A fugitive is not in such case denied any rights, privileges, or immunities secured to him by the constitution or the laws of the United States.
4. **Imprisonment Without Extradition.** *In re Robinson*, 29 Neb., 135, distinguished.

ORIGINAL application for writ of *habeas corpus*.

The opinion contains a statement of the case.

J. O. Detweiler, for petitioner:

The petitioner not having had an opportunity to return to the state from which he was taken, should only have been tried for the offense for which he was extradited. (9 Am. & Eng. Ency. Law, 252; *State v. Hill*, 40 Kan., 338; *In re Robinson*, 29 Neb., 135; *In re Cannon*, 47 Mich., 481; *Ex parte McKnight*, 28 N. E. Rep. [O.], 1034; *Compton v. Wilder*, 40 O. St., 130; *Van Horn v. Great Western Mfg. Co.*, 37 Kan., 523; *United States v. Watts*, 14

Fed. Rep., 130; *Ex parte Hibbs*, 26 Fed. Rep., 421; *Ex parte Coy*, 32 Fed. Rep., 911; *United States v. Rauscher*, 119 U. S., 407; *State v. Vanderpool*, 39 O. St., 278; *Commonwealth v. Hawes*, 13 Bush [Ky.], 700; *State v. Simmons*, 39 Kan., 262; *State v. Ross*, 21 Ia., 467; *State v. Brewster*, 7 Vt., 118; *Dows' Case*, 18 Pa. St., 37; *Ker v. People*, 110 Ill., 627.)

Habeas corpus is the proper writ upon which to procure the prisoner's discharge. (*Ex parte McKnight*, 28 N. E. Rep. [O.], 1034; *In re Robinson*, 29 Neb., 135.)

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

The court has jurisdiction over the person of one who has been extradited from a sister state to place him on trial for an offense other than that for which he was extradited, without his first having had an opportunity to return to the state of his asylum. (*State v. Brewster*, 7 Vt., 118; *In re Noyes*, 17 Albany L. J., 407; *Kingen v. Kelley*, 28 Pac. Rep. [Wyo.], 36; *State v. Glover*, 17 S. E. Rep. [N. Car.], 525; *In re Keller*, 36 Fed. Rep., 682; *Mahon v. Justice*, 127 U. S., 700; *State v. Ross*, 21 Ia., 467; *State v. Stewart*, 19 N. W. Rep. [Wis.], 429; *Ham v. State*, 4 Tex. App., 645; *Williams v. Weber*, 28 Pac. Rep. [Colo.], 21; *People v. Cross*, 32 N. E. Rep. [N. Y.], 246; *Commonwealth v. Wright*, 33 N. E. Rep. [Mass.], 82; *Lascelles v. State*, 16 S. E. Rep. [Ga.], 945; *State v. Kealy*, 56 N. W. Rep. [Ia.], 283; *State v. Wenzel*, 77 Ind., 428; *Cook v. Hart*, 146 U. S., 183; *In re Miles*, 52 Vt., 609.)

Upon the facts presented by the record *habeas corpus* is not petitioner's proper remedy. (*Ex parte Fisher*, 6 Neb., 309; *Williamson's Case*, 26 Pa. St., 17; *Commonwealth v. Deacon*, 8 S. & R. [Pa.], 72;

Ex parte Toney, 11 Mo., 661; *In re Betts*, 36 Neb., 282; *State v. Crinklaw*, 40 Neb., 759; *In re Havlik*, 45 Neb., 747.)

POST, C. J.

This is an application addressed to this court, in the exercise of its original jurisdiction, for a writ of *habeas corpus* in behalf of Edward Petry, who is, according to the complaint which is the basis of the proceeding, unlawfully imprisoned by the respondent, George W. Leidigh, as warden of the penitentiary. It is unnecessary to copy at length from the record, as the material facts may be briefly stated, viz.: On the 4th day of April, 1895, application was made to the governor of this state for a requisition upon the governor of Illinois for the surrender of the relator, an alleged fugitive from justice, who was charged by the complaint of one Jewett with burglariously entering the house of the said complainant, in the county of Douglas, in the night season, and with stealing therefrom jewelry and clothing of the value of $50. Upon said application a requisition was allowed, in pursuance of which a warrant was issued by the governor of Illinois for the apprehension of the relator, and upon which the latter was, on March 7, arrested and immediately thereafter conveyed to Douglas county, in this state, for trial. Having waived a preliminary hearing upon the charge mentioned, he was committed to the jail of said county, and on the 3d day of May an information was filed by the county attorney charging him with the identical offense specified in the extradition papers, to which he interposed a plea of not guilty and was remanded for trial. On the 20th day of June, 1895, the said relator,

without having had an opportunity to depart from this state, and without his consent, was taken before a magistrate in and for Douglas county and required to answer another and different charge, to-wit, of burglariously entering the house of one Thomas H. O'Neill and stealing therefrom jewelry of the value of $37.50, and upon which charge he was committed for trial. Afterward, during the May, 1895, term of the district court, an information was therein filed by the county attorney charging the relator with the last mentioned offense, and to which the latter, at a subsequent day of the term, entered a plea of not guilty, accompanied by an affidavit challenging the jurisdiction of the court over his person, in which the matters here stated are set out in detail. His objection to the jurisdiction of the court being overruled, a trial was had, resulting in a conviction of the offense charged in said information, and which judgment the respondent relies upon as a justification in this proceeding.

It is in the first place contended by the attorney general that, conceding the action complained of to be irregular, it is at most voidable, not affecting the jurisdiction of the district court, and that the relator's remedy is accordingly by direct proceeding to secure a review of the judgment of conviction. There appears to be no doubt of the soundness of that proposition, either upon reason or authority. The accused, in the language of the statute, "shall be taken to have waived all defects which may be excepted to by a motion to quash, or a plea in abatement, by demurring to an indictment, or pleading in bar, or the general issue." (Criminal Code, sec. 444.) The writ of *habeas corpus*, as said by this court in *State v.*

Crinklaw, 40 Neb., 759, "is not a corrective remedy, and is never allowed as a substitute for appeal or writ of error," and the same principle is distinctly recognized in *Ex parte Fisher*, 6 Neb., 309; *In re Betts*, 36 Neb., 282; *In re Havlik*, 45 Neb., 747.

But there exists a fundamental objection to this proceeding. The right of a demanding state, upon the surrender of a fugitive from justice, to try him upon a charge other than that specified in the extradition papers has long been the subject of judicial controversy. Arrayed on one side are cases which appear to rest upon the inherent justice of the claim that a court cannot acquire jurisdiction over the person of one accused of crime through the fraud, duplicity, or abuse of process by an officer or agent entrusted with the impartial administration of the law. On the other hand are cases holding that a fugitive surrendered by one state on the demand of another may, under the constitution and the laws of the United States, be prosecuted for any extraditable offense committed within the territorial jurisdiction of the latter, on the ground that there exists no right of asylum as applied to interstate extradition, and that it would be a useless and idle ceremony to return a fugitive to another state in order to again demand his surrender for trial. The constitutional provision upon the subject is found in section 2 of article 4 of the constitution of the United States, viz.: "A person charged in any state with treason, felony, or other crime, who shall flee from justice and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime." The acts of congress bearing upon

the subject (secs. 5278, 5279, Revised Statutes, U. S.) are designed merely to carry into effect the constitutional provision, without assuming to enlarge or restrict the rights of the several states thereunder. During every stage of the discussion the courts have agreed substantially upon one proposition, viz., that the subject involved is a construction of the national constitution, and, therefore, in its broadest sense, a federal question. It is worthy of note, too, that until a comparatively recent date the diversity of opinion among federal judges respecting the true interpretation of the foregoing provision was no less radical than existed between state courts. But in *Lascelles v. Georgia*, 148 U. S., 537, which was a writ of error to the supreme court of the state of Georgia, the subject was by the supreme court considered in all of its phases, and the conclusion announced fully sustained the power of the demanding state to try a fugitive surrendered pursuant to the constitution of the United States, for any crime committed within its borders, whether specified in the extradition warrant or not, and that one so tried is not thereby deprived of any rights, privileges, or immunities secured to him by the constitution or laws of congress. As that case must be regarded as an authoritative construction of the constitutional provision governing the subject, and binding alike upon state and federal tribunals, we feel warranted in here quoting at some length from the opinion of the court by Mr. Justice Jackson: "But it is settled by the decisions of this court that, except in the case of a fugitive surrendered by a foreign government, there is nothing in the constitution, treaties, or laws of the United States which exempts an of-

fender, brought before the courts of a state, for an offense against its laws, from trial and punishment, even though brought from another state by unlawful violence or by abuse of legal process. (*Ker v. State of Illinois*, 119 U. S., 436; *Mahon v. Justice*, 127 U. S., 700; *Cook v. Hart*, 146 U. S., 183.) * * * To apply the rule of international or foreign extradition as announced in *United States v. Rauscher*, 119 U. S., 407, to interstate rendition involves the confusion of two essentially different things, which rest upon entirely different principles. In the former the extradition depends upon treaty, contract, or stipulation, which rests upon good faith, and in respect to which the sovereign upon whom the demand is made can exercise discretion as well as investigate the charge on which the surrender is demanded, there being no rule of comity under and by virtue of which independent nations are required or expected to withhold from fugitives within their jurisdiction the right of asylum. In the matter of interstate rendition, however, there is the binding force and obligation, not of contract, but of the supreme law of the land, which imposes no conditions or limitations upon the jurisdiction and authority of the state to which the fugitive is returned."

In re Robinson, 29 Neb., 135, has been cited as supporting the claim of the relator; but that contention is based upon apparent misconception of what is there decided, viz., that one forcibly and unlawfully carried into this state will not be held to answer to a criminal charge without an opportunity to return to the state from whence he is brought. What is there said in regard to the right of the state to prosecute a fugitive regularly

extradited is mere *obiter*, and not intended as decisive of the question now before us. To what extent that case is to be regarded as authority, when applied to the same or a similar state of facts, in view of the decision in *Lascelles v. Georgia*, is a question foreign to this controversy and does not call for notice. It follows, however, that the writ must be denied and the relator remanded to the custody of the respondent.

WRIT DENIED.

CITY OF HARVARD V. L. P. CROUCH, ADMINISTRATOR.

FILED FEBRUARY 18, 1896. No. 6081.

1. **Review**: WEIGHT OF EVIDENCE. A judgment will not be reversed on account of a mere difference of opinion between this court and the trial judge or jury regarding the weight of the evidence.

2. **Municipal Corporations**: CHANGE IN GRADE OF STREETS: DAMAGES. Under the constitution of this state providing that private property shall not be taken or damaged for public use without compensation, a city is liable for damage resulting from a material change of the grade of its streets from the natural surface. (*Harmon v. City of Omaha*, 17 Neb., 548.)

3. ———: ———: ———. The measure of damage in such cases is the depreciation in the value of the property, occasioned by the change of grade. (*Omaha Belt R. Co. v. McDermott*, 25 Neb., 714.)

4. **Witnesses**: CREDIBILITY: INSTRUCTIONS: REVIEW. It is not error to advise the jury that in determining the credit which should be given to the defendant's witnesses their interest in the result of the suit may be taken into consideration. (*Barmby v. Wolfe*, 44 Neb., 77.)

ERROR from the district court of Clay county. Tried below before MORRIS, J.

Leslie G. Hurd, for plaintiff in error.

L. P. Crouch, contra.

POST, C. J.

A former opinion in this cause is reported under the title of *Hammond v. City of Harvard*, 31 Neb., 635. The plaintiff below, Hammond, having died in the meantime, the cause was prosecuted to judgment in the name of L. P. Crouch as administrator. The facts essential to an understanding of the controversy are set out at length in the opinion referred to, and need not be here repeated. It is sufficient for our present purpose that the cause of action alleged is (1) the grading of Clay avenue, in the city of Harvard, so as to collect and discharge the surface water upon the lot of the deceased adjacent thereto, and against a certain brick building situated upon said lot; (2) the raising of the sidewalk in front of the plaintiff's said building from fourteen to sixteen inches above the level of the floor, and exposing it to invasion of the floods at certain seasons of the year.

We have carefully read the evidence in the record and are unable to say that the amount of the verdict, $310, is excessive. Were the question an open one for a finding in accordance with what, to us, appears the weight of the evidence, we would feel constrained to assess the plaintiff's damage at a sum considerably less than that awarded by the jury; but, as has frequently been said, a judgment will not be reversed on account of a mere difference of opinion between this court and the

trial judge or jury regarding the weight of the evidence.

Exception was taken during the trial in various forms on the ground that the facts alleged and proved do not constitute a cause of action against the city. Such objections appear to rest upon the proposition that the deceased, Hammond, in the construction of the building in question, evidently anticipated the action of the city in the improvement of the street upon which it abuts, and must be held to have contemplated the inconvenience which is naturally incident to such improvement, or, as said in *Callender v. Marsh*, 1 Pick. [Mass.], 418: "Those who purchase house lots bordering upon streets are supposed to calculate the chance of such elevations and reductions as the increasing population of the city may require. * * * and as their purchase is always voluntary, they may indemnify themselves in the price of the lot which they buy, or take the chance of future improvements, as they shall see fit." Such is undoubtedly the rule of the common law (2 Dillon, Municipal Corporations, secs. 990, 995*a*); but under our constitution, which prohibits the taking or damaging of private property for public use without compensation, that rule can have no application. (*Harmon v. City of Omaha*, 17 Neb., 548; *Hammond v. City of Harvard*, 31 Neb., 635; *City of Plattsmouth v. Boeck*, 32 Neb., 298.) And the views expressed in the cases cited are in harmony with the decisions of other courts under like constitutional provisions. (*City Council of Montgomery v. Townsend*, 80 Ala., 491; *Hot Springs R. Co. v. Williamson*, 45 Ark., 436; *City of Atlanta v. Green*, 67 Ga., 386; *City of Fort Worth v. Howard*, 22 S. W. Rep. [Tex.], 1059; *Davis v. Missouri P. R. Co.*, 24 S. W. Rep. [Mo.], 777.)

Among other instructions asked by the defendant below, and refused, is one to the effect that the purchaser of property abutting upon a street is presumed to have consented to such changes in the surface of the street as are obviously necessary in order to subserve public rights and interests. But we will not at this time determine the question of the soundness of the instruction asked, or whether it may be harmonized with the rule above stated, since we agree with the district court that it was altogether unwarranted by the evidence.

Exception was also taken to the refusal of the court to charge that "it is the plaintiff's duty to protect his property from injury or damage by any reasonable means in his power, and any loss or damage suffered by him which he might by reasonable means have prevented is not chargeable to the city." This instruction was rightly refused. The measure of damage is the depreciation in the value of the property occasioned by the grading of the street. (*Omaha Belt R. Co. v. McDermott*, 25 Neb., 714.) Evidence was received by the trial court tending to prove that it was possible, at a trifling cost, to protect the property in question against the water discharged upon it as the result of the improvement of the street. Such evidence was admissible as bearing directly upon the present value of the property, but the ultimate inquiry is as already suggested, how much, if at all, has the property depreciated in value in consequence of the improvement complained of?

Exception was taken to the giving of the following instruction: "In passing upon the testimony of the witnesses for the defendant, you have a

right to take into consideration any interest which such witnesses may feel in the result of the suit, if any is proved or appears, growing out of their relationship or interest in the defendant or otherwise, and give to the testimony of such witnesses only such weight as you think it entitled to under all the circumstances proved on the trial." The witnesses for the defendant city were mostly, if not all, residents and taxpayers therein, and had to that extent a pecuniary interest in the result of the trial, from which it is argued that the effect of the instructions quoted was to discredit their testimony. Practically the same question was presented for consideration in *Barmby v. Wolfe*, 44 Neb., 77, and decided adversely to the contention of the plaintiff in error. It is there said, referring to *Housh v. State*, 43 Neb., 163, and *Carleton v. State*, 43 Neb., 373: "In the two latest cases doubts were expressed as to the policy of such instructions, but the question was no longer deemed an open one." The rule thus stated follows logically from the doctrine of the earlier opinions of this court and is decisive of the question here presented.

The remaining assignments of error present in different forms the questions already examined, and do not require further notice at this time. We discover no error in the record and the judgment will be

AFFIRMED.

HOME FIRE INSURANCE COMPANY OF OMAHA V. CATHARINE KENNEDY.

FILED FEBRUARY 18, 1896. No. 6184.

1. **Insurance**: FAILURE TO DECLARE FORFEITURE: WAIVER OF BREACH OF WARRANTY. An insurance company which, after a loss of the property covered by its policy, with a knowledge of acts amounting to a breach of warranty by the insured, fails to declare such policy forfeited, but, on the contrary, continues to recognize its liability thereon, by demanding repeated proofs of loss, and by insisting upon arbitration under a stipulation which applies to the measure of damage only, will be *held* to have waived all defenses based upon such breach of warranty and resulting forfeiture of the policy.
2. ———: ———: ———. So *held*, notwithstanding the secretary of the defendant company, in returning the proof of loss for correction, added: "This company neither admits nor denies its liability nor waives any of its rights under said policy."
3. ———: ARBITRATION. A stipulation for arbitration which does not provide for submitting the matters in dispute to a particular person or tribunal, but to one or more persons to be mutually chosen, is revocable by either party, and will not oust the jurisdiction of the courts having cognizance of the subject of the controversy.
4. ———: ———: WAIVER. An insurance company, by denying its liability on the ground of a forfeiture of the policy by reason of a breach of warranty by the insured, waives whatever right it may have had to insist upon arbitration as a means of determining the amount of the plaintiff's damage.

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

Jacob Fawcett, for plaintiff in error.

I. J. Dunn and *Martin Langdon*, *contra*.

POST, C. J.

This was an action by the defendant in error, Catharine Kennedy, against the plaintiff in error, the Home Fire Insurance Company of Omaha, upon a policy of insurance. The defendant company for answer admitted the insuring of the plaintiff's property, to-wit, a two-story frame and brick building, and that said building was destroyed by fire within the period covered by said policy. It, however, alleged that said policy was not in force at the time of the loss, for reasons which will be hereafter noticed. A trial was had in the district court for Douglas county, resulting in a verdict and judgment for the plaintiff below, which has been removed into this court for review by the defendant company.

It is first contended that the risk was increased in violation of the policy, (1) from the fact that the building described therein was at the time of the loss used and occupied as a tenement house, whereas it was insured as a private dwelling only; (2) by the use and keeping therein of gasoline in excess of the amount permitted by the policy. In support of the first of the alleged violations we are referred to the following questions and answers shown by the application for the policy: "Q. Is the house occupied for private dwelling only? A. Yes. Q. By owner? A. Yes." And also to the following conditions of the policy: "Or if the risk be increased in any manner without consent indorsed hereon, * * * then this policy shall be null and void." It is not claimed that the representations of the insured respecting the occupancy of the premises at the date of the policy were false as to any essential fact. The only evi-

dence we discover bearing upon that question is the following testimony of the defendant in error, Mrs. Kennedy:

Q. Who was occupying the house at the time the policy was issued, March 30, 1889?

A. I could not say whether there was any one but myself or not.

Q. The house was not complete at the time the policy was issued?

A. No, sir.

It is, however, contended that the foregoing condition of the policy, in connection with the application, is to be construed as a continuing warranty or affirmative agreement that the validity of the said policy should depend upon the literal fulfillment of the contract by the insured. Applying the rule thus asserted to the facts disclosed by this record, counsel argue that the policy is void and of no effect, for the reason that there were at the time of the loss, in addition to the family of the insured, consisting of herself and son, three families occupying rooms in said house, although the record is silent respecting the number of such occupants or the character of their tenure. It is deemed unnecessary to review the many authorities cited in support of that contention, since it is, we think, conclusively shown that the defendant company has, by its action subsequent to the loss, waived whatever right it may have had to declare the policy void on account of the facts stated, or by reason of the violation of the condition regarding the keeping of gasoline in the building insured. The company, according to the testimony of its own witnesses, was fully advised of the facts constituting the alleged violation of the contract by the insured, five days

after the loss, to-wit, on March 16, 1891. Fourteen days later, on March 30, the plaintiff below served upon the defendant what appears to be formal proof of loss, sworn to before a notary public and attested by two disinterested neighbors, in the presence of a justice of the peace. On the same day Mr. Barber, secretary of the defendant company, acknowledged the receipt thereof as follows:

"OMAHA, NEB., March 30, 1891.

"Mrs. Catharine Kennedy, Holder of Policy No. 30715, Issued by the Home Fire Insurance Company of Omaha, Nebraska.

"Papers purporting to be proofs of an alleged loss under said policy have been received, but same are irregular, defective, and deficient, in that they do not comply with the terms of the said policy, in that it requires that proofs duly executed and sworn to by the *assured* under the said policy be made and furnished the said company. *You* have been required, and are hereby required, to *render under oath* a particular account of said alleged loss, setting forth the date and circumstances of the same, together with title, occupancy, and other insurance, if any, and itemized estimate of the value of the property destroyed, said proofs to be *signed* and *executed* in accordance with the terms of said policy. No estimate of the said building insured under the said policy, nor the alleged damage thereto, made by J. P. Gardiner, nor any other person, have been furnished this company by you. The papers purporting to be proofs of loss are not signed and sworn to by *you*, and are defective and deficient as to every requirement of said policy, the same are herewith returned declined.

"The said company neither admits nor denies liability, nor waives any of its rights under said policy.

"Very truly, CHAS. J. BARBER,
"*Secretary Home Fire Insurance Company.*"

In accordance with the direction contained in the above communication the plaintiff, on April 1, served upon the company an additional, or, as described by the witnesses, an amended proof of loss, which was likewise returned, accompanied by the following letter:

"OMAHA, NEB., April 3, 1891.

"Mrs. Catharine Kennedy, Holder of Policy No. 30715, Issued by the Home Fire Insurance Company of Omaha, Neb.

"MADAM: Papers purporting to be proof of your alleged loss and damage under the said policy have been received, but same are defective, deficient, and incomplete, in that they do not fully set forth the occupancy of the said building alleged to have been damaged, nor are they accompanied by an itemized estimate of value of property destroyed, nor are said alleged proofs signed by two disinterested neighbors, nor by nearest magistrate, as required by terms of the said policy. The estimates given in said proofs are in lump, and not itemized, and are not made by competent party. The estimate must be specific and in detail in order to be an itemized estimate. The papers are therefore herewith returned, declined.

"Very truly, CHAS. J. BARBER,
"*Secretary Fire Insurance Company.*"

And on April 6 the plaintiff prepared and served a third statement of her loss, which, so far as appears, conforms to all the suggestions of the

defendant company. She was in the meantime notified by the defendant of its election to arbitrate the differences between them, by letter of Mr. Barber, under date of March 31, in the following language:

"OMAHA, March 31, 1891.

"Mrs. Catharine Kennedy, Holder of Policy No. 30715, Issued by the Home Fire Insurance Company of Omaha.

"MADAM: Arbitration of the differences that have arisen between you and the said company, as to the actual damages by fire to building insured under the said policy, is hereby demanded. Please name arbitrator and date agreeable to have said arbitration take place. The said company, by calling for arbitration, neither admits nor denies liability, nor waives any of its rights under the said policy.

"Very truly, CHAS. J. BARBER,

"*Sec. Home Fire Insurance Company.*"

The foregoing was followed by communications bearing date of April 3d, 4th, 8th, and 24th, each, in positive terms, demanding arbitration in accordance with a provision of the policy for the adjustment by that means of controversies relating to the amount of loss or damage by the insured.

In *Hollis v. State Ins. Co.*, 65 Ia., 454, the rule is thus stated: "Where the insured, at the time of the loss, has forfeited his right to recover on the policy, and the company, knowing the facts, continues to treat the contract as of binding force, thereby inducing the insured to act and incur expense in that belief, the company thereby waives the forfeiture;" and in *Titus v. Glens Falls Ins. Co.*, 81 N. Y., 410, we observe the following

language: "But it may be asserted broadly that if, in any negotiations or transactions with the insured, after knowledge of the forfeiture, it (the insurer) recognizes the continued validity of the policy, or does acts based thereon, or requires the insured by virtue thereof to do some act or incur some trouble or expense, the forfeiture is, as a matter of law, waived; and it is now settled in this court, after some difference of opinion, that such a waiver need not be based upon any new agreement or an estoppel." (See, also, *Webster v. Phœnix Ins. Co.*, 36 Wis., 67; *Cannon v. Home Ins. Co. of New York*, 53 Wis., 585; *Knickerbocker Life Ins. Co. v. Norton*, 96 U. S., 234; *Silverberg v. Phenix Ins. Co.*, 67 Cal., 36; *Marthinson v. North British & Mercantile Ins. Co.*, 64 Mich., 372; *Eddy v. Merchants, Manufacturers & Citizens Mutual Fire Ins. Co.*, 72 Mich., 651; *German Ins. Co. v. Gibson*, 53 Ark., 494.)

The foregoing, among the many cases in harmony therewith, serve to illustrate the rule applicable to the present controversy. The demand for successive proofs of loss after knowledge of all the facts, upon grounds which are, to say the least, highly technical, thus imposing upon the insured the labor and expense incident to their preparation, and the repeated peremptory calls for arbitration, in accordance with the terms of the policy relating to the measure of damage only, cannot be construed otherwise than as a waiver of the alleged forfeiture. And the rulings complained of, so far as they relate to that branch of the case, if erroneous, are manifestly not prejudicial to the plaintiff in error; nor are we unmindful of the fact that Mr. Barber, on the return of the first proof of loss, disavowed the admission

thereby of any liability on the part of the defendant company or a waiver of any of its rights. But such a disavowal will not vary the legal effect of his actions in behalf of the defendant. In *Marthinson v. North British & Mercantile Ins. Co., supra,* a case in point, the managing officer of the company, on returning the proof of loss for correction, used this language: "You will further take notice that, in returning said papers and making the objection thereto, and in all other matters herein, this company waives none of its rights and defenses under their said policy, but expressly reserves each and every one thereof unto itself." In commenting upon the foregoing the court, by Morse, J., say: "We do not think this general reference to other possible defenses was sufficient. It devolved upon the defendant to specifically state its defenses, or some of them, if it had any other than those going to the defects in the proof of loss. If the company had frankly stated that it refused to pay the alleged loss because of the breaches of warranty and forfeiture by the conditions of the policy, the knowledge of which it then possessed, the assured would have, in all probability, gone no further into cost and trouble to perfect such proofs of loss, as its refusal to pay on other grounds would have rendered it unnecessary. This loose and general reservation of its rights cannot be considered as an adequate notice of the defenses insisted upon at the trial, and it must be held that such defenses were waived by its conduct."

The only remaining question relates to the effect of the provision of the policy for determining, in case of loss, by arbitration of the amount of damage. It has been repeatedly held that a

stipulation for arbitration which does not provide for submitting the matters in dispute to a particular person or to a particular tribunal, but to one or more persons to be mutually chosen, is revocable by either party, and will not oust the jurisdiction of the courts having cognizance of the subject-matter of the controversy. (*Hostetter v. City of Pittsburgh*, 107 Pa. St., 419; *Commercial Union Assurance Co. of London v. Hocking*, 115 Pa. St., 407; *Donnell v. Lee*, 58 Mo. App., 288; *Rison v. Moon*, 22 S. E. Rep. [Va.], 165; *Canfield v. Watertown Fire Ins. Co.*, 55 Wis., 419; *German-American Ins. Co. v. Etherton*, 25 Neb., 505.) The last mentioned case furnishes an additional reason for the rejection of the defense based upon the refusal of the plaintiff below to arbitrate, viz., that the denial by the defendant company of its liability under the policy is a waiver of whatever right it may have had to insist upon the means therein provided for ascertaining the amount of the plaintiff's damage.

The judgment of the district court is right and must be

AFFIRMED.

DAVID T. SHARPLESS V. R. E. GIFFEN.

FILED FEBRUARY 18, 1896. No. 6025.

1. **Negotiable Instruments: WANT OF CONSIDERATION: PLEADING.** Want of consideration in an action on a promissory note is new matter which must be specially pleaded, and is not available as a defense under a general denial.

2. **Dismissal.** The plaintiff may, as a matter of right, under section 430 of the Civil Code, dismiss his action without prejudice at any time before its final submission to the court or jury.

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

Harwood, Ames & Pettis, for plaintiff in error.

Atkinson & Doty, contra.

POST, C. J.

This cause originated before a justice of the peace for Lancaster county, from whence it was taken by appeal to the district court for said county, and where a trial was had to the court, a jury being waived, resulting in the judgment for the defendant therein, which it is sought to reverse by means of this proceeding.

The cause of action alleged in the petition below is a note for $144.80, bearing date of May 14, 1881, payable on demand to S. E. Sharpless, and in due form assigned to the plaintiff. The answer is a general denial. The defendant was by the district court permitted, over the objection of the plaintiff, to introduce evidence tending to prove a want of consideration for the note sued on, and which ruling is now relied upon for a reversal of the judgment.

In admitting the evidence complained of the district court erred. The general denial put in issue the execution of the note only. Want of consideration is new matter, within the meaning of the Code, which, to be available as a defense, must be specially pleaded. (*Atchison & N. R. Co. v. Washburn*, 5 Neb., 117; *Jones v. Seward County*,

10 Neb., 154; *Mordhorst v. Nebraska Telephone Co.*, 28 Neb., 610; *Cady v. South Omaha Nat. Bank*, 46 Neb. 756.) It is clear, from an inspection of the record, that the finding of the district court rests upon the alleged want of consideration. The case is not, therefore, within the exception recognized by this court, viz., that a judgment in a case tried without a jury will not be disturbed on account of the admission of immaterial evidence, when there is in the record sufficient competent evidence to sustain the finding complained of.

On the production of the evidence, and before the final submission of the cause, the plaintiff asked leave to dismiss his action without prejudice, which was refused and which is also assigned as error. Section 430 of the Code confers upon the plaintiff the right to dismiss his action without prejudice at any time before its final submission to the court or jury, and in refusing the request in this instance the court erred. *Smith v. Sioux City & P. R. Co.*, 15 Neb., 583, and *Chicago, B. & Q. R. Co. v. Richardson*, 28 Neb., 118, cited in support of ruling of the district court, are not in point. It was in the cases cited held that there was sufficient evidence to submit to the jury, and that they could not, therefore, be dismissed over the objection of the plaintiff. The judgment is reversed and the cause remanded for trial *de novo*.

REVERSED.

FIRST NATIONAL BANK OF CHADRON V. MCKINNEY, HUNDLEY & WALKER.

FILED FEBRUARY 18, 1896. No. 6989.

1. Sales: FRAUD OF PURCHASER: PLEADING AND PROOF. Proof of false statements knowingly made by the purchaser of goods, whereby he is shown to be possessed of a large amount of property over and above his liabilities, is admissible under an allegation that, being insolvent, he knowingly concealed his insolvency from the vendor.
2. ———: REPLEVIN: RATIFICATION: ELECTION OF REMEDIES. A vendor who is induced to part with possession of property through the fraud of the purchasers has his election to rescind the contract and reclaim the property sold, or to ratify the sale and pursue his ordinary remedy by an action on the contract.
3. ———: ———: ———: ———. But such remedies are not concurrent, and by electing to pursue one, with a knowledge of the facts, he waives his right to the other.

ERROR from the district court of Dawes county. Tried below before KINKAID, J.

Albert W. Crites, for plaintiff in error.

Bartlett, Baldrige & De Bord and *Spargur & Fisher, contra.*

POST, C. J.

This cause was before us at the January, 1893, term, at which time it was held that the petition below stated a cause of action against the defendant therein, the plaintiff in error, for the recovery of merchandise sold to one Charles F. Yates, the plaintiff below having elected to rescind the contract of sale on account of the fraud of said Yates, through whom the defendant claims by virtue of

a chattel mortgage. (*McKinney v. First National Bank of Chadron*, 36 Neb., 629.) Since then a second trial has been had in the district court for Dawes county, resulting in a verdict for the plaintiff therein in accordance with the peremptory instructions of the court. A motion for a new trial having been overruled, judgment was entered upon the verdict, which has been removed into this court for review by means of the petition in error of the unsuccessful party.

The first proposition to which we will give attention is that there is a fatal variance between the allegations of the plaintiffs below and the proofs; but that argument is without force. The charge of the petition is that Yates, being insolvent at the time of the purchase of the goods, concealed his insolvency from the plaintiff, whereas the evidence received over the objection of the defendants tended strongly to prove false representations by him, Yates, respecting his financial standing, whereby he was shown to be possessed of a large amount of property over and above his liabilities. The false statements proved certainly tend to sustain the allegations that Yates concealed his insolvency at the time of the purchase of the goods in controversy, and were, therefore, rightly received in evidence.

It is contended that the peremptory instruction was unwarranted by the evidence, there being no proof of Yates' insolvency when he purchased the goods which are the subject of this controversy; but in that view we are unable to concur. On the contrary, we have no doubt, from a careful examination of the record, that Yates was at the time in question, within his own knowledge, hopelessly insolvent.

According to the record offered in evidence, and which is made a part of the bill of exceptions, the defendants in error, before the commencement of this action, brought suit against Yates for the contract price of the identical bill of goods now in controversy, which is still pending in the district court for Dawes county, and in which there was issued an order of attachment, upon the filing of an affidavit in due form by F. M. Dorrington, as attorney for plaintiffs therein, pursuant to which the plaintiff in error was served with garnishee process as the supposed debtor of said Yates. On the offer of said record Mr. Baldrige, attorney for defendants in error, testified that in the year 1889 he was a member of the firm of Baldrige, Blair & Green, engaged in the practice of law in the city of Omaha; that some time during said year defendants in error telegraphed his said firm to protect their interests with respect to their claim against Yates, and that "We were then, and ever since have been, one of the attorneys for the plaintiffs in this suit. I never authorized any attachment papers to be filed that I have any recollection of. I consulted with my partners at the time the claim was telegraphed to us. That is as much as I can say of my own knowledge." And on cross-examination he was asked if Mr. Dorrington, who appeared for the defendants in error as plaintiffs in said action, was not associated with him or his firm. To which he answered, "I don't know. I understood Spargur & Fisher were." And to the inquiry, "Was not Dorrington the first attorney your firm employed?" he answered, "I don't know. The only correspondence I remember was with Spargur & Fisher. I don't recollect of any correspond-

ence with Mr. Dorrington." Counsel thus sought to prove that the action against Yates for the price of goods was unauthorized by defendants in error; but for that purpose the evidence quoted is, for obvious reasons, wholly insufficient.

A vendor who is induced to part with possession of property through the fraud of a purchaser has his election to rescind the contract and reclaim the property sold, or to ratify the sale and pursue his ordinary remedy by an action *ex contractu;* but such remedies are not concurrent, and by electing to pursue one with knowledge of the facts, he waives his right to the other. (*Morris v. Rexford*, 18 N. Y., 552; *Rodermund v. Clark*, 46 N. Y., 354; *Bach v. Tuch*, 26 N. E. Rep. [N. Y.], 1019; *Bryan & Brown Shoe Co. v. Block*, 12 S. W. Rep. [Ark.], 1073; 2 Herman, Estoppel & Res Judicata, sec. 1051.) True, the suit against Yates may have been unauthorized or brought without knowledge of the fraud alleged as ground for the rescission of the contract of sale; but such facts will not be presumed, and, if relied upon, must be affirmatively shown by the party asserting them. It follows that the record should have been admitted in evidence and that its rejection was error, for which the judgment must be reversed and the cause remanded for trial *de novo.*

There are other errors assigned which need not be noticed at this time, since they involve questions of practice mainly, and which may not arise in the further prosecution of the cause.

REVERSED.

M. J. WAUGH v. F. A. GRAHAM ET AL.

FILED FEBRUARY 18, 1896. No. 7981.

1. **Intoxicating Liquors:** DECISION ON APPLICATION FOR LICENSE: APPEAL: EVIDENCE. In an appeal from the action of a body authorized to hear and decide applications for license to sell intoxicating liquors, in order to properly present any evidence which may have been introduced at the original hearing, to the appellate court, it must be reduced to writing, filed in the office of application, and transmitted to the appellate court.

2. ———: PETITION FOR LICENSE: DESCRIPTION OF PREMISES. A petition filed in an application for license to sell intoxicating liquors should contain such a description of the premises where it is proposed to conduct the business as indicates the exact location, and if it does this it is sufficient.

3. ———: ———: REMONSTRANCES: APPEAL. Persons remonstrating against the issuance of a liquor license should make and present the objections they desire to urge to the body authorized by law to pass upon applications for such licenses. Ordinarily, questions not raised before the original tribunal need not, or will not, be considered in the appellate court.

4. ———: EXCISE BOARD. The authority to pass upon applications for liquor licenses vests in the body upon which it is by law conferred a discretionary power. Its action is judicial and not merely ministerial.

5. ———: APPEAL FROM DECISION OF EXCISE BOARD: REVIEW. Where questions of fact have been determined by the body authorized to pass upon applications for licenses to sell intoxicating liquors, and also by the district court, to which an appeal has been taken from the decision of the licensing body, and the findings or conclusions agree, they will not be disturbed in error proceedings to this court, unless manifestly wrong.

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

The issues appear in the opinion.

A. G. Greenlee, for plaintiff in error:

The application praying for a license at 229 M street did not give the excise board or the court jurisdiction to grant a license to open a saloon at 229 South Thirteenth street. (*State v. Weber*, 20 Neb., 467; *Dexter v. Town Council*, 21 Atl. Rep. [R. I.], 347; *Commonwealth v. Bearce*, 23 N. E. Rep. [Mass.], 99.)

The excise board and the court erred in granting a license upon the petition, for the reason that it does not comply with the rule of the excise board requiring that it shall contain the certificate of the register of deeds that the signers of the petition are residents and freeholders of the ward in which sales under such license are to take place, there being no other proof that the signers were such as are authorized by the statutes to request such license. (*State v. Hill*, 19 Atl. Rep. [N. J.], 789.)

The court erred in its finding that the matter of granting saloon licenses is wholly in the discretion of the excise board, and unless it appears affirmatively from the evidence that the granting of the license was an abuse of such discretion, the order of the board should not be disturbed, and in thus refusing the exercise of the court's own judgment upon the application. (*Livingston v.* Corey, 33 Neb., 372; *State v. Bonsfield*, 24 Neb., 517; *Pleuler v. State*, 11 Neb., 547; *State v. Hanlon*, 24 Neb., 608.)

Reference is also made to the following cases: *State v. Barton*, 27 Neb., 481; *State v. Village of Elwood*, 37 Neb., 473; *Foley v. State*, 42 Neb., 233.

L. W. Billingsley and *R. J. Greene, contra.*

References: *Brown v. Lutz*, 36 Neb., 532; *Lambert v. Stevens*, 29 Neb., 283; *Lydick v. Korner*, 13 Neb., 10; *Powell v. Egan*, 42 Neb., 482.

HARRISON, J.

A. L. Hoover of defendants applied to the excise board of the city of Lincoln for license to sell liquors,—as was stated in the petition of the applicant,—"at No. 229 M street, in said city, situated on lot 12, block 66, city." To this application remonstrances were filed, and after a hearing the excise board granted a license to A. L. Hoover to sell intoxicating liquors at 229 South Thirteenth street, from which action an appeal was taken to the district court of Lancaster county, which court, after a hearing, dismissed the appeal. Plaintiffs in error have presented the case to this court by proceedings in error.

We will first notice the condition of the record presented here, and as before the district court. If considered upon the merits in the district court, it must have been upon the testimony introduced at the hearing before the excise board, and upon this alone. (*State v. Bonsfield*, 24 Neb., 517.) In order to properly bring such evidence before the district court it was necessary that it be reduced to writing and filed in the office of application and transmitted to the district court to which an appeal was taken. (Compiled Statutes, ch. 50, sec. 4.) It was said by MAXWELL, J., in *Lydick v. Korner*, 13 Neb., 10: "The testimony taken before the city council must be reduced to writing, and should be certified by the presiding officer as all the testi-

mony taken, as the statute seems to require the judge of the district court to decide the case upon such evidence alone." And in the opinion in *Powell v. Egan*, written by IRVINE, C., 42 Neb., 483, it was stated, after quoting the section to which reference has been made: "The statute therefore requires the certification of the evidence to the district court." There was a finding on this question by the judge before whom it was tried in the district court, which was as follows: "That the purported evidence taken before said board upon the hearing of plaintiff's remonstrance, and filed herein, was never filed with the city clerk or the excise board, as provided in section 4, chapter 50, of the Statutes of 1881, and that the same is not certified by the said clerk or presiding officer of the said board, as required by law, and was not transmitted by said clerk or any officer of said board to this court, and is not, therefore, properly or sufficiently authenticated as the testimony taken upon said hearing." This, we think, was correct, and the rule announced a true one.

It is contended for plaintiff in error that the application for a license to sell intoxicating liquors at 229 M street did not give the excise board jurisdiction to grant a license to open and conduct a saloon at 229 South Thirteenth street. To thoroughly understand the question here raised it will be necessary to refer to the description of the location of the prospective saloon, contained in the several papers filed as required in the proceedings preliminary to the issuance of the license. In the petition of the applicant it was set forth as "at No. 229 M street, in said city [referring to Lincoln], situated on lot 12, block 66, city." In the published notice of the application

it was stated to be "in building situated at 229 South Thirteenth street, on lot 12, block 66, fronting on Thirteenth street in said city." Counsel for plaintiff in error contends that the excise board could not, upon a petition for license to run a saloon at 229 M street, issue it for one to be conducted at 229 South Thirteenth street; that the places so designated are in different wards of the city; that the petition fixed the location of the proposed saloon in the Second ward of the city, and the license as issued was for a location in the Fourth ward. The section of our statute governing in the particular involved states that the petition for a license shall be sufficient if signed by thirty of the resident freeholders of the ward where the sale of the liquors is to take place. We agree with counsel that this implies that the location of the saloon business for which license is sought shall be stated or described more or less accurately in the application for the license. Of a set of rules adopted by the excise board in regard to the license and regulation of the sale of intoxicating liquors within the city of Lincoln was one which required quite a definite and specific description of the location of any proposed saloon to be given in the application for the license therefor. A petition filed in an application for a license to sell intoxicating liquors should comply with the requirements of the law, and include all things which the law prescribes shall appear therein, but it will not be construed in accordance with strict rules. Its substance or import will be mainly considered in determining whether it is sufficient. Mere informalities will not be regarded. The description of the premises where it is proposed to conduct the business is

sufficient, if so reasonably full and certain as to indicate the exact location. (Black, Intoxicating Liquors, sec. 156, p. 198, and cases cited.) In the matter under consideration the petition described the location of the proposed business as on lot 12, block 66, of the city. The notice described the same lot and block and gave the same number, and, dropping the "M" designating the street, substituted in its stead the words, "South Thirteenth." The remonstrators, some of them, in their objections filed with the board, remonstrated against "the granting of a license for a saloon on lot 12, block 66," and others, stating that they were freeholders, owners of property in block 66 of Lincoln, remonstrated against the issuance of a license for a saloon to be operated on any lot in above block, from which it is very evident that all persons interested knew from the portion of the description lot 12, block 66, just exactly where the saloon for the opening and operating of which the petition asked a license was to be located, and it does not appear that any one was in any manner or to any extent misled in regard thereto. This being true, the description served the purpose for which it was intended and fulfilled the intention and requirements of the law in respect to it.

Another contention of counsel for plaintiff in error is that the statute requires the application or petition for liquor license must be signed by thirty of the resident freeholders of the ward in which it is expected to conduct the business; and further, that by one of the rules of the excise board it was enacted: "Before the petition or bond, as provided in rule three hereof, shall be filed with the clerk, the applicant shall be re-

quired to procure a certificate of the register of deeds of the county of Lancaster, to be indorsed on said petition, certifying that each of the persons signing the same is a resident and freeholder within the ward where the sale of such liquors is to take place;" that the certificate of the clerk which was indorsed upon the petition merely stated that the signers were freeholders within the Fourth ward and did not state that they were residents; that this was not enough and the board did not acquire jurisdiction to entertain and hear the application, or to issue a license. This question was not raised by the remonstrances against the issuance of the license filed with the excise board. Fairness to all parties would seem to demand that objections to granting a license should be made before the body to which the application is presented, in the first trial tribunal. If not made there, they need or will not be considered in the appellate court. (*Livingston v. Corey*, 33 Neb., 366.)

The judge of the district court, after reaching and announcing the conclusion that the testimony taken at the hearing before the excise board was not authenticated or transmitted to the district court as required by law, and need not be made the subject of inquiry, examined and considered it and passed upon its weight and sufficiency. In one of its findings it was stated by the court that the granting of a saloon license was a matter resting in the discretion of the excise board, governed and controlled by the various provisions of law in relation to the issuance of such licenses, and unless it affirmatively appeared from the evidence that its granting a license for conducting a saloon business at any assigned location was an abuse of

the discretionary power of the board, its order to that effect would not be disturbed. It is urged by counsel for plaintiff in error that the court, by this finding, in effect refused to pass upon this application on its merits, refused to give its judgment as to whether or not a license should be issued, or refused to give the remonstrators a hearing upon the evidence or examine it for the purpose of determining whether a license ought to issue. We do not think the language of the court, when read and considered in connection with the other findings, can fairly be construed to have the meaning stated by counsel. After holding that the testimony introduced before the excise board was not authenticated as provided by law and not properly before the court, it is further said in the findings and decision: "But the court, having fully examined the evidence filed by plaintiff's counsel herein, and heard arguments thereon, finds," and here follow statements from which it clearly appears that all the evidence given before the excise board was considered by the court; that it in effect tried the matter on the same testimony, heard it upon its merits, and made a finding on each of the contested questions, and in each instance reached the same conclusion as did the board. A careful perusal of the whole of the findings and judgment of the court convinces us that the evident meaning of the language used, to which the objection applies, or intended to be conveyed by the court, was that in the matter of the hearing on the application for a liquor license the excise board did not act ministerially, but judicially, and after listening to the evidence, exercised their discretion or judgment in determining whether, in view of all the facts

and circumstances, a license should be granted or refused, and that if the appellate or district court, after scanning all the same testimony, reached a different conclusion on any vital point involved, the decision of the excise board must be reversed as a wrong exercise of the right to decide, of the discretion vested in it, or if the court's conclusions agreed with those of the board, its judgment must also agree. It is clear that the licensing body is vested with discretionary power; that its action is judicial and not merely ministerial. "In far the greater number of states the doctrine is now well settled that the court or board charged with the duty of issuing licenses is vested with a sound judicial discretion, to be exercised in view of all the facts and circumstances in each particular case as to granting or refusing the license applied for. The principle is that the licensing authorities act judicially, and not merely in a ministerial capacity. In determining the nature as well as the existence of this discretion much will depend upon the language of the local statute, and this, of course, should be carefully scrutinized; but the general disposition, under all the diverse forms of statutory provisions, is to leave a wide margin of discretion to the court or board hearing the application." (Black, Intoxicating Liquors, sec. 170, p. 211; *State v. Cass County*, 12 Neb., 54.)

It is further urged that the findings and order of the excise board were not supported by the evidence. The testimony was listened to and passed upon by the excise board, and was again investigated and the questions raised decided by the district court. We have carefully studied it and cannot say that the conclusions of the board and of the district court in respect to the points

involved were manifestly wrong; hence they will not be disturbed. The judgment of the district court is

AFFIRMED.

JOHN W. CHILDERSON v. MARY A. CHILDERSON.

FILED FEBRUARY 18, 1896. No. 6154.

1. **Appeal and Error: ELECTION OF REMEDIES.** Where a case is presented for review to this court within the time allowed in which to perfect an appeal, but a petition in error is filed therewith, the party bringing the case here will be presumed to have elected the remedy by error and the case will be so considered.
2. **Review Without Bill of Exceptions.** Where the bill of exceptions is not properly authenticated by the certificate of the clerk of the district court, as required by law, it need not be examined by this court.

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

Thomas H. Matters, for plaintiff in error.

Leslie G. Hurd, contra.

HARRISON, J.

The plaintiff herein alleges the relationship of husband and wife as existing between himself and the defendant; that, as the outcome of difficulties and dissensions during the course of their married life, the wife left the home and abandoned the plaintiff, and he, as a consideration for her return to him and the family relations and duties and continuance thereof and therein, did, during the

year of 1889, convey by deed to the wife certain lands in Clay county, Nebraska; that on or about the 8th day of December, 1891, the defendant violated her promise and contract and again departed from the home of the parties, and abandoned the plaintiff, by which act he became entitled to the property conveyed to her. Hence he prays a decree against her, requiring its reconveyance to him. The wife, in answer to the pleas of the plaintiff herein, admits the assumption of the marriage relation by and between plaintiff and herself, and that after some years of married life disagreements and contentions arose and prevailed, and finally to such an extent that she forsook the home and her marital rights, and also the duties, or was forced so to do, but she affirmatively states that at the time of the marriage to plaintiff she was the owner of certain property, both personal and real, the proceeds of which the plaintiff reduced to his possession and used in such manner and for such purposes as he desired, and the lands which the plaintiff conveyed to her were so conveyed to her in payment and to reimburse her for the appropriation of the proceeds of her separate property. To this answer of defendant there was filed a reply which in effect denied the affirmative matter contained therein or avoided its force, and reasserted the substantive matters set forth in the petition in so far as it related to the consideration for the conveyance of the lands from plaintiff to defendant. At the close of the trial of the issues the court rendered a decree favorable to defendant, by which the action was dismissed and the costs taxed against the plaintiff, and the case is presented here for review.

The record here is entitled as in an appeal, but a petition in error was filed and a summons in error was caused to be issued. Under such circumstances it will be presumed that the plaintiff has elected to present the case to this court by error proceedings. (*Woodard v. Baird*, 43 Neb., 311; *Monroe v. Reid*, 46 Neb., 316; *Burke v. Cunningham*, 42 Neb., 645.) If this is treated as an error proceeding, then the errors assigned in the petition cannot be reviewed, for the reason that no motion for a new trial was filed in the district court. Where a party does not move for a new trial in the lower court, he cannot raise any question on error to this court. (*Zehr v. Miller*, 40 Neb., 791, and cases cited; *Brown v. Ritner*, 41 Neb., 52; *Scroggin v. National Lumber Co.*, 41 Neb., 195; *Appelget v. McWhinney*, 41 Neb., 253.) The transcript in the case at bar was filed within the time for effecting appeal to this court, and if we were at liberty under the rules to consider it as an appeal, the questions raised and discussed in the brief of counsel for the unsuccessful party in the trial court all depend for their proper understanding and decision on an examination and consideration of portions of the evidence introduced at the trial. This necessitates in any case the presentation of the evidence to this court, properly preserved in a duly authenticated bill of exceptions, and in the absence of such bill of exceptions the evidence need not be investigated. There was no certificate of the clerk of the district court attached to what purported to be the bill of exceptions. It was not legally authenticated and is not properly before this court. (*Martin v. Fillmore County*, 44 Neb., 719; *Yenney v. Central City Bank*, 44 Neb., 402; *Felber v. Gooding*, 47 Neb., 38.) We

have, however, reviewed the testimony, and our conclusion is that, as to the points argued by the complaining party, it is conflicting, but sufficient to sustain the findings and judgment of the trial court, and had the case been suitably presented here for review as to such questions, the findings and judgment would not have been disturbed or reversed. The judgment of the lower court is

AFFIRMED.

W. S. MCAULEY ET AL. V. J. H. COOLEY.

FILED FEBRUARY 18, 1896. No. 5305.

1. **Partnership**: DISSOLUTION: ACTION AT LAW BETWEEN PARTNERS. The decision in relation to certain questions in this case, which were announced in a former opinion, for a report of which see 45 Neb., 582, herein reaffirmed, and having been stated in the syllabus, will not be here restated.
2. **Principal and Surety.** Parties who signed the bond of one of the members of a copartnership, conditioned for the due and faithful performance of his duties, in and concerning the business in which the firm engaged, *held*, not released from their obligation thus assumed, by an increase in the amount of the capital invested in the business.

REHEARING of case reported in 45 Neb., 582.

Capps & Stevens, *John M. Ragan*, and *J. B. Cessna*, for plaintiffs in error.

References as to non-liability of sureties: *Miller v. Stewart*, 9 Wheat. [U. S.], 680; *Grant v. Smith*, 46 N. Y., 95; *Walrath v. Thompson*, 6 Hill [N. Y.],

540; *Dobbin v. Bradley*, 17 Wend. [N. Y.], 422; *Bonser v. Cox*, 4 Beav. [Eng.], 379; *Zimmerman v. Judah*, 13 Ind., 286; *Judah v. Zimmerman*, 22 Ind., 388; *Lee v. Dick*, 10 Pet. [U. S.], 482; *Edmondston v. Drake*, 5 Pet. [U. S.], 624; *Osborne v. Van Houten*, 8 N. W. Rep. [Mich.], 77; *Woodworth v. Anderson*, 19 N. W. Rep. [Ia.], 296; *Sage v. Strong*, 40 Wis., 575; *Henderson v. Marvin*, 31 Barb. [N. Y.], 297; *Farmers & Mechanics Bank v. Evans*, 4 Barb. [N. Y.], 487; *Lang v. Pike*, 27 O. St., 498; *Wassenick v. Ireland*, 9 S. W. Rep. [Tex.], 203.

B. F. Smith, contra.

HARRISON, J.

In October, 1888, J. H. Cooley and George A. Bentley formed a copartnership, and under the firm name and style of J. H. Cooley & Co. engaged in the business of dealing in lumber and coal in the town of Holstein, this state. The firm continued its operations until on or about July 31, 1889, when it was dissolved. The written agreement or contract for the formation of the partnership, and to govern in conducting its affairs, was, in part, as follows:

"Articles of agreement, made and entered into this 12th day of October, 1888, by and between J. H. Cooley, of Kenesaw, and G. A. Bentley, of Holstein, Nebraska, as follows:

"The said parties above named have agreed to become copartners in business and by these presents do agree to be copartners together under the firm name of J. H. Cooley & Co. in buying, selling, and vending of lumber, lath, shingles, coal, and other business of like nature, and to that end the said J. H. Cooley shall contribute a stock of lum-

ber, lath, shingles, coal, real estate, and improvements, etc., for which the whole investment shall not exceed three thousand ($3,000) dollars, and is not required to do any more work than he shall elect, and the said G. A. Bentley shall, and he is hereby firmly bound to give all his time and use his best efforts to promote the interests of this business.

"The said G. A. Bentley is to keep the books of the firm in a careful and workmanlike manner, and to render a just, true, and accurate account of all goods, wares, commodities, merchandise, moneys, and accounts at any time required, and to do all the work required to be done in the business as long as one man can do it, after which the expense of hiring a man shall be borne equally out of the business, and G. A. Bentley be allowed to draw his personal expenses, not to exceed the sum of forty ($40) dollars, which amount shall be charged to his personal account and come out of his share of the profits."

W. S. McAuley and Charles H. Furer signed a bond with George A. Bentley as principal, by which they obligated themselves as follows:

"Whereas, on the 12th day of October, 1888, the above named G. A. Bentley and the said J. H. Cooley entered into a copartnership for the purpose of carrying on business of lumber, coal, etc., in the village of Holstein, in the county of Adams, in the state of Nebraska:

"Therefore the condition of this obligation is such that if the above named G. A. Bentley shall do and perform all the acts of the written contract entered into by and between the said parties of the above date, and shall carry out the obligations therein required of him strictly according to its

spirit and terms, then these obligations to be void, otherwise to remain in full force and effect."

The present action was instituted by J. H. Cooley against the plaintiffs in error upon the bond which they had signed, the object being to recover the aggregate amount of sums which it was claimed had been paid to Bentley, and of which he had made no entry in the books of the firm, and for which he had failed to account. Defendant in error was successful in the district court, and to reverse the judgment there rendered in his favor the parties sureties on the bond presented the case to this court by petition in error. On hearing in this court the judgment of the trial court was affirmed. (For report of the decision then announced see 45 Neb., 582.) A motion for a rehearing was filed, which was sustained, and the cause has been reargued and again submitted for our consideration and adjudication.

The conclusion of the former decision in relation to the dissolution of the firm and accounting or settlement of its affairs between the partners, and the right of defendant in error to maintain an action at law, were not attacked at the present hearing, and, without discussion or further notice now, they will be adopted and reaffirmed.

The argument of counsel for plaintiffs in error on rehearing was an effort to maintain the proposition advanced by them that there had been such a modification of the contract of partnership by the parties to it as released the sureties on the bond which was executed with reference to and reliance upon such contract, and its performance in strict accordance with its terms. The facts in respect to the modification or change which it is claimed was made in the agreement are as fol-

lows: It was stated in the contract that "J. H. Cooley shall contribute a stock of lumber, lath, shingles, coal, real estate, and improvements, for which the whole investment shall not exceed three thousand dollars;" and he put into the business, property and money to the amount of, in round numbers, $5,000. It is urged on behalf of the plaintiffs in error that, inasmuch as the obligation of their bond was that Bentley should "do and perform all the acts required of him by the written contract, and carry out the obligations therein required of him strictly according to its spirit and terms," that the terms of the contract became of the substance of the bond, and if it was changed in any material particular without the consent of the sureties, it effected their release; that the change in the amount invested by Cooley was a material one; that thereby greater opportunity was afforded the principal in the bond to commit the alleged acts by which it is claimed the damages sought to be recovered in this suit were occasioned; that the sureties may have thought that Bentley could successfully manage a business in which was invested $3,000 and were willing to become responsible for his acts in and concerning such a business and not one in which there was to be handled a larger amount. They state that the theory upon which their argument is based is that the articles of copartnership and the bond must be construed together as one instrument in determining the liability assumed by the parties who signed the bond. The rule of law relied upon by counsel for plaintiffs in error, as stated in their briefs, is that in determining the liability of a surety it must be borne in mind that he is a favorite of the law, and

has a right to stand upon the strict terms of his contract, when such terms are ascertained. A surety is bound for the due performance by his principal of the precise contract to which the guaranty referred, and if that contract has been changed or modified, without the consent of the surety, he is discharged. This is an established doctrine, and variously worded it has been applied by the courts, both federal and state. It has been recognized and applied in this state. (See *Curtin v. Atkinson*, 36 Neb., 110; *Crane v. Specht*, 39 Neb., 125.) Accepting and proceeding according to the theory advanced for plaintiffs in error in respect to construing the bond and contract in this case as one instrument, there must, conjointly with the rule of law quoted in regard to sureties and applicable to their obligation, be applied one which is here equally as forcible and proper. Another rule, equally binding upon the courts, is that in the construction of a contract of a surety, as well as of every other contract, the question is, what was the intention of the parties as disclosed by the instrument, read in the light of the surrounding and attendant facts and circumstances? (1 Brandt, Suretyship & Guaranty, sec. 80; *Lionberger v. Krieger*, 4 West. Rep. [Mo.], 431.) The bond and contract involved in this action, when considered together, and viewed in the light of the facts and circumstances surrounding and attendant upon their inception and existence, when fairly and reasonably construed, seem to indicate that the limit placed by the terms of the contract of partnership upon the amount of capital to be at its beginning invested by Cooley was for his benefit and might be waived by him in favor of a larger sum if he so desired. That it was in direct

contemplation of the parties that the business might grow and increase in volume, and necessarily in the capital to sustain it in its larger workings, appeared in and was directly provided for in the contract, wherein it is stated that Bentley was to do "all the work required to be done in the business, as long as one man can do it, after which the expense of hiring a man shall be borne equally out of the business," and certainly it must have been clear to and within the expectation of all the parties to both contract and bond that if the business was successful the principal in the bond would have the management and handling of a capital considerably more than $3,000 during the times when the profits remained for longer or shorter periods mingled with the other funds in the business. The increase in the investment may have rendered the duties devolving upon Bentley, the principal in the bond, to some extent more arduous and laborious, but it did not effect any change in the character or nature of the acts to be performed by him, and for the due performance of which the sureties were bound. The acts he was obliged to do were the same. The province of his duties was not changed, though the subject-matter was increased, which was possible at all times by additions of profits, and for the damages which accrued through the failure of the principal in the bond to perform acts included and covered by the obligations of the bond, the sureties were and remained bound. (*Eastern R. Co. v. Loring*, 138 Mass., 381; *Rollstone Nat. Bank v. Carleton*, 136 Mass., 226; *Bank of Wilmington v. Wollaston*, 3 Harring. [Del.], 90; *London, B. & S. C. R. Co. v. Goodwin*, 3 W. H. & G. [Eng.], 320; *Strawbridge v. Baltimore & O. R. Co.*, 14 Md., 360; *Gaussen v.*

United States, 97 U. S., 584; *Exeter Bank v. Rogers*, 7 N. H., 21; *Lionberger v. Krieger*, 4 West. Rep. [Mo.], 431.) Whether the recovery could be for more than the $3,000 we are not called upon at this time to discuss and do not express any opinion, as the amount recovered was much less than that sum. The judgment of the district court is

AFFIRMED.

RAGAN, C., not sitting.

FIRST NATIONAL BANK OF GREENWOOD V. CASS COUNTY ET AL.

FILED FEBRUARY 18, 1886. No. 6148.

Review Without Bill of Exceptions. Where the bill of exceptions purporting to contain the evidence in a case is not authenticated by the certificate of the clerk of the trial court, it is not properly before this court and will not be examined, and assignments of error depending upon matters of evidence cannot be decided.

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

Marquett, Deweese & Hall, for plaintiff in error.

Byron Clark and *H. D. Travis*, *contra*.

HARRISON, J.

This is an action by Cass county and its county treasurer against the plaintiff in error, hereinafter called "the bank," to recover the sum of $551.79, alleged to be due as interest on county

funds on deposit with the bank under the provisions of the act of the legislature of 1891 entitled "An act to provide for the depositing of state and county funds in banks." (Session Laws, 1891, p. 347, ch. 50.) The petition stated the corporate character of the county and also of the bank; that Louis C. Eickoff was the duly elected, qualified, and acting county treasurer of the county, and collected and had the custody and control of the moneys and funds of the county. The proposition, and its terms, of the bank to the county for the reception of county funds on deposit, its acceptance, the presentment and approval of the bond as required by the law, and the deposit by the treasurer of the funds of Cass county in the First National Bank of Greenwood in accordance with the terms of the contract, were pleaded, also the failure and refusal of the bank to pay the interest agreed upon, in the sum of $551.79. The bank filed an answer as follows: "Now come the defendants and for answer to plaintiffs' petition deny that they owe the plaintiffs $551.79, interest on the county funds deposited with the First National Bank of Greenwood by the county treasurer of Cass county, or any other sum, but on the contrary allege the fact to be that the defendant, the First National Bank of Greenwood, Nebraska, has paid to the county of Cass, through its county treasurer, all of the interest due and owing to the said county upon county funds so deposited with the said First National Bank of Greenwood, Nebraska." To this answer there was in reply a general denial. A trial of the issues resulted in a verdict and judgment against the bank, and in its behalf the case is presented here for review.

It is contended by the bank that the evidence

adduced in the case disclosed that the major portion of the demand upon which the action was based was composed of interest on state funds, or money collected by the county treasurer of the taxes levied for state purposes, and the other of interest on school district moneys and the district road fund; that these are not current funds belonging to the county, and that the law under which the transaction herein involved was made only provides for the deposit by the treasurer "of money in his hands belonging to the several different current funds of the county treasury," and that no recovery could be legally had of interest on a deposit of any other than current funds, hence none could be allowed in this case. It does not appear from the pleadings that interest is claimed herein on other than "county funds," and the disposition of the contention on behalf of the bank calls for an examination of the testimony, for which reference must be made to a bill of exceptions. The document attached to the record in this case, which purports to be the bill of exceptions, is not identified as such by the certificate of the clerk of the trial court, and is not, therefore, authenticated as required by law, and, as a general rule, the evidence not being properly before the court, will not be examined, and questions raised which depend upon matters of evidence cannot be decided. It follows that the judgment of the district court must be

AFFIRMED.

NATHAN J. BURNHAM V. FRANK J. RAMGE.

FILED FEBRUARY 18, 1896. No. 5930.

1. **Attachment:** AFFIDAVIT. An affidavit for an attachment setting forth the grounds therefor in the language of the statute is sufficient.
2. **Garnishment.** Error cannot be predicated by a judgment debtor upon the making of an order upon a garnishee to pay money into court, or the refusal to vacate such order, when such debtor disclaims any interest in the money garnished.

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

Slabaugh & Rush, for plaintiff in error.

Parke Godwin, *contra*.

NORVAL, J.

Plaintiff recovered a judgment in the court below against defendant in the sum of $79.90 and costs of suit, and Frank E. Moores, garnishee, was ordered to pay into court the money garnished in his hands. At the commencement of the action plaintiff filed an affidavit for attachment, and an order of attachment and notice in garnishment, directed to Frank E. Moores, were issued and served. Subsequently the defendant moved the court to discharge the attachment upon two grounds: (1) The facts stated in the affidavit are insufficient to justify the issuing of the writ; (2) because the affidavit is untrue. This motion was overruled. After the rendition of the judgment, and the making of the order upon the garnishee to pay the money into court, the defendant filed a motion, which was overruled, to set aside

the order made upon the garnishee. These rulings of the court are assigned for error.

No error was committed in overruling the motion to dissolve the attachment. The affidavit for attachment is in the usual form, the grounds for attachment being set forth in the language of the statute, viz., "that said defendant fraudulently contracted the said debt on which said suit has been brought." This was sufficient to sustain the writ, without a statement of the facts showing the ground of attachment to be true. (*Hilton v. Ross*, 9 Neb., 406; *Steele v. Dodd*, 14 Neb., 496.) The affidavit read at the hearing on the motion to dissolve the attachment failed to deny the existence of the debt which is the basis of the suit, or to disprove the averments in the attachment affidavit that the debt was fraudulently contracted. The ground for attachment is nowhere denied. The evidence adduced in support of the motion was merely for the purpose of showing that the moneys garnished in the hands of Frank E. Moores were held by him in his official capacity as clerk of the district court; but such evidence does not disclose that the moneys did not belong to the attaching defendant. Moreover, it is stated in substance, in the motion to set aside the order on garnishee, as well as in brief of plaintiff, that the moneys garnished did not belong to Burnham, and that he had no interest therein. If this be true, the latter certainly cannot complain that it was applied to pay the judgment against him. (*Langdon v. Martin*, 10 O. St., 439; *Mitchell v. Skinner*, 17 Kan., 563.) Moores, to protect himself, could have objected, but he makes no complaint of the order of the court.

It is insisted that there was error in denying the motion to vacate the order on the garnishee, because the garnishee did not answer in the case, and further, that as the money was held by Moores as clerk of the district court, it was *in custodia legis*, and, therefore, not subject to garnishment. Whether the order was made upon the garnishee without his appearing and disclosing the amount of money in his hands belonging to the defendant, or whether the moneys in the hands of Moores could be garnished in this case, are immaterial inquiries in the light of this record. Plaintiff having disclaimed any interest in the moneys ordered paid over by the garnishee, both upon the record and in his brief, clearly he cannot be heard to complain that the order was erroneous. No prejudicial error having been shown to exist, the judgment of the district court is

AFFIRMED.

ISAAC N. HICKMAN V. JOHN LAYNE ET AL.

FILED FEBRUARY 18, 1896. No. 6005.

1. **Action on Contractor's Bond for Price of Material Used in Public Building:** JUDGMENT FOR SURETIES. Evidence examined, and *held* to support the verdict.
2. **Instructions:** ASSIGNMENTS OF ERROR. Instructions given and refused not reviewed because insufficiently assigned for error in the motion for a new trial.
3. **Trial:** EVIDENCE: MISCONDUCT OF JURY. Plaintiff introduced in evidence an itemized account of materials furnished, which the jury took to their room when considering of their verdict. *Held*, Not prejudicial error.

4. **Review**: EVIDENCE. Error cannot be predicated on the admission of certain testimony, where ample testimony of the same nature was admitted without objection.

5. **Opening and Closing.** The party upon whom rests the burden of the issue is entitled to open and close the evidence and arguments to the jury on the trial of the cause.

6. ———. Where the party holding the affirmative waives the opening argument to the jury, he is not thereby deprived of closing the case, after his adversary has made his argument.

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

John M. Stewart and *William Leese*, for plaintiff in error.

Pound & Burr, contra.

NORVAL, J.

This action was brought upon the bond hereinafter mentioned by Isaac N. Hickman against John Layne and Fred W. Krone, partners as Layne & Krone, George Martin, N. Westover, George Sherer, A. B. Beach, J. E. Stockwell, N. N. Menard, Fred Voight, and W. Henegan to recover for materials alleged to have been sold and delivered to Layne & Krone by one John Ellis, and used by them in the erection, for the state, at Beatrice in 1887, a building for the institution for the feeble-minded. Layne & Krone entered into a written contract with the board of public lands and buildings to furnish the materials and labor and to erect said building for a stipulated price, payable as the work progressed on the monthly estimates of the superintendent of construction, which contract contained a provision to the effect that Layne & Krone should pay off and settle in

full with all parties entitled thereto claims that should become due by reason of labor and materials furnished or used in the construction of the building. A bond for the faithful compliance with the contract was given to the state by Layne & Krone, which was also signed by the other defendants, some of them as sureties and others as witnesses to its execution merely. This bond, with the exception of the parties, date, and amount of the penalty, being identical with the one involved in *Sample v. Hale*, 34 Neb., 220, will not be set out in this opinion. Subsequent to the execution of the bond and contract aforesaid John Ellis furnished the contractors the stone and concrete used in the building, amounting to $2,124.16, upon which has been paid $1,902.02, and no more, leaving a balance due therefor of $222.14. The account for the materials so furnished has been duly transferred by Ellis to this plaintiff, who brings this action to recover said balance against the principals and sureties upon said bond. Layne interposed no defense. The other defendants answered the petition by a general denial, and as a second defense alleged that prior to the furnishing of the materials, for which compensation is demanded, the firm of Layne & Krone had dissolved, said Krone retiring from the firm, of which plaintiff and his assignor had knowledge and notice, and that Layne alone is liable for the payment of said materials. By stipulation of the parties in open court the jury returned a verdict for Menard, Voight, and Henegan, they having signed the bond as witnesses. The jury found for plaintiff against the defendant Layne for the full amount claimed, and also in favor of the other defendants.

That the bond given to the state inured to the benefit of the subcontractors of Layne & Krone, and that such subcontractors could maintain an action for a breach of the conditions of the bond, is settled by repeated decisions of this court. (*Sample v. Hale*, 34 Neb., 220; *Habig v. Layne*, 38 Neb., 747; *Lyman v. City of Lincoln*, 38 Neb., 794; *Doll v. Crume*, 41 Neb., 655; *Korsmeyer Plumbing & Heating Co. v. McClay*, 43 Neb., 649; *Kaufmann v. Cooper*, 46 Neb., 644.) The first question, therefore, to be considered is whether the materials, for the value of which this suit is brought, were furnished by plaintiff's assignor, Ellis, to the firm of Layne & Krone or under a contract with them, or to John Layne alone on his individual account. The partnership of Layne & Krone was dissolved on November 9, 1887, the defendant Krone retiring from the firm, and the business was thereafter conducted by Layne in his own name, who completed the building. A considerable portion of the materials had already been furnished by Ellis at the date of said dissolution, and payment therefor has been made. The amount claimed in this action is for a part of the materials delivered since November 9. It is claimed by plaintiff in argument that all the materials were delivered under a contract entered into by Ellis with Layne & Krone about October 1, 1887, and during the existence of the partnership. This the defendant insists is incorrect. The testimony on behalf of the plaintiff adduced on the trial, and which is embodied in the bill of exceptions, fully sustains the theory and contention of the plaintiff. On the other hand, the inference could be properly drawn from portions of the testimony of the defendant Layne that no contract was made with his

firm, whereby it agreed to furnish any certain amount of stone for the erection of the building; that prices were named on the different kinds of stone, but the firm did not agree to take, nor did Ellis agree to deliver what stone should be required to complete the building or any part thereof; that the stone was ordered as it was needed from time to time; that after the dissolution in the name of Layne, and a portion of this was paid by the individual check of the latter. While the testimony of this witness is in some particulars weak and evasive, we cannot say that the jury were not warranted in finding that the materials in dispute were not furnished under and in pursuance of a contract with the firm of Layne & Krone, although the preponderance of the evidence would have justified a different conclusion. In this connection it may not be amiss to state that no express contract with Layne & Krone for the furnishing of the materials is averred in the petition, the allegation being that they were furnished at their request. It is true, as argued by counsel, that partners are not released from unfulfilled contracts and obligations by the dissolution of the firm. Such was the decision in *Swobe v. New Omaha Thomson-Houston Electric Light Co.*, 39 Neb., 587. But this principle could only be invoked by the plaintiff in case he established that Layne & Krone agreed with Ellis to take from him all the stone required for the erection of the building, and all that was received was delivered under such agreement. The jury having found against the plaintiff on the facts, the principle of law invoked by plaintiff that partners cannot by dissolving release themselves from unfulfilled contracts is not applicable to the case under consideration.

Complaint is made in the brief of the third and fourth instructions given by the court on its own motion, and the refusal to give the plaintiff's third, fourth, and sixth requests. The court's charge consists of five separately numbered paragraphs, and the giving of them all, as well as the three requests refused, is assigned for error in the motion for a new trial as follows:

"5. The court erred in giving paragraphs of instructions numbered 1, 2, 3, 4, 5 on its own motion.

"6. The court erred in refusing to give paragraphs of instructions numbered 3, 4, and 6, asked by the plaintiff."

The first and second instructions were properly given. The first briefly stated the nature of the action, and the second told the jury that, under the stipulation of the parties, they should return a verdict for Menard, Voight, and Henegan. There being no error in either of these instructions, the fifth subdivision of the motion for a new trial was not well taken. It is needless to cite authorities in support of this familiar rule.

Plaintiff's fourth request was as follows: "If you find from the evidence that the plaintiff entered into the contract with Layne & Krone to furnish the material sued for prior to a dissolution of such firm, but did not deliver the same until after a dissolution, both Layne & Krone, together with the sureties on their bond to the state, would be liable for any balance due plaintiff for such material." The doctrine enunciated in this instruction is clearly expressed in the fourth paragraph of the charge to the jury. It was not error to decline to repeat it. The request being properly denied for the reason stated, the assignment based upon the refusal of instructions must

be overruled without considering the other requests of which complaint is made.

Plaintiff introduced in evidence his itemized account of the stone furnished, and over his objection the jury were permitted to take the same to their room when considering of their verdict. Error is assigned upon this action of the court. We fail to comprehend how plaintiff could have been prejudiced by allowing the jury to inspect the account, since it was introduced by himself. True, it was made out against Layne alone, but if plaintiff had any explanation to make concerning that matter he should have done so in his testimony. This he did not do, and this circumstance may have militated against him with the jury. If so, he has no one but himself to blame therefor.

It is next argued that error was committed in permitting the witnesses Coldiron and Cain to give testimony to the effect that the dissolution of the partnership between Layne & Krone was a general subject of conversation in and about the building in question during its erection. To this argument there are two answers. In the first place, while objection was made by plaintiff to this class of testimony, one if not both of the witnesses named testified to the same fact without any objection whatever. Again, the purpose of this testimony was to show that Ellis had notice or knowledge of the dissolution. Whether such evidence was competent or not we shall not determine. It is enough to know that Ellis himself testified that he was cognizant of the report current on the streets that Layne & Krone had dissolved, and it is undisputed that Layne told him of the dissolution soon after it occurred. Plaintiff's assignor having had actual notice of

the dissolution, the testimony of the two persons mentioned, if erroneous, was error without prejudice.

It is finally urged that the trial judge committed an error in refusing to permit counsel for the plaintiff to make the closing address to the jury. It appears from the transcript of the journal entry of the case that after the evidence on both sides was adduced, counsel for the plaintiff waived the opening argument, and after the summing up by counsel for defendants was made defendants objected to plaintiff's counsel making the closing argument, which objection the judge sustained, and an exception was taken to the ruling. Section 283 of the Code of Civil Procedure specifies the order of proceedings in jury trials, which order must be followed unless the court otherwise directs. The sixth subdivision of this section reads thus: "Sixth—The parties may then submit or argue the case to the jury. In the argument, the party required first to produce his evidence shall have the opening and conclusion." Under this provision the party having the affirmative of the issue, or against whom judgment would have gone had no evidence been introduced, has the right to open and close the argument to the jury. (*Vifquain v. Finch*, 15 Neb., 505; *Rolfe v. Pilloud*, 16 Neb., 21; *Omaha & R. V. R. Co. v. Walker*, 17 Neb., 432; *Osborne v. Kline*, 18 Neb., 344; *Rea v. Bishop*, 41 Neb., 202.) Under the quoted statutory provision and the foregoing authorities, counsel for the plaintiff in the case at bar was entitled to make the opening and closing addresses to the jury had he so desired; but he expressly waived the opening. Did he thereby waive the right to close? We do not so under-

stand the rule and practice to be. Had counsel for defendants waived an argument, then the case would have gone to the jury without any argument whatever. Plaintiff took that chance when he waived his opening. The defendants not having waived argument on their part, the plaintiff has the right to close, notwithstanding he made no opening address. (*Trask v. People*, 151 Ill., 523.) But it is said if plaintiff had made the closing address, he could have replied alone to the argument of defendants' counsel, and as the record does not affirmatively show there was anything to reply to, therefore the ruling was without prejudice. Conceding it to be the rule, without deciding the point, that the closing must be confined to a strict reply to the argument on the other side, and that such matters rest largely in the discretion of the trial court, it does not follow that counsel for the plaintiff, to save his exception, was required to preserve the speech of his adversary in the bill of exceptions in order to make error affirmatively appear. If the verdict was the only one which could have been found under the evidence, then the denial of the right to close would have been without prejudice. In such case there would have been no abuse of discretion. In the case at bar the evidence was sharply conflicting upon the real litigated issue in the case, namely, whether the materials were furnished under a contract with Layne & Krone or to Layne alone upon his own responsibility. Therefore the right to make the closing argument upon the evidence was of no inconsiderable advantage. Had plaintiff's counsel been permitted to close the case, who knows but what his eloquence and logic may not have turned the scales? Much discretion

rests with the trial judge as to the scope of arguments of counsel, either as to time or relevancy, and such discretion will not be interfered with by a reviewing court except where an abuse is shown. Such discretion, however, cannot be extended to the denial of the right to make any argument to a jury where there is a conflict in the evidence or where different conclusions may be legitimately drawn from the facts proven. (*Houck v. Gue*, 30 Neb., 113; *Hettinger v. Beiler*, 54 Ill. App., 320; *Chicago, B. & Q. R. Co. v. Bryan*, 90 Ill., 126; *St. Louis & S. F. R. Co. v. Thomason*, 59 Ark., 140; *Huntington v. Conkey*, 33 Barb. [N. Y.], 218; *Harley v. Fitzgerald*, 84 Hun [N. Y.], 305.) The denial to plaintiff the right to make the closing argument is a fatal error, for which the judgment must be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

NORWEGIAN PLOW COMPANY, APPELLANT, V. REUBEN BOLLMAN ET AL., APPELLEES.

FILED FEBRUARY 18, 1896. No. 6034.

1. **Order by Consent:** REVIEW. A party cannot predicate error upon a ruling which he procured to be made.
2. **Transcripts:** REVIEW. The transcript of appeal is the exclusive evidence of the proceedings in the trial court.
3. **Injunction Enjoining Judgment:** FRAUD: LACHES. A court of equity will not enjoin a judgment at law upon the ground of fraud where it does not appear that such judgment is inequitable, or where it is disclosed that plaintiff has not exercised due diligence in the assertion of his rights.

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

H. C. Brome and *R. A. Jones*, for appellant.

D. A. Holmes, Reese & Gilkeson, and *Robertson & Wigton, contra.*

NORVAL, J.

This was a suit to enjoin the collection of a judgment of the district court of Madison county rendered in an action at law wherein Reuben Bollman was plaintiff and H. A. Pasewalk and others were defendants, which judgment was affirmed by this court at the January, 1890, term, the opinion being reported in 29 Neb., 519. The injunction case was dismissed and plaintiff appeals. The order of dismissal is as follows:

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"Now on this 17th day of December, 1892, this cause came on to be heard on the motion of the *plaintiff* for judgment of dismissal upon the issues presented by the pleadings herein filed, and the court being fully advised in the premises sustains said motion, and said cause is dismissed at plaintiff's costs, to all of which rulings and judgment of the court plaintiff at the time excepted," etc.

It will be observed from the foregoing that plaintiff has appealed from an order sustaining his own motion to dismiss the cause. He having expressly invited this decision to be made, if erroneous, it is his own error, and not the error of the court, and he is thereby precluded from assailing

the ruling. (*Omaha Fire Ins. Co. v. Maxwell*, 38 Neb., 358; *Weander v. Johnson*, 42 Neb., 117.) It may be said the journal entry is incorrect wherein it is stated that the motion to dismiss was made by the plaintiff; that in fact it was defendants' motion. There is nothing in the record to show that such a mistake was made. The motion is not included in the transcript, and the journal entry contains the written approval of the attorneys for the respective parties indorsed thereon, as well as being authenticated by the certificate of the clerk of the trial court. It is well settled that the transcript of appeal is the sole and exclusive evidence of the proceedings in the court below. (*Weander v. Johnson*, 42 Neb., 117; *Dryfus v. Moline, Milburn & Stoddard Co.*, 43 Neb., 233; *Davis v. Snyder*, 45 Neb., 415.) The same result is reached upon a ground less technical. Conceding that plaintiff did not ask the order of dismissal to be made, as counsel in their briefs assume to be the case, yet there must be an affirmance upon the merits, as we shall proceed to show. Before doing this a statement of the issues presented by the pleadings will be necessary to a proper understanding of the case, since the decision was predicated upon them alone.

The petition alleges, in substance, that the defendant Bollman was sheriff of Knox county, and Rothwell was his deputy. The other defendants, Tyrell and Losey, are, respectively, the clerk of the district court and sheriff of Madison county; that the plaintiff recovered certain judgments before a justice of the peace of Knox county against one Fred Fischer, and caused executions to be issued thereon, which were delivered to said Rothwell for collection; that on the same day

plaintiff caused to be executed and delivered to Rothwell an undertaking signed by H. A. Pasewalk, J. S. McClary, and A. P. Pilger, as sureties, for the purpose of indemnifying the sheriff on account of the levy of said executions upon certain goods and chattels, then in the possession of Fischer, but claimed by Deere, Wells & Co. and others. A copy of this bond, as set forth in the petition, is set out in the opinion in 29 Neb., 517, and need not be here given. The petition further avers that the deputy sheriff levied these executions upon, and sold, certain property then in the possession of Fischer, described in Exhibit A, attached to the petition, and applied the proceeds arising from such sale to the payment of plaintiff's judgments; that at the same time Bollman and Rothwell fraudulently and unlawfully, and for the purpose of cheating and defrauding plaintiff, and without his knowledge or consent, or that of the sureties upon the indemnifying bond, took into their possession and converted to their own use certain other property claimed by Deere, Wells & Co., described in Schedule B, attached to the petition, and that no accounting has ever been made to the plaintiff, or said sureties, for the property so taken and converted by said sheriff and his deputy. It is further alleged that subsequently Deere, Wells & Co. brought an action in the circuit court of the United States for the district of Nebraska against said Bollman and the sureties on his official bond, for the conversion of all the goods so taken by the officer, and recovered therein a judgment against the defendants for the sum of $3,416.65 damages and costs of suit for the goods taken at the request and appropriated to the use and benefit of the plaintiff herein, as well

as for the goods described in said Exhibit B; that subsequently Bollman instituted an action in the district court of Madison county against said McClary, Pilger, and Pasewalk, upon said indemnifying bond, for the purpose of compelling the plaintiff herein to pay for the property described in Exhibit B, and for and on account of the said judgment recovered by said Deere, Wells & Co.; that Bollman in his said action on said bond, for the purpose of cheating and defrauding the Norwegian Plow Company, unlawfully and fraudulently averred that the said judgment of Deere, Wells & Co. was recovered on account and for goods taken by Bollman upon said executions, although in fact said judgment was not obtained for such purpose, as Bollman well knew at the time of bringing his suit, but on account of and for the goods described in Exhibit B, as well as for the goods mentioned and set forth in Exhibit A. The petition further charges that Bollman prosecuted his said action to final judgment, recovering therein against Pilger, McClary, and Pasewalk for the sum of $3,797.87, for the value of the goods, including those converted by him; that the undertaking was for the use and benefit of plaintiff, and that the latter is liable to the sureties for any and all moneys they may be compelled to pay Bollman on account of the giving of said undertaking; that the judgment obtained by Bollman is in full force and unpaid; that plaintiff is now, and at all times has been, ready and willing to account to Bollman for all property taken upon said executions, and to indemnify and save him harmless for all costs and damages resulting from such seizure, and is ready and willing and offers to pay into court for his benefit all moneys

justly due Bollman on account thereof, together with all costs and expenditures incurred by him, which plaintiff ought equitably and fairly to pay on such account; that Bollman and Rothwell are insolvent; that the former has caused execution to be issued upon his judgment and placed the same in the hands of said defendant Losey as sheriff, who threatens to levy the same upon the property of Pilger, McClary, and Pasewalk. The petition contains other averments, which will be adverted to further on.

The defendants, for answer, admit that Tyrell is clerk of the district court and Losey is sheriff of Madison county; that Bollman was sheriff of Knox county and Rothwell was his deputy; admit the recovery of the judgments in the justice court by the Norwegian Plow Company, the levy of the execution by the deputy sheriff upon the goods in the possession of Fischer, the recovery of the judgment by Deere, Wells & Co. in the circuit court against Bollman, the institution of the suit by the latter, and the recovery of the judgment against the sureties on the bond, and deny all other averments of the petition. The defendants also allege that at the time the suit was commenced by Deere, Wells & Co. the plaintiff herein was notified thereof, and employed counsel to defend the same and had exclusive control of the defense therein; and that upon the institution of the said suit against the sureties the Norwegian Plow Company was notified of the fact, employed counsel to defend it, and had full control of the defense and paid all the expenses in connection with the defense of said action.

For reply plaintiff admits that it was advised of the fact of the commencement of the actions

referred to in the petition, denies all other allegations of the answer, and alleges that at the time of the commencement of the action in the circuit court, and at the time of the rendition of the judgment, plaintiff had no notice or knowledge that Bollman or his deputy had converted to their own use a large portion of the property for the value of which said suit was brought, and had no knowledge of such conversion until after the recovery of the judgment sought to be enjoined herein.

Judgment having gone against the plaintiff in the case at bar upon the pleading, in reviewing the decision of the trial court we must regard as true every fact well pleaded in the petition, and that every allegation of the answer, put in issue by the reply, should be taken as not true. In other words, if the facts set up in the petition, taken in connection with the admission of the plaintiff in the reply that it had notice at the time of the pendency of the action of Deere, Wells & Co. against Bollman and that of Bollman against the sureties on the indemnifying bond, were insufficient to entitle the plaintiff to enjoin the enforcement of the judgment in question, the order of dismissal was properly entered.

It is too well settled by the courts of this country to require the citation of authorities in support thereof that in a proper case equity will grant relief against a judgment fraudulently obtained, when a meritorious cause of action or defense is shown. An exception to this general rule is that a judgment at law obtained through the fraudulent conduct of the judgment creditor will not be enjoined where the defense could have been made at law. Stated differently, a court of equity will not interfere because of fraud alone,

but the person aggrieved must make it appear that a good reason existed why the defense was not interposed in the original suit. As stated by Mr. High in his valuable work on Injunctions: "Where defendant has allowed a suit to proceed to judgment without any attempt on his part to obtain proof, an injunction will not be allowed on the ground of fraud in the original transactions on which the suit was founded. So where the fraud relied upon might have been used as a defense to the action at law, but it does not appear whether it was so used, or whether defendant neglected to avail himself of it, the judgment will not be restrained." (1 High, Injunctions, sec. 194.) Applying the principles already stated to the case made by the pleadings, it is plain that plaintiff is not in a position to invoke the aid of equity to prevent the enforcement of the judgment obtained against the sureties upon the ground of fraud. The act of fraud imputed to Bollman and his deputy consisted in converting to their own use certain property of Deere, Wells & Co. at the time of the levying of the executions against Fischer and in suing for and recovering the value thereof against the sureties upon the indemnifying bond. It is true that both in the reply, and one place in the petition, it is stated that plaintiff had no knowledge of such conversion until after the rendition of the judgment in favor of Bollman and against the sureties; but such allegation is inconsistent with the following averment of the petition: "Plaintiff further alleges that prior to the bringing of said action against Pilger, McClary, and Pasewalk, and against this plaintiff, the Norwegian Plow Company offered to account to and pay said defend-

ant Bollman for all the property levied upon by him or by said defendant Rothwell on said judgment in favor of this plaintiff and against said Fischer, together with all damage, costs, or other expenditures occasioned or incurred by said Bollman or Rothwell, or either of them, on account of and for the seizure and sale of property claimed by Deere, Wells & Co. under and by virtue of said executions, and that said defendant Bollman, unlawfully and fraudulently, and for the purpose of cheating, wronging, and defrauding this plaintiff for property so taken and sold, then demanded that this plaintiff should account to and pay said defendant Bollman for the property taken by said defendants Bollman and Rothwell and converted by them to their own private use."

The foregoing quotation from the petition is an admission, it seems to us, that plaintiff, prior to the inception of the suit in which the judgment sought to be enjoined was pronounced, was fully cognizant of the alleged fraudulent conduct of Bollman and his deputy, of which complaint is now made. If that is not a fair inference to be drawn from said averment of the petition, we are at a loss to know why this plaintiff offered to pay merely for the property seized and sold under the executions, together with costs. He must have been apprised that property belonging to Deere, Wells & Co. other than that applied upon the executions had been taken by the sheriff, and for which the latter claimed compensation, since the petition avers that when the proposition of settlement was made by plaintiff, that Bollman "then demanded that this plaintiff should account to and pay said defendant Bollman for the property taken by said Bollman and Rothwell and con-

verted to their own use." The allegation of want of notice in the reply must be disregarded, as to the petition alone we must look for the statement of the facts constituting plaintiff's cause of action. Two allegations of the petition in regard to notice or knowledge of the alleged fraud being inconsistent with each other, we must regard as true and give effect to the one which is against the interest of the plaintiff. This is but an application of the rule that a pleading, when attacked by demurrer, and such is the nature of the motion to dismiss, is to be construed most strongly against the pleader. It does not appear that plaintiff exercised due diligence. Having notice of the alleged fraud, he should have urged that as a defense to the suit on the bond of indemnity. We know, although outside of the record before us, from the opinion in *Pascoalk v. Bollman*, 29 Neb., 522, which cannot properly be considered here, that the sureties in their answer interposed the defense that the judgment recovered by Deere, Wells & Co. "was for the conversion of goods by plaintiff and his agents other than the goods taken by Rothwell under said executions."

Moreover, the petition herein is defective for another reason. It contains no averment as to the value of the goods not levied upon by the sheriff which it is claimed he converted to his own use. The petition refers us to Exhibit B for the value of the property, but it is not there stated, except a trifling sum appears opposite a few of the articles alone. For all that this record shows, they may have been of little or no value. It does not appear that the judgment obtained by Bollman exceeded the value of the property sold and applied on the executions in favor of the Norwegian

Plow Company, including Bollman's damages and costs growing out of the transaction. For this reason there is no equity in the bill. (*Scofield v. State Nat. Bank of Lincoln*, 9 Neb., 316.)

AFFIRMED.

MARGARET A. ISSITT, FORMERLY MARGARET A. DEWEY, APPELLANT, V. WILLIAM L. DEWEY ET AL., APPELLEES.

FILED FEBRUARY 18, 1896. No. 5664.

1. **Deeds:** DELIVERY. Where a mother executes a deed to her son, and voluntarily places the same upon record for the purpose, and with the intent, of passing title to the grantee, actual manual delivery and formal acceptance are not essential to the validity of the conveyance.
2. **Action to Cancel Deed from Mother to Son:** CONSIDERATION: DECREE FOR DEFENDANT. Evidence *held* to support the findings and decree.

APPEAL from the district court of Gage county. Heard below before BUSH, J.

Hugh J. Dobbs, for appellant.

Griggs, Rinaker & Bibb, contra.

NORVAL, J.

This lawsuit is over a house and lot situate in the city of Beatrice, which plaintiff conveyed to her son, W. L. Dewey, one of the defendants, and which conveyance plaintiff seeks by this proceeding to have canceled and the title to the property quieted and confirmed in herself. The trial court,

by its decree, awarded the premises in dispute to the son, subject to a life estate which was given the plaintiff.

The undisputed evidence shows that on the 26th day of September, 1887, the plaintiff, by deed of general warranty, conveyed the property in litigation to defendant W. L. Dewey; that one of the purposes of the plaintiff in placing the title in the name of her son was to prevent her husband, who was living apart from her, from having any interest in the property in the event he should survive her. It is insisted that no consideration is shown for the deed. Mr. Dewey swears that he paid plaintiff $10 in cash, and agreed to pay future taxes and insurance on the property, which he has so far done; and further, that he has contributed money to plaintiff's maintenance and support. While plaintiff explicitly denies the cash payment of $10 and the agreement to pay future taxes and insurance, yet it cannot be said that there is an entire lack of proof to establish a good and valuable consideration for the conveyance. Whether it was adequate or commensurate to the value of the property is immaterial, as there is no charge or proof of fraud or undue influence in the case.

It is further argued that the deed was never formally delivered by the plaintiff to the grantee. Upon this branch of the case there is a conflict in the proof adduced on the trial. It is, however, established, without dispute, that plaintiff voluntarily filed the deed for record, for the purpose, and with the intent, of passing title to the grantee. Actual manual delivery and formal acceptance were therefore not necessary to make the conveyance effectual. (*Glaze v. Three Rivers Farmers Mutual Fire Ins. Co.*, 87 Mich., 349; *Cecil v.*

Beaver, 28 Ia., 246; *Palmer v. Palmer*, 62 Ia., 204; *Compton v. White*, 86 Mich., 33; *Bowman v. Griffith*, 35 Neb., 361.)

From a careful consideration of the evidence in the case, we are led to the conclusion that it is sufficient to sustain the decree, and that the *allegata et probata* agree.

AFFIRMED.

JOHN ROMBERG V. GERHARD FOKKEN.

FILED FEBRUARY 18, 1896. No. 5956.

1. **Bill of Exceptions:** AUTHENTICATION. A bill of exceptions in a cause tried in the district court must be authenticated by the certificate of the clerk of such court, to entitle it to be considered in the supreme court.
2. **Transcript:** MOTION FOR NEW TRIAL. A paper purporting to be a motion for a new trial cannot be considered, unless certified to in the transcript by the clerk of the district court.

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

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

T. M. Franse and *C. C. McNish*, *contra*.

NORVAL, J.

This is an action at law by a lessee against his lessor to recover damages for the failure of the defendant to put the plaintiff in possession of the leased premises according to the stipulations in

the lease. From a verdict and judgment against the defendant, he prosecutes error to this court.

A reversal is sought upon two grounds:

1. The verdict is contrary to, and is unsupported by, the evidence.

2. The court erred in the giving and refusing of certain instructions.

The assignment that the verdict of the jury is not sustained by sufficient evidence cannot be considered by this court, for the reason that the bill of exceptions purporting to contain the evidence adduced on the trial is not authenticated. That which purports to be a bill of exceptions, and which is attached to the transcript, does not appear to have been filed in the district court, nor has the clerk of that court certified that it is either the original bill of exceptions settled and allowed in the cause or a copy thereof, as required by law. The pretended bill, therefore, must be ignored, and cannot be considered for any purpose. (*Aultman v. Patterson*, 14 Neb., 57; *Hogan v. O'Niel*, 17 Neb., 641; *Flynn v. Jordan*, 17 Neb., 518.) But it may be said the omission of the clerk's certificate authenticating the bill must be deemed to have been waived by the parties, inasmuch as they have conceded the validity of the bill of exceptions by raising no objections thereto in this court. *Yates v. Kinney*, 23 Neb., 648, recognizes such rule, but we do not hesitate to say that it is unsound. In the exercise of its appellate jurisdiction, this court reviews the proceedings of the district court, and our only means of ascertaining what proceedings were had and taken in the trial court in any case, or what pleadings were filed therein, is the transcript of the record of that court, duly authenticated by the proper officer.

If the parties may waive the certificate of the clerk of the district court to the original bill of exceptions, then there is no reason why they may not likewise waive the authentication of the transcript of the final judgment or order sought to be reviewed and the pleadings in the case. The statute requires both the transcript and the bill of exceptions to be authenticated by the certificate of the clerk of the district court, and we have no right to ignore or disregard its mandatory provisions. (*Moore v. Waterman*, 40 Neb., 498; *Otis v. Butters*, 46 Neb., 492; *Martin v. Fillmore County*, 44 Neb., 719; *Yenney v. Central City Bank*, 44 Neb., 402.)

There is another reason why this evidence cannot be considered. It has been frequently asserted by this court that the sufficiency of the evidence to support the verdict, as well as errors in the giving and refusing of instructions, must be called to the attention of the trial court by a motion for a new trial. The record shows that a motion for a new trial was overruled by the court below, and while a paper purporting to be such a motion is contained in the transcript, it lacks authenticity. Attached to the transcript is the following certificate:

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

"I, Emil Heller, clerk of the district court of Cuming county, do hereby certify that the foregoing is a true transcript of the petition, answer, instructions, and journal entries as the same are of record and on file in my said office.

"Witness my hand and the seal of said district court, this 2d day of April, A. D. 1892.

"EMIL HELLER,
"Clerk of the District Court."

It will be observed that the certificate makes no reference to the motion for the new trial, but particularly enumerates which papers contained in the transcript are certified to be true copies of the originals on file. In this condition of the record, we are unable to say that the alleged motion for a new trial included in the transcript is a copy of the one passed upon by the district court, therefore it cannot be considered by us. (*Haggerty v. Walker*, 21 Neb., 596; *Chamberlain v. Brown*, 25 Neb., 434; *Burlingim v. Baders*, 47 Neb., 204.) It follows that neither the instructions nor the evidence can be reviewed. No question which has been argued in the brief is presented by the record. The judgment is

AFFIRMED.

JOHN ROMBERG V. RUDOLPH HEDIGER.

FILED FEBRUARY 18, 1896. No. 5955.

1. **Failure to Authenticate Bill of Exceptions:** REVIEW. In the absence of a certificate of the clerk of the district court authenticating the bill of exceptions, it will be presumed that every essential averment in the petition not negatived by the verdict was proven, and that the instructions refused were properly denied.
2. **Instructions:** EXCEPTIONS: REVIEW. Instructions not excepted to when given cannot be reviewed in the appellate court.
3. **Review:** ASSIGNMENTS OF ERROR. The fifth paragraph of the court's charge to the jury not considered, because the giving was not properly assigned for error in either the motion for a new trial or petition in error.

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

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

Uriah Bruner and *T. M. Franse, contra.*

NORVAL, J.

Rudolph Hediger sued John Romberg in the court below to recover damages alleged to have been sustained by reason of his having been ejected from a certain farm in Cuming county at the instance of the defendant under a writ of restitution on a judgment in an action of forcible detainer, wherein Romberg was plaintiff and Hediger was defendant, after an appeal undertaking had been filed by said Hediger, and after the justice before whom said cause was tried had recalled said writ of restitution. To the petition in the case before us the defendant answered, admitting certain averments therein, and denying others. Upon the trial, plaintiff recovered judgment, and the defendant brings the cause to this court on error.

It is argued that there is an entire failure of proof to sustain the allegation in the petition that the defendant leased to the plaintiff the premises from which he was evicted. Whether this is true or not we are unable to determine, since there is no certificate of the district court authenticating the bill of exceptions. (*Romberg v. Fokken*, 47 Neb., 198.)

Complaint is made in the brief of the refusal of the court to give the following instructions, requested by the plaintiff in error:

"2. You are instructed that the plaintiff has not shown any right of property, or right of posses-

sion, in the premises described in the petition, and you will therefore find for the defendant."

"4. You are instructed that the plaintiff has not shown that he had leased the premises for the year commencing March 1, 1890, nor that he had paid anything for the use of said premises, hence he cannot recover the value of the use of said premises.

"5. Under the evidence and the law in this case, the plaintiff is not entitled to recover more than nominal damages."

These requests to charge can only be considered in connection with the evidence adduced on the trial. The testimony not being properly before us, we are unable to determine whether the trial court erred in refusing to give the above instructions. (*Willis v. State*, 27 Neb., 98.) Error must affirmatively appear. It is never presumed. We must indulge the presumption that there was evidence before the jury which made the defendant's instructions inapplicable.

Objection is made in the brief to the fifth paragraph of the court's charge to the jury, on the ground that it incorrectly states the measure of damages. The assignment relating thereto in the petition in error and in the motion for a new trial is in the following language: "The court erred in giving the first, second, third, fourth, fifth, sixth, and seventh instructions given by the court on its own motion." The first two instructions given, briefly, yet accurately, state the issue in the case. They are free from errors. The fourth instruction correctly stated the rule as to the burden of proof, and counsel has not suggested that it is erroneous. No exceptions were taken in the court below to the giving of the sixth and seventh instructions,

hence they are not reviewable. The assignment of error above quoted not being well taken as to all the instructions mentioned therein, it, under the familiar rule, must be overruled without considering the instruction of which complaint is specifically made in the brief. It is true there is another assignment in the motion for a new trial and petition in error based upon the fifth instruction, but it presents alone the question of its intelligibility. The language in which the instruction is couched is plain and its meaning easily comprehended. If the learned counsel for plaintiff in error regarded the instruction unintelligible, they have been very remiss in not pointing out to us wherein it is so.

The conclusions reached lead to an affirmance of the judgment.

AFFIRMED.

S. C. BURLINGIM V. WILLIAM BADERS.

FILED FEBRUARY 18, 1896. NO. 5751.

Transcripts: AUTHENTICATION: INSTRUCTIONS. Where there is no error sufficiently assigned in the petition in error to challenge the attention of the supreme court, except such as are claimed to have arisen upon the alleged giving or refusal to give instructions, an entire failure to authenticate these alleged instructions precludes the consideration of assignments of error with respect thereto.

REHEARING of case reported in 45 Neb., 673.

Ed P. Smith, M. B. Reese, and *E. C. Biggs,* for plaintiff in error.

Norval Bros. & Lowley, contra.

RYAN, C.

There is contained a clear statement of the issues and facts herein involved in a former opinion in this case, reported in 45 Neb. on page 673 *et seq.* After the above opinion had been filed there was granted a rehearing, upon which the errors alleged to have occurred have again been argued and submitted for consideration.

The assignments in the petition in error, that "the court erred in admitting evidence over the objection of the plaintiff in error," and that "there was error in excluding evidence offered by the plaintiff in error, to which ruling exception was duly taken," are too indefinite to receive attention. This is also true of the assignment that the court erred in overruling the motion for a new trial. There was sufficient evidence to sustain the verdict of the jury, and, as no good purpose could be subserved by rehearsing it, the general conclusion stated must answer every purpose.

No question aside from the above is presented by this petition in error, except such as are urged with reference to the alleged giving or refusal to give instructions. The authentication which follows the record is as follows: "I, George A. Merriam, clerk of the district court in and for said county, do hereby certify that the above and foregoing contains and is a true and perfect copy of all the pleadings on file and used in said entitled cause, and also, of all of the orders of the court entered of record in said case, as the same appears of record and on file in the clerk's office of said court, and that the attached bill of exceptions is the original bill of exceptions as settled in the

case. In witness whereof," etc. In this certificate there is no reference to instructions either given or refused, and the assignments pertaining to instructions of either class must therefore be ignored.

The judgment of the district court is

AFFIRMED

CAROLINE A. ESTABROOK, EXECUTRIX, APPELLEE, V. SAMUEL G. STEVENSON ET AL., APPELLANTS.

FILED FEBRUARY 18, 1896. No. 6139.

Landlord and Tenant: TERMINATION OF LEASE ON PAYMENT FOR IMPROVEMENTS: ARBITRATION. In a lease for the term of ten years it was provided that the lessor might terminate the lease at the end of five years by giving sixty days' notice and paying the lessee the value of such improvements as, meantime, such lessee should have placed upon the premises. Before the lessor had the right to give the required notice the lessee assigned his interest in the lease to another party, who in turn made still another assignment of such interest. *Held*, That, upon giving notice as required, the lessor was not bound to pay to the lessee the value of the aforesaid improvements as an indispensable condition precedent to his right to terminate the lease, but that, having tendered in a court of equity payment for the improvements to whomsoever should be found entitled thereto in such amount as upon an accounting should be found due, the court had jurisdiction to declare the lease to have been terminated at the end of five years of its existence and grant full relief between the parties litigant.

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

The facts are stated by the commissioner.

Arthur C. Wakeley, for appellants:

Payment of the sum awarded was a condition precedent to the termination of the lease. (*People's Bank v. Mitchell*, 73 N. Y., 406; *Clemens v. Murphy*, 40 Mo., 122; *Friar v. Grey*, 5 Exch. [Eng.], 584; *Cadby v. Martinez*, 11 Ad. & E. [Eng.], 720; *Pomroy v. Gold*, 43 Mass., 500; *McFadden v. McCann*, 25 Ia., 252; *Goodwin v. Lynn*, 4 Wash. C. C. [U. S.], 714; *Wells v. Smith*, 2 Edw. Ch. [N. Y.], 78; *Porter v. Shephard*, 6 T. R. [Eng.], 665; *Kerr v. Purdy*, 51 N. Y., 629; *Jones v. Barkley*, 2 Doug. [Eng.], 690; *Parmalee v. Oswego & S. R. Co.*, 6 N. Y., 79; *Commonwealth v. Pejepscut Proprietors*, 7 Mass., 399; *Dwiggins v. Shaw*, 6 Ired. Law [N. Car.], 46; *Mecum v. Peoria & O. R. Co.*, 21 Ill., 534.)

Impossibility of performance will not relieve from the consequence of a condition precedent unperformed. (3 Am. & Eng. Ency. of Law, 901; *School Trustees v. Bennett*, 27 N. J. Law, 513; *Jones v. United States*, 96 U. S., 29; *The Harriman*, 76 U. S., 172; *Dermott v. Jones*, 2 Wall. [U. S.], 1; *Booth v. Spuyten Duyvil Rolling Mill Co.*, 60 N. Y., 487; *Youqua v. Nixon*, 1 Pet. [U. S. C. C.], 221; *Mill Dam Foundry v. Hovey*, 38 Mass., 441; *Ford v. Cotesworth*, 4 L. R., Q. B. [Eng.], 134; *Bunn v. Prather*, 21 Ill., 217; *Williams v. Vanderbilt*, 28 N. Y., 222; *White v. Mann*, 26 Me., 368.)

The award was valid, and upon Estabrook's refusal to pay, his right to terminate the lease was at an end. (*Pearson v. Sanderson*, 128 Ill., 88; *Norton v. Gale*, 95 Ill., 533; *Straw v. Truesdale*, 59 N. H., 111; *Garr v. Gomez*, 9 Wend. [N. Y.], 661; *Garred v. Macey*, 10 Mo., 161; *Curry v. Lackey*, 35 Mo., 389; *Leeds v. Burrows*, 12 East [Eng.], 1; *Elmendorf v. Harris*, 5 Wend. [N. Y.], 516.)

Estabrook & Davis, contra:

The award was invalid, and upon the arbitrators' refusal to further act, Estabrook's only recourse was to the courts. (*State v. Jackson*, 36 O. St., 283; *Smith v. Boston C. & M. R. Co.*, 36 N. H., 458; *Peters v. Newkirk*, 6 Cow. [N. Y.], 103; *Falconer v. Montgomery*, 4 Dall. [Pa.], 232; *Passmore v. Pettit*, 4 Dall. [Pa.], 271; *Chambers v. Crook*, 94 Am. Dec. [Ala.], 638; *Emery v. Owings*, 48 Am. Dec. [Md.], 580; *Curtis v. City of Sacramento*, 64 Cal., 102; *Elmendorf v. Harris*, 23 Wend. [N. Y.], 628; *Caldwell v. Dickinson*, 13 Gray [Mass.], 365.)

Reference was also made to the following cases: *Reformed Protestant Dutch Church v. Parkhurst*, 4 Bosw. [N. Y.], 491; *Copper v. Wells*, 1 N. J. Eq., 10; *Berry v. Van Winkle*, 2 N. J. Eq., 269; *Conner v. Jones*, 28 Cal., 59; *Frey v. Campbell*, 3 S. W. Rep. [Ky.], 368; *Montgomery v. Chadwick*, 7 Ia., 114.

RYAN, C.

On May 1, 1884, Experience Estabrook entered into a written contract with Samuel G. Stevenson, by the terms of which Mr. Estabrook leased to Mr. Stevenson the south forty-four feet of lot 1, in block 43, in the city of Omaha, for the term of ten years. Immediately following the description of the term "ten years" there was this language: "Provided that said Estabrook shall have the privilege of terminating said lease at the end of five (5) years by giving sixty (60) days' notice in writing to said Stevenson of his intention so to do, and by paying said Stevenson the value of his improvements, to be determined by arbitrators, one to be chosen by each of the parties hereto, and they to choose a third in the event of disagree-

ment." On January 30, 1889, Mr. Estabrook caused to be served upon Samuel G. Stevenson the following notice:

"*To Samuel G. Stevenson Omaha, Neb.*—SIR: In pursuance of the terms of your lease made the 1st day of May, 1884, I hereby notify you of my election to declare said lease at an end on the 1st day of May, A. D. 1889, and that I will pay you at that time the value of your improvements, such value to be determined by arbitration as provided in said lease. I hereby nominate as the arbitrator to act in my behalf Mr. James H. Baldwin, of Omaha, who will be ready to meet and arrange with such arbitrator as you may select at such time and place as you may indicate, and who will be present on the ground on said 1st day of May, 1889. You are further notified that the ground covered by said lease, and to which this notice applies, is south forty-four (44) feet of lot one (1), block forty-three (43), in said city of Omaha, Douglas county, Nebraska.

"Dated at Omaha, Neb., January 30, 1889.

"E. ESTABROOK."

Before May 1, 1889, Samuel G. Stevenson selected an arbitrator, one John H. Harte, who, with James H. Baldwin, above named by Mr. Estabrook, on the date therein indicated drew up and signed the following document:

"MAY 1, 1889.

"*Messrs. E. Estabrook and S. G. Stevenson, City:* We, James H. Baldwin and John H. Harte, have examined buildings Nos. 414 and 416 North 16th street, city of Omaha, and appraise them at thirty-one hundred and 00-100 dollars ($3,100.00).

"JAMES H. BALDWIN.

"JAMES H. HARTE."

Mr. Baldwin on the day following met Mr. Estabrook, who had meantime heard of the amount agreed upon, and, by the manifested dissatisfaction with the amount fixed, was prevented from giving him a copy of the above award. On the 26th day of September, 1885, Samuel G. and his wife, Mary E. Stevenson, signed, acknowledged, and delivered to Louis Bradford a written assignment of the above mentioned lease. This assignment was filed for record in the office of the county clerk of Douglas county October 1, 1885, and was recorded in book 61 of deeds. On July 8, 1886, Louis Bradford, by an indorsement upon the written assignment to himself, transferred and assigned to Mary E. Stevenson, and at the same time executed to her an unacknowledged quit-claim conveyance of his interest in the parcel of land described in the lease. Neither of these was recorded, and it was shown by the testimony of Samuel G. Stevenson that he never informed Mr. Estabrook that such transfers had been made. At the time the award was made in favor of Samuel G. Stevenson he had, therefore, no beneficial interest whatever in the lease to which, originally, he had been a party. If Mr. Estabrook had paid to Mr. Stevenson the amount of the award made in his favor, of $3,100, he could have protected himself against being compelled to pay Mrs. Stevenson only by proving that in some way she was represented by her husband in receiving the payment which he did receive, or by showing that he was entitled to credit against her by reason of the want of notice of her interest as assignee of the lease. This Mr. Stevenson, after he had parted with all his rights in the lease, was certainly not in a position to insist upon. On the 9th day of

May, 1889, Experience Estabrook filed in the office of the clerk of the district court of Douglas county his petition, wherein Samuel G. Stevenson and Mary Stevenson were named as defendants. In this petition he copied the aforesaid lease and the notice to terminate the same, and having set out the award and alleged its invalidity for want of precedent notice, he alleged that Samuel G. Stevenson was not the owner of this lease and that he had been unable to discover who was its owner. In this connection the plaintiff alleged that he had always been willing to pay for the improvements the actual value thereof to whomsoever was entitled to receive such payment, and offered to give such bond as the court should require for the payment of any amount found due upon an investigation had between himself and such party as was the holder of the lease in question.

It is insisted by appellants that by the terms of the lease not only was there sixty days' notice required, but there should have been payment of the award of $3,100 to Samuel G. Stevenson to terminate the lease according to its terms. It is true that the condition precedent seems to have been nominated in the lease, but the manifest injustice of requiring payment to be made to one who, by his own assignment, had constituted himself a stranger to the lease, requires no argument to demonstrate. Samuel G. Stevenson has no right to complain of non-payment to himself under these circumstances, and it requires no Portia's specially borrowed learning to point out that the technical construction which requires payment to Samuel G. Stevenson forbids that this condition for a forfeiture should be extended to any one else. The lease itself, while it provided that pay-

ment for the improvements should be made to S. G. Stevenson, recited that its covenants and agreements should be succeeded to, and be binding upon, the respective heirs, executor, administrators, and assigns of the parties thereto. There was, therefore, open to Mr. Estabrook but one safe course, and that was to implead as defendants in a court of equity such parties as he knew claimed an interest in the lease, and having tendered the performance of his part of the contract in favor of whomsoever was thereto entitled, pray that the lease should be adjudged to have been terminated by his performance of all that it was possible to him to perform. The jurisdiction of a court of equity having been invoked, such a court properly proceeded to the enforcement of complete justice between all parties concerned with respect to the subject-matter involved upon issues duly joined and presented for determination. As was to be expected in making an accounting, on the one hand as to the value of improvements, and on the other as to the liabilities for rents of the premises involved in this litigation, the witnesses differed greatly, but they came as near agreeing in their estimates as witnesses ordinarily do under like circumstances. The court very properly treated the lease as having been terminated on May 1, 1889, and, upon conflicting evidence, made an accounting of the liabilities of each of the litigants which seems to us to have been fully warranted by the evidence, which we need not review. The judgment of the district court is

AFFIRMED.

IRVINE, C., not sitting.

LUCINDA MONELL, APPELLEE, V. H. B. IREY, COUNTY TREASURER, ET AL., APPELLANTS.

FILED FEBRUARY 18, 1896. No. 6074.

Tax Deeds: INJUNCTION TO RESTRAIN ISSUANCE: EVIDENCE. Where the plaintiff's right to have enjoined the issuance of a treasurer's deed depends upon his affirmatively showing that the sale, pursuant to which such deed is to be issued, was made in violation of an injunction prohibiting it, there must, to entitle to the relief prayed, be evidence of the very essential fact that at the time of the tax sale such decree was in existence.

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

Balliet & Points, for appellants.

Lake, Hamilton & Maxwell, contra.

RYAN, C.

Lucinda Monell, the appellee, brought this action in the district court of Douglas county July 13, 1892, alleging in her petition that she had been the owner of lot 6, block 106, of the city of Omaha for ten years before the commencement of this action, and by virtue of her continued ownership she prayed the relief which afterwards was granted. As her grounds for this relief she alleged that on July 16, 1890, Adam Snyder, the then treasurer of Douglas county, had offered the said lot for sale and had made a pretended sale thereof to the defendants Grant & Grant for an alleged unpaid and special assessment levied and assessed against the said premises by the said city of Omaha in the year 1879 for curbing and gutter-

ing Douglas street, in the said city, and had delivered to said Grants a certificate of sale therefor, and that thereupon the said Grants on the same day had paid to the said county treasurer purported county taxes assessed against said premises unpaid and delinquent for the years 1866 and 1867, and on the 22d of July, 1890, had paid to said county treasurer a purported city tax assessed against said premises unpaid and delinquent for the year 1864. It was further alleged in the petition that at the time the aforesaid paving and guttering tax was levied and assessed in 1879, Gilbert C. Monell was the owner of the aforesaid lot, and that about May 20, 1881, said Gilbert C. Monell brought his action in the district court of Douglas county against W. F. Heins, treasurer of said county, to procure the said paving and guttering tax to be decreed void and to have the collection and enforcement of the same perpetually enjoined, and that in February, 1886, this relief was granted, from which it resulted that a tax sale to Grant & Grant was utterly void and vested said Grants with no title, claim, lien, or interest in said lot 6, block 106, of the city of Omaha. To defeat the right of Grant & Grant to be subrogated to the rights of the county with respect to taxes by them paid after their purchase of said lot, it was alleged that when these taxes were assessed the lot was the property of the Second Presbyterian Church of the city of Omaha and was then used for church purposes. The prayer of the petition in the case now under consideration was that the county treasurer of Douglas county be enjoined from issuing a tax deed to Grant & Grant upon their certificate of purchase, and that the cloud thereby and by the subse-

quently paid taxes be removed, and for general equitable relief. The defendants admitted in their answer that the county treasurer had been correctly named in the petition; that the lot in question had been sold to Grant & Grant; that said firm of Grant & Grant had paid taxes, as in the petition had been alleged, and that notice of the application for the treasurer's deed on said purchase had been given as plaintiff in her petition had alleged. There was in effect a denial of the allegations of the petition not above admitted.

In the decree from which this appeal has been prosecuted there was the following language: "It being unnecessary, in the court's opinion, to a proper decision of the case, no finding is made on the question as to said premises being church property and exempt from taxation during the years 1864, 1866, and 1867, and the court does not determine the same." In respect to appellants' rights as to all the taxes outside the paving and guttering tax we shall follow the line pursued by the district court, and shall consider the case as though the only rights involved were such as depend directly upon the paving and guttering tax.

In the course of the trial in the district court there was by the appellants offered in evidence the county treasurer's certificate showing the sale of the aforesaid lot on July 16, 1890, to Grant & Grant, for $422.51, the amount of a paving and guttering tax. By the appellee there was offered in evidence the following record:

"GILBERT C. MONELL
v. } Decree.
WILLIAM F. HEINS ET AL.

"Now come the parties herein by their attor-

neys, and thereupon this cause came on for hearing on the pleadings and evidence and was submitted to the court, on consideration whereof, and all parties consenting thereto, the court do find on the issue joined for the plaintiff and that the plaintiff is entitled to the relief prayed for. It is therefore considered and decreed that the defendants be, and they hereby are, perpetually and forever enjoined from, in any manner, collecting the curb and gutter tax levied on lot 6, block 106, in the city of Omaha, Douglas County, Nebraska. It is further considered that the plaintiff recover from the defendant his costs herein expended, taxed at $——."

There is neither in this decree, nor in any evidence offered in connection with it, any indication of its date. As this action, upon the theory of the appellee, was only maintainable upon the theory that the enforcement of the paving and guttering tax having been enjoined, the said tax no more justified a sale of the lot than though such paving and guttering tax had never existed, it devolved upon the party relying upon the decree to show that the sale called in question had been made, notwithstanding the fact that this decree was then in existence. No presumption of the performance by the county treasurer of his duty can aid us in this matter, for the presumption that he would not have made a sale in violation of the decree is as strong as any other that can be invoked. It may be, as alleged in the petition, that this decree was entered on May, 1886, but this, with other averments, was put in issue by the answer, and, as has already been stated, there was no showing by proofs what in fact was the date of this decree. There was in evidence, as we have

seen, a certificate showing the sale for the satisfaction of this paving and guttering tax, and this was not met by proof that at the time of this sale there was in existence a decree that forbade it, and against its validity no other defense has been pleaded. The judgment of the district court is therefore

REVERSED.

IRVINE, C., not sitting.

COMMERCIAL NATIONAL BANK OF OMAHA, APPELLANT, V. MERCHANTS EXCHANGE NATIONAL BANK OF NEW YORK ET AL., APPELLEES.

FILED FEBRUARY 18, 1896. NO. 5251.

Estoppel: CHATTEL MORTGAGES: DISTRIBUTION OF PROCEEDS OF SALE: STIPULATIONS. In an action begun to subject goods and the proceeds of sales of goods in the hands of an agent of defendants to the payment of a claim held by the plaintiff against the common debtor of both the plaintiff and the defendants, the plaintiff is *held* not to have disclosed a right superior to that of the defendants by merely showing that the goods and proceeds sought to be reached had originally been taken possession of by an agent of defendants by virtue of defective mortgages, especially in view of the fact that there was subsequent to such possession taken an agreement made by the parties that the action should proceed to judgment according to the rights of each after the proceeds of the sales of the goods had been remitted to defendants, which remittance had accordingly been made, there being no evidence of fraud practiced or participated in by the defendants, against whom judgment is sought for the amount of such proceeds.

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

Montgomery, Charlton & Hall, for appellant.

Hall, McCulloch & English, contra.

RYAN, C.

On the 24th of November, 1888, the Commercial National Bank of Omaha filed its petition in this case in the office of the clerk of the district court of Douglas county. The defendants named were the New York & Omaha Clothing Company, the Merchants Exchange National Bank of New York City, the Western National Bank of New York City, M. J. Newman, Richard S. Hall, and James H. McCulloch. The New York & Omaha Clothing Company was described as a Nebraska corporation, and the two New York banks as corporations doing business under the national banking laws in the state of New York. It was averred in this petition that the New York & Omaha Clothing Company had become the debtor of the plaintiff in a large sum, of which over $5,000 still remained unpaid, and that the defendants R. S. Hall and James H. McCulloch, as a partnership firm of attorneys at law in Omaha, had taken and still retained possession of and were selling all the goods of the clothing company by virtue of its two pretended mortgages to the national banks named, each of which mortgages was to secure payment of over $20,000. It was also alleged that the clothing company was insolvent.

It was averred by the plaintiff that the aforesaid mortgages had not been executed in such a manner as to create a mortgage lien upon the goods of the clothing company. In the view which we take of this case this contention need

not be considered, for it appears from the averments of the petition, admitted by the answers of all the defendants, that the firm of Hall & McCulloch, as the agent of the two national banks named as defendants, before the petition was filed, had taken possession of the goods sought to be reached, and, from the evidence adduced, that this possession has never been interrupted. As plaintiff sought to assert a right superior to that implied from the possession of the agent of the New York banks, it is necessary to examine carefully plaintiff's description of the origin of this alleged paramount right and to consider whether such right is enforceable under the facts disclosed by the proofs. It must be conceded that the conduct of the clothing company's managers was unfair toward the plaintiff, in leaving it entirely unsecured as it did, and it was quite satisfactorily shown that the credit, upon the faith of which this unsecured debt was created, was procured by false representations. Our concern, however, is with plaintiff on the one hand and the two national banks of New York City on the other.

Plaintiff, to show its right to be paid out of the mortgaged stock of goods in possession of Hall & McCulloch, averred in the petition that about July 3, 1888, plaintiff commenced an action in the district court of Douglas county against the Omaha & New York Clothing Company for the recovery of the amount of the aforesaid indebtedness due from the latter to the former; that in said action an order of attachment was issued and delivered to the sheriff of Douglas county, and together therewith there was likewise issued and delivered a notice in garnishment, which notice was duly served upon the New York banks as garnishees,

such service being accepted by Hall & McCulloch, as attorneys for the aforesaid garnishees, and that such garnishees had never answered as such. About October 27, 1888, it was alleged in the petition, plaintiff recovered judgment in the action just described for the sum of $5,454.22; that in due time an execution was issued for the collection of said judgment and was returned unsatisfied for want of goods and chattels of the clothing company whereon to levy. It was averred by plaintiff that at the time its petition was filed in the case at bar there remained in the possession of Hall & McCulloch goods of the clothing company of the value of $10,000. The prayer of the plaintiff's petition was that there might be issued an injunction to prevent the turning over to the New York banks of the proceeds of sales which had already been made; that Hall & McCulloch might be required to account for the proceeds of such sales and for the goods still in their possession, and for the proceeds of such sales as the said firm might afterwards make; that a receiver might be appointed to take possession of and sell the goods not yet sold and apply the proceeds as the court should direct; that the mortgages to the New York banks should be decreed fraudulent, illegal, and void, and that plaintiff be adjudged to be entitled to be paid out of proceeds of sales of the clothing company's goods. There was duly allowed an injunction, and a bond accordingly was executed and approved. On the 8th day of July, 1889, the firm of Hall & McCulloch filed a motion to dissolve this temporary injunction, accompanied by answers of all the defendants in denial of the material averments by which it had been sought to impeach the validity and good faith of

the mortgages made to the New York banks. Under date of February 27, 1891, the following journal entry appears in this case: "Pursuant to stipulation herein made in open court by the parties hereto, this action is hereby dismissed as to the defendants Hall & McCulloch, and it is ordered that the injunction heretofore granted herein be, and the same is hereby, dissolved, this dissolution to be and have effect as of August 10, A. D. 1890." The above entry in the journal was probably based upon the following quotation from the bill of exceptions evidencing a stipulation with which the trial of this cause began on February 26, 1891: "Pursuant to a verbal agreement made between the plaintiff and the defendants Hall & McCulloch, the Western National Bank, and the Merchants Exchange National Bank, both of New York City, New York, before the answers of the said last named banks were filed, and in view of which they were filed, it is hereby agreed that the injunction heretofore granted be dissolved, and the defendants waive damages on account thereof, and the costs to follow the result of this case on its merits. And the defendants Hall & McCulloch, pursuant to said verbal agreement, having sold such of the property mentioned in the petition as was in their possession at the time of the commencement of this action, and having remitted the proceeds of such sales to the said above named New York banks, upon the agreement that the said New York banks would personally appear and file answers in this case, in which event the said case was to be dismissed as to defendants Hall & McCulloch, and in consideration of which, also, it was agreed that the controversy

should be proceeded with as against the said New York banks, and any judgment which might be rendered be rendered against said banks, provided, on hearing, the plaintiff is entitled to judgment, it is hereby agreed and stipulated that the said action be, and hereby is, dismissed as against Hall & McCulloch. The above stipulation is entered into in open court." There was upon this trial a judgment in favor of the defendants, from which plaintiff appeals.

There was no evidence introduced which tended to show that there was due either of the New York banks less than the amount claimed to be owing each of them, neither was there any attempt to show any unfair means resorted to by these banks either for the purpose of obtaining security for, or payment of, the debt due to each of them. It may be conceded that the mortgages were not executed under a power conferred by the board of directors of the clothing company, as required by its articles of incorporation, and yet, with the assent of the officers of the clothing company, the New York banks, by the firm of Hall & McCulloch, took possession and were selling the goods to pay the debts due them. While Hall & McCulloch were in possession they acknowledged service of a garnishment notice upon the New York banks, their principal, but nothing further was done to render effective this garnishment. In the judgment taken upon the claim of the Commercial National Bank of Omaha against the New York & Omaha Clothing Company there was no mention of the garnishment which had been had of the New York banks. For the collection of this judgment there was issued an ordinary execution, which was returned unsatisfied for want of goods whereon to

levy. In the case at bar there was obtained a preliminary injunction to restrain Hall & McCulloch from paying over to the New York banks the proceeds of sales of goods already, or thereafter to be, made. There was in the petition upon which this injunction was obtained a prayer that Hall & McCulloch be required to account for the proceeds of such sales and that plaintiff be decreed entitled to receive the same. In the oral argument of this case counsel for appellant suggested that instead of pressing the injunction proceeding and that for the appointment of a receiver it was deemed advisable to permit the firm of Hall & McCulloch to proceed to sell, and look to them, rather than to a receiver, for the proceeds of the sales of goods, and that it was upon this theory that the verbal agreement referred to in the stipulation at the opening of the trial had been made. In the stipulation just referred to there was an admission that pursuant to the aforesaid verbal agreement Hall & McCulloch had sold such of the goods as were in their possession when this action was begun, and had remitted the proceeds of such sales to the New York banks upon the agreement that said banks would appear and file their answers in this case, and that upon such answers being filed there should be a dismissal as to Hall & McCulloch and the controversy should be proceeded with as against the banks and a judgment be rendered against said banks if, upon a hearing, plaintiff should be entitled to the judgment.

In view of this stipulation, in which is recited certain acts done pursuant to verbal agreements between the parties, it is quite difficult to determine whether, in advance, it had been orally agreed that Hall and McCulloch might make sales and remittances or not. In any event, appellant

relies upon this verbal agreement to entitle it to proceed against the New York banks in this action. Whether or not the mortgages to the New York banks were authorized by the board of directors, as required by the articles of incorporation of the New York & Omaha Clothing Company, became immaterial when the plaintiff consented that Hall & McCulloch should sell the goods in their possession and remit the proceeds to their principals. Thenceforward there could be no question made by plaintiff as to the means by which the New York banks had become possessed of the goods of the clothing company, but plaintiff was limited to the question whether or not plaintiff was entitled to recover such proceeds from said banks. If, before this agreement, the garnishment proceedings had not been abandoned, there was by the agreement a complete abandonment of rights predicated upon the garnishment. It admits of grave doubt whether the Commercial National Bank of Omaha, as plaintiff, could recover judgment against the New York banks, as defendants, merely because these latter two banks have been more diligent or more fortunate than plaintiff in making collections from a common debtor, and this, as we understand it, is the sole matter now in controversy in this case. In any event appellant could claim no more than that the banks of another state should be held accountable because of fraud by which had been obtained the advantage which they possess. A careful examination of the evidence convinces us that there was shown nothing in the conduct of the New York banks or their agents which justifies or even tends to justify such an imputation of fraud. The judgment of the district court is

AFFIRMED.

JOHN A. WAKEFIELD V. PETER CONNOR ET AL., IMPLEADED WITH LOUIS SCHROEDER, APPELLANT, AND BATES, SMITH & CO., APPELLEE.

FILED FEBRUARY 18, 1896. No. 6077.

Review: CONFLICTING EVIDENCE: MECHANICS' LIENS. There is presented in this case only a question of fact which the district court determined upon conflicting evidence. Its judgment is therefore affirmed.

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

Edward W. Simeral, for appellant.

Meikle & Perley, contra.

RYAN, C.

This action was brought by John A. Wakefield in the district court of Douglas county on March 24, 1890, for the foreclosure of a mechanic's lien on lots 21, 23, 25, 27, and 29, block 4, in Campbell's Addition to the city of Omaha. On March 18, 1892, this lien was paid by a party representing Mr. Schroeder, one of the defendants. A decree was entered October 20, 1892, in which there was determined in favor of Bates, Smith & Co. against Louis Schroeder the sole matter of controversy then in issue. In his answer to the petition of John A. Wakefield, and by way of an affirmative cause of action against the firm of Bates, Smith & Co., his co-defendant, Louis Schroeder, alleged that previous to December 13, 1889, he had been the owner of the lots against which the mechanic's lien was claimed by Wakefield; that about De-

cember 13, 1889, he conveyed said real property to his co-defendant, Michael Donnelly, for the consideration of $16,500; that at the time said deed was executed Bates, Smith & Co. verbally agreed that, in consideration of said Schroeder waiving his right to the first mortgage and taking a second mortgage to secure payment of the above $10,500, the said firm of Bates, Smith & Co. would lend said Donnelly the sum of $16,800, for the sole and only purpose of erecting and completing buildings on the aforesaid lots, taking, to secure payment of said sum of $16,800, a first mortgage on the property. It was further alleged by Louis Schroeder that Bates, Smith & Co. further covenanted and agreed with him to hold and use all of the said first mortgage loan of $16,800 in making payments for the erection of said buildings, and that Bates, Smith & Co. covenanted to and did become trustees of that fund for said purpose, the said Donnelly assenting and agreeing thereto. In reliance upon said covenants and agreements of said Bates, Smith & Co. the said Schroeder averred that he was induced to and did accept Donnelly's second mortgage for the purchase price of the lots sold to him, and that, notwithstanding the said covenants and agreements, said firm had wrongfully and fraudulently withheld out of the said $16,800 the sum of $9,000, and had diverted said last named sum to its own use. Louis Schroeder further alleged that on May 1, 1890, the contractor, who had undertaken for Donnelly the erection of eight buildings on the above described lots, ceased work because he could not get his pay from Donnelly, who was utterly insolvent, or from the firm of Bates, Smith & Co., and that said Schroeder, to preserve his security and

save said buildings from destruction, was compelled to and did, at his own expense, complete said buildings; that in completing said buildings he had paid $7,632.75, exclusive of the claim of Wakefield (of $1,792.57); and that, if all the money in the hands of Bates, Smith & Co. had been rightly and justly used in the erection of said buildings, defendant Schroeder would not have been compelled to pay said sum, or any other amount, for said buildings could have been erected and completed for said sum of $16,800, the amount of Bates, Smith & Co.'s mortgage. It was further averred that Bates, Smith & Co. had transferred the aforesaid first mortgage to innocent purchasers. The prayer of Louis Schroeder was as follows: "Wherefore defendant prays that an accounting may be had of the amount of money paid by said Bates, Smith & Co. in the erection of said buildings, and that said defendant be decreed to pay to said Schroeder so much of said $16,800 as was in fact not paid out in the improvement of said property, as said Bates, Smith & Co. agreed to do, and for such other and further relief as in equity and justice he may be entitled to." In the reply of Bates, Smith & Co. there was a denial that such firm had agreed with Schroeder that it would see that the proceeds of the $16,800 loan would be applied to the payment of any particular class of indebtedness of Donnelly, or upon the construction of the buildings to be erected, and there was a further denial that any sum had been improperly paid or withheld by said firm. The judgment of the district court was, upon conflicting evidence, favorable to Bates, Smith & Co., and as there is presented no other question, its judgment is

AFFIRMED.

PHENIX IRON WORKS COMPANY V. H. C. MCEVONY.

FILED FEBRUARY 18, 1896. No. 6112.

1. **Replevin:** RESCISSION OF SALE: FRAUD: PLEADING AND PROOF. A plaintiff in replevin may under a petition alleging generally ownership and right of possession in himself, and a wrongful detention by defendant, prove fraud inducing a previous sale by plaintiff to defendant, and a rescission because thereof. It is not necessary to specially plead the fraud.

2. **Sales:** RESCISSION: CHATTEL MORTGAGES. One who takes a pledge or mortgage of personal property to secure a pre-existing debt is not entitled to protection as a *bona fide* purchaser against an action to rescind a sale of the property previously made to the pledgor or mortgagor. *Tootle v. First Nat. Bank of Chadron*, 34 Neb., 863, followed.

3. ———: ———: RETURN OF PURCHASE MONEY. In general, when a vendor seeks to rescind a sale for fraud he must return or offer to return any portion of the purchase money which he may have received; but he need not do so when the property has been damaged by the fraudulent vendee to an amount equal to the purchase money so received.

ERROR from the district court of Holt county. Tried below before KINKAID, J.

R. R. Dickson, for plaintiff in error.

H. M. Uttley, contra.

IRVINE, C.

This was an action of replevin by the plaintiff in error against the defendant in error, to recover an engine, boiler, and other machinery. The plaintiff based its claim on former ownership of the property, which had been parted with in pursuance of a contract of sale which the plaintiff

claimed it had been induced to enter into by fraudulent misrepresentations. The defendant, the sheriff of Holt county, denied plaintiff's ownership and right of possession, and also alleged a sale by the plaintiff of the property to one Donald McLean, followed by a pledge of the property to secure a debt of $700 to one Mathews. The defendant also justified under a writ of attachment issued at the suit of the State Bank of O'Neill against Donald McLean, and levied upon the property subject to the lien of Mathews. The case was tried to the court, and there was a finding and judgment for the defendant.

A question which must be disposed of *in limine* is that presented by the argument of the defendant that the judgment was correct, regardless of any assignments of error, for the reason that the petition did not state a cause of action. The petition was in the ordinary form in replevin cases where a general ownership is claimed, charging merely, in general terms, ownership, a right to the immediate possession of the property described, and the wrongful detention thereof by the defendant. The contention of the defendant is that inasmuch as the plaintiff based its claim on fraud, this petition was insufficient, because not pleading the facts constituting the fraud. The defendant, we think, mistakes the rule. When it becomes necessary to plead fraud, a general allegation of fraud is insufficient. The facts must be specifically pleaded; but it is not in all cases that it is necessary to plead fraud, although that question may turn out to be in issue. In ejectment a defendant under a general denial may prove fraud in the procurement of a deed under which plaintiff claims, for the purpose of disproving plaintiff's right of

possession. (*Franklin v. Kelley*, 2 Neb., 79; *Staley v. Housel*, 35 Neb., 160.) A certain analogy exists between ejectment and replevin under the Code. One is an action to recover the possession of land; the other to recover the possession of personal property; and the pleadings in both actions depart somewhat from the general rules of Code pleading. (See as to replevin, 2 Kinkead, Code Pleading, sec. 1079.) As said in *School District v. Shoemaker*, 5 Neb., 36, the Code takes actions of replevin out of the general rule in regard to pleadings. In *Haggard v. Wallen*, 6 Neb., 271, it was said: "A petition in replevin should state that the plaintiff is the owner of the goods sought to be recovered (or has a special property therein, stating its nature), that he is entitled to the immediate possession of such goods, and that the defendant wrongfully detains the same." Where a special ownership only is claimed, greater particularity in pleading is required. (*Curtis v. Cutler*, 7 Neb., 315; *Musser v. King*, 40 Neb., 892; *Randall v. Persons*, 42 Neb., 607; *Sharp v. Johnson*, 44 Neb., 165; *Camp v. Pollock*, 45 Neb., 771.) But from the time of the early cases cited it has always been considered that a general allegation of ownership, right of possession, and unlawful detention is sufficient, however the plaintiff may deraign his title on the trial; and the reports are full of cases where such petitions have been treated as sufficient, although the proof of the case involved an issue of fraud. That the general rule as to pleading fraud has no application to actions of replevin under the Code was held in *Sopris v. Truax*, 1 Colo., 89. In *Tootle v. First Nat. Bank of Chadron*, 34 Neb., 863, the petition, after the general allegations, pleaded the fraud specially. In discussing this the court

said that had the pleader stopped at the general allegations "it is conceded that the petition would have been sufficient." This was reaffirmed on rehearing, 42 Neb., 237. The objection so raised by the defendant could hardly in any event go to the general sufficiency of the petition, but would rather go to the admissibility of evidence of fraud thereunder; but however raised, we hold the objection not well taken.

The defendant also contends that the petition in error contains no sufficient assignments to reach the other questions argued. This may be true in a general way, but there is an assignment that the finding was not sustained by sufficient evidence. This we may consider. Most of the facts in the case were settled by a stipulation thereof embodied in the bill of exceptions. From this it appears, among other things, that on September 18, 1890, the plaintiff sold and delivered to Donald McLean the property in controversy, $700 to be paid during the erection of the machinery, at O'Neill, and the remainder sixty days after erection, the total price being $2,888. McLean was the president of the Pacific Short Line railroad, and represented that he desired to purchase the property for said railroad, for the purpose of heating and lighting a roundhouse at O'Neill; that he had authority to purchase such property and bind the railroad for the payment; that the railroad was solvent and on a prosperous and solid financial basis. Relying on these representations the plaintiff sold the property. In fact McLean had no authority to purchase for the railroad. He was not acting for the railroad, but for himself. The property was not desired for heating and lighting the roundhouse, but for carrying

on an electric system owned by McLean for lighting the city of O'Neill, and the railroad was insolvent. The plaintiff had no knowledge of the falsity of the representations until shortly before this action was instituted, and after all intervening rights, if any, accrued. The plaintiff put in the machinery according to its contract. About January 1, 1891, the plaintiff received the payment of $700 from McLean, McLean borrowing the money from the State Bank of O'Neill, the plaintiff knowing that fact, but not knowing that the loan was a personal one of McLean's, and the payment not that of the railroad. McLean then entered into possession of the property with the consent of the plaintiff. In December, 1890, McLean made to Mathews his note for $2,000. This note was purchased by the bank, which, on December 22, 1891, commenced a suit against McLean thereon and caused the property in controversy to be attached. It was further stipulated that at the time of bringing the action the property had been damaged while in the possession of McLean to the amount of $900. In addition to the foregoing facts, it appears from parol testimony, and in part by the stipulation, that after the bank had lent McLean the $700 to make the first payment on the machinery, one of its officers insisted upon security therefor, and some kind of a writing, not disclosed by the evidence, was prepared, whereby the property was pledged to Mathews, the president of the bank, to secure the loan; and there was also some kind of a constructive delivery of the property by McLean to Mathews. There is much controversy in the briefs as to this transaction; but we do not deem its precise nature material, because the same result must be

reached even though there was a complete pledge or mortgage. There is no room for doubt that under these facts a case of fraud was established which would have entitled the plaintiff to recover the property from McLean. McLean procured it on the representation that he was acting on behalf of a solvent corporation purchasing the property for a particular purpose, whereas he was purchasing for himself for another purpose. The corporation was not bound, and was insolvent even if it had been bound. It may be added, also, that there is sufficient to show McLean's insolvency. It has been several times held, directly or by plain inference, that one who takes personal property as security for a pre-existing debt is not a *bona fide* purchaser so as to be protected from the rescission of a contract whereby such property was sold to the pledgor or mortgagor. (*Symns v. Benner*, 31 Neb., 593; *Tootle v. First Nat. Bank of Chadron*, 34 Neb., 863, 42 Neb., 237; *Work v. Jacobs*, 35 Neb., 772.) The case of *Tootle v. First Nat. Bank of Chadron* is directly in point. The bank, when it lent the money, did not take the property as security. It was only after the loan had been perfected that it sought security. The interval of time was only a day, but that makes no difference. The bank did not part with the money on the faith of this property as security, and the pledge, mortgage, or whatever it was, to Mathews was one to secure a pre-existing debt. The plaintiff has made no offer to return the $700 received by it; but it is stipulated that the property was damaged to the amount of $900 while in McLean's possession. A question is thus presented as to whether under the circumstances it was necessary to offer to return the money. We think not. The rule that one, in

order to rescind a contract procured by fraud, must return or offer to return what he has received thereunder, is not one of universal application. In *First Nat. Bank of Barnesville, Ohio, v. Yocum*, 11 Neb., 328, the rule was stated that in such case a party seeking to rescind must put the subject-matter of the contract as near *in statu quo* as may be under the circumstances; or upon the trial must give a reason why the same could not be reasonably done. It is well established that no offer to return is necessary when the party guilty of fraud has rendered a return impossible; and it would seem to be equally true when the party guilty of fraud has rendered a return unjust to the other party. In *Symns v. Benner, supra*, $100 had been paid on the purchase money; but goods to the value of $47 had been sold. It was held that an offer to repay $53 after the value of the sold goods had been ascertained was sufficient; and in *Tootle v. First Nat. Bank of Chadron, supra*, the same doctrine was reaffirmed. If, then, McLean had sold a portion of this machinery to the value of $900, the remainder might be replevied without offering to return the $700 received. We can see no difference in principle between the sale of a portion of the property and its deterioration in value by damage or use while in the vendee's possession. Under our view of the law, as above stated, the evidence did not sustain the finding of the court.

REVERSED AND REMANDED.

STATE OF NEBRASKA, EX REL. REGINA MARROW, V. GEORGE W. AMBROSE.

FILED FEBRUARY 18, 1896. No. 7823.

Time to Prepare Bill of Exceptions: NEW TRIAL: MANDAMUS. Where a trial has been had and a motion for a new trial sustained, the time for preparing a bill of exceptions embodying the evidence on that trial is fixed at the latest by the term at which the motion for a new trial was sustained, and not by the term at which final judgment was rendered, or at which a new trial was had, or a new trial after such second trial denied.

ORIGINAL application for *mandamus* to compel the respondent to sign a bill of exceptions. *Writ denied.*

V. O. Strickler, for relator.

References: *Scott v. Waldeck*, 11 Neb., 526; *City of Seward v. Klenck*, 30 Neb., 775; *Artman v. West Point Mfg. Co.*, 16 Neb., 572; *Fleming v. Stearns*, 79 Ia., 258; *State v. Hopewell*, 35 Neb., 824; *Preble v. Bates*, 40 Fed. Rep., 745; *Stocking v. Morey*, 14 Colo., 319; *Cowan v. Cowan*, 16 Colo., 337; *Henze v. St. Louis, K. C. & N. R. Co.*, 71 Mo., 644; *Woods v. Lindvall*, 48 Fed. Rep., 74; *Commissioners of Baltimore County v. Cummings*, 26 Atl. Rep. [Md.], 1111; *Rayl v. Brevoort*, 51 N. W. Rep. [Mich.], 693; *Riddlesbarger v. McDaniel*, 38 Mo., 140; *Hill v. Egan*, 160 Pa. St., 122; *Stonesifer v. Kilburn*, 94 Cal., 33.

William O. Gilbert, contra.

References: *Sohn v. Marion and Liberty Gravel Road Co.*, 73 Ind., 79; *Hicks v. Person*, 19 O., 437; *Kline v. Wynne*, 10 O. St., 223; *Morgan v. Boyd*, 13

O. St., 271; *Donovan v. Sherwin*, 16 Neb., 130; *Wineland v. Cochran*, 8 Neb., 529; *Jones v. Wolfe*, 42 Neb., 272; *Birdsall v. Carter*, 16 Neb., 422; *Greenwood v. Craig*, 27 Neb., 669; *State v. Walton*, 38 Neb., 496; *Schields v. Horbach*, 40 Neb., 103.

IRVINE, C.

This is an original application for a writ of *mandamus* requiring the respondent, one of the judges of the fourth judicial district, to settle and sign a bill of exceptions in the case of the relator, Regina Marrow, v. Emily Hespeler, tried before the respondent. An answer to the alternative writ was presented raising issues of fact, and a referee, appointed by the court for the purpose, has made a report of the evidence taken, together with his findings of fact and conclusions of law. The relator moves for a confirmation of this report. The respondent moves to set it aside and for judgment. Our conclusion on one question of law presented by findings of fact which are not attacked, renders it unnecessary to consider any of the other exceptions to the report.

The referee finds that the action of Marrow v. Hespeler was tried at the May, 1894, term of the district court and a verdict returned in favor of the plaintiff, the relator in this action, for $4,000; that on the same day a motion for a new trial was filed by the defendant, which was on the following day sustained; that the May, 1894, term adjourned July 14, 1894. At the September, 1894, term the cause was again tried, resulting, November 17, 1894, in a verdict for the defendant, and forty days—thereafter extended to eighty days—from the adjournment of that term was allowed for preparing and serving a bill of exceptions that

the September term adjourned January 26, 1895. February 19 Emily Hespeler died, and February 26 William O. Gilbert was appointed special administrator and the action revived in his name. On April 13 the bill of exceptions, which defendants seek to compel the respondent to allow, was served on the defendant, who returned it, refusing to take action for the reason that it had not been served within the time provided by law, and for a further reason not necessary to consider; that the bill of exceptions so tendered contained only the evidence and proceedings on the first trial of the case at the May, 1894, term, resulting in the verdict which was set aside. Final judgment was entered November 17, 1894, at the September term.

It will be observed that the foregoing facts present the question as to whether, when a trial has been had and the verdict set aside, a party seeking to procure a bill of exceptions preserving the evidence on that trial must move in the matter within the statutory period after the first trial, or whether he may wait until final judgment or the overruling of a motion for a new trial after a subsequent trial, and have his bill settled as of the later term. The statute, as it stood when this controversy arose, was, so far as material, as follows: "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."

(Code of Civil Procedure, sec. 311.) By a later clause the judge, for cause shown, may grant forty days' additional time. The question now before us seems to be here presented to this court for the first time, although there has been much controversy from the ambiguity of the statute as to whether the term referred to meant the term at which the verdict was returned, or the term at which the motion for a new trial was overruled. The act of 1895, fixing the latter time, has set this question at rest. (Session Laws, 1895, p. 311, ch. 72.) The course of decision under the old statute, we think, leads to a certain conclusion in this case. There are many decisions holding that the term referred to in the statute is the term at which the verdict was returned, and not the term at which the motion for a new trial was ruled on. (*Monroe v. Elburt*, 1 Neb., 174; *Wineland v. Cochran*, 8 Neb., 528; *Scott v. Waldeck*, 11 Neb., 525; *Donovan v. Sherwin*, 16 Neb., 129; *City of Seward v. Klenck*, 27 Neb., 615, 30 Neb., 775.) In *Dodge v. Runels*, 20 Neb., 33, it was held that where the setting aside of a verdict was saved by the entry of a remittitur at a term following its rendition, the time for settling the bill ran from the later term; but this was placed upon the ground that, had it not been for the remittitur, the verdict would have been set aside and the party seeking the bill would have had no occasion for one. In *State v. Hopewell*, 35 Neb., 822, the court held that the term fixing the time in an equity case was that at which the decision was announced, and not that of its formal entry upon the journal of the court. This is really in line with the first cases cited, and not as the relator contends in support of her position, because in a case tried to the court the findings

take the place of the verdict. The case did not distinguish between the time findings were announced and the time judgment was pronounced on the findings. It quite clearly appears, as is usual in equity cases, that the findings and judgment were concurrent acts. In *State v. Walton*, 38 Neb., 496, a decree of foreclosure was rendered April 18, 1892, and June 26, 1893, a deficiency judgment entered. It was thereafter sought to have settled a bill of exceptions containing the evidence leading to the original decree, but the court held it was too late. This was evidently upon the ground that, although the deficiency judgment only was attacked, it had been the duty of the defeated party to preserve his bill of exceptions within the statutory time after the proceedings which led to the findings fixing his personal liability, and that it was not sufficient to proceed after the final judgment enforcing that liability. This case, therefore, is directly opposed to the relator's contention that she might wait until final defeat and then preserve the record of the first trial. In *Schields v. Horbach*, 40 Neb., 103, it was held that where it is sought to preserve a bill of exceptions embodying the evidence on an interlocutory motion, this must be done within the statutory period after the term at which the motion was ruled on, and not after the trial of the case. We think all these cases lead irresistibly to the conclusion that the term referred to in the statute is, if not the term at which the evidence was taken, at latest the term at which an order was made based on that evidence. It is immaterial to the present case how the old controversy should have been settled, because the trial was here had and the motion ruled on at the same

term. But if any regard is to be paid to the long line of decisions to which we have referred, we must hold that the bill should have been settled within the statutory period after that term expired. The relator argues that such holding imposes an unnecessary burden upon litigants; that, until final judgment, it is uncertain that a party defeated at one step of the case will meet ultimate defeat, and that he should, therefore, be permitted to await the final event before incurring the labor and expense of preparing a bill of exceptions. In support of this argument it is urged that there is in each court a short-hand reporter, who is a public officer, whose notes are public records, and that no difficulty arises in obtaining a true bill even after great lapse of time. The authenticity of the reporter's notes was left in some doubt by *Spielman v. Flynn*, 19 Neb., 342, and *Lipscomb v. Lyon*, 19 Neb., 511; but these cases were explained in *Smith v. State*, 42 Neb., 356, where the true character of the short-hand reporters and their records is discussed. The notes are not public records. The reporter's certificate to a transcript thereof does not authenticate them so as to permit their introduction in evidence. Parties in preparing and the judge in settling a bill of exceptions are not bound by the reporter's transcript. There is, indeed, nothing to require parties to resort to such transcript in the preparation of a bill. The settlement of a bill rests finally upon the judge's determination of what occurred at the trial; and when the accuracy of a proposed bill is properly challenged, the judge must settle the matter in accordance with the truth, and not blindly in accordance with a reporter's transcript. Therefore, the pol-

icy of the law requires that the bill of exceptions should be settled within such reasonable time fixed by statute after the taking of the evidence sought to be preserved, that the parties and the judge may bring to their aid their own recollections; and this is a much more important consideration than the saving to the parties of labor and expense. The referee evidently based his conclusion of law in favor of the relator on the cases of *Scott v. Waldeck* and *City of Seward v. Klenck, supra.* In each it was held that a bill settled after the trial term would be considered to ascertain whether the evidence sustained the verdict. These cases in that feature have for years not been followed in the practice of this court, and to that extent they have been recently expressly overruled by *Jones v. Wolfe*, 42 Neb., 272, and *City National Bank of Hastings v. Thomas*, 46 Neb., 861.

The plaintiff, after the final trial, endeavored to preserve her rights by moving for a rehearing of the first motion for a new trial. This proceeding, however, did not operate to extend her time for settling the bill here presented.

The foregoing considerations dispose of the case. The parties argue quite extensively, and with some bitterness, questions affecting the merits of the Hespeler case, and the regularity of the court's action in sustaining the first motion for a new trial. These questions are, however, all foreign to the merits of this proceeding. The referee's conclusion of law on this branch of the case must therefore be set aside, the findings of facts confirmed, and the

WRIT DENIED.

J. A. LUNDGREN V. JAMES CRUM.

FILED FEBRUARY 18, 1896. No. 6191.

1. **Courts: TRANSFER OF CASES: JURISDICTION.** An action of trespass was begun in the county court. After issues joined there a stipulation was entered into transferring the case to the district court. The pleadings were then refiled in the district court and a trial was there had. It turned out that the vital issue concerned the title and boundaries of land. *Held*, That the stipulation was equivalent to one dismissing the case in the county court and recommencing it in the district court, with appearance of parties, and that the district court had jurisdiction, although the county court might not.
2. **Trespass: PLEADING.** A petition charging an unlawful entry and damage to plaintiff's land states a cause of action for trespass, although it prays treble damages and does not charge that the trespass was willful, as required by Code, section 636, as a basis for treble damages.
3. **Review: CONFLICTING EVIDENCE.** Where the evidence is conflicting this court will not disturb the verdict as unsupported by the evidence.

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

R. R. Dickson and *C. F. Bayha*, for plaintiff in error.

N. D. Jackson and *W. H. Holmes, contra.*

IRVINE, C.

Crum was the owner of that part of the northwest quarter of section 10, township 25, range 7 west, in Antelope county, lying north of the Elkhorn river, as the course of that river lay in 1883, and Lundgren was the owner of that portion of the quarter section lying south of the river.

Lundgren brought an action in the county court charging that Crum had unlawfully entered upon his land and cut and removed timber to the value of $90. Crum filed an answer, which was in effect a denial of any entry upon or cutting of timber from the lands of Lundgren. Thereupon a stipulation was entered into that the cause should be transferred to the district court and there stand for trial as though originally commenced in that court, waiving all questions of jurisdiction, and agreeing that the costs should follow the result of the suit. A transcript was filed in the district court, and thereafter the original pleadings were refiled, which was followed by an amended petition filed by Lundgren. There was a verdict and judgment for the plaintiff for $3, and the defendant prosecutes error.

The issue between the parties was the boundary between their lands, the timber having been cut on a tract which each claimed; the plaintiff claiming that at the time of his grant this tract lay south of the Elkhorn river, but by avulsion in 1888 the stream formed a new channel, whereby the land in dispute was cast to its north. This was the issue tried.

It is first insisted by the plaintiff in error that the action having been begun in the county court, and that court being without jurisdiction in matters wherein the title or boundaries of land may be in dispute (Compiled Statutes, ch. 20, sec. 2), the district court acquired no jurisdiction of the subject-matter. This contention is based on the doctrine that where the court in which an action originates is without jurisdiction of the subject-matter, an appellate court acquires no jurisdiction on appeal, although it might have had juris-

diction of an original action for the same purpose; but this contention ignores the fact that this case did not go to the district court by appeal or otherwise by course of law. It went there before trial in the county court by stipulation of the parties. The stipulation had the same effect as if it had been for the dismissal of the case in the county court and its recommencement in the district court, with the entry of appearance by the defendant. The parties filed their pleadings in the district court and proceeded to trial. The district court had jurisdiction of such actions, and as it was prosecuted there as an original action, and not for the purpose of reviewing any judgment or order of the county court, the original want of jurisdiction in the county court was immaterial.

It is next argued that the amended petition does not state a cause of action. This petition alleges that the plaintiff was the owner of the land described, and in possession thereof; that the defendant, in the summer of 1888, and at various times thereafter, wrongfully, and without consent of the plaintiff, entered upon said premises and cut and removed timber therefrom to the value of $30, whereby the defendant became liable to pay the plaintiff the sum of $90; and the prayer is for judgment for $90. The objection urged to the petition is that it fails to state a cause of action under section 636 of the Code of Civil Procedure, whereby for willful trespass, etc., the trespasser is rendered liable for treble damages. It is stated that the petition is defective in not charging that the trespass was willful. No exceptions were taken to the instructions submitting the case to the jury under this statute,

and the objection that the petition does not state a cause of action does not reach the point. The petition certainly states a cause of action for trespass, independent of the statute, and the prayer for treble damages does not vitiate it.

Finally, it is contended that the verdict is not sustained by the evidence; but the very candid brief of the plaintiff in error discloses that on the controverted issue the evidence was conflicting. As has been repeatedly held, it is not the province of this court in the exercise of its appellate jurisdiction to weigh conflicting testimony.

JUDGMENT AFFIRMED.

PETER C. BOASEN V. STATE OF NEBRASKA.

FILED FEBRUARY 18, 1896. No. 8236.

1. **Mandamus:** PAYMENT OF JUDGMENT. A writ of *mandamus* to compel county officers to pay judgments against the county is not void because the judgments were void.
2. ———: ———: CONTEMPT. In such case the nullity of the judgments was a defense to the application for a *mandamus*. The district court having jurisdiction of the parties, had jurisdiction to determine the validity of the judgments, and a writ of *mandamus* issued in that case cannot be resisted because the issue was erroneously determined.

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

Ed L. Adams, for plaintiff in error.

A. S. Churchill, Attorney General, George A. Day, Deputy Attorney General, and *Stewart & Hague, contra.*

IRVINE, C.

Certain judgments were entered against Kearney county in the district court of that county. The judgment creditors applied to the district court for a writ of *mandamus* to require the clerk and the chairman of the board of supervisors to issue warrants in payment of the judgments, it being alleged that there were funds available sufficient for their payment. A peremptory writ was allowed. Thereafter the plaintiff in error succeeded to the office of chairman of the board of supervisors and the writ was served upon him. He refused to comply therewith, and the present proceeding was instituted for contempt in refusing such obedience. He was found guilty and sentenced to be confined in jail until he complied with the requirements of the writ. Error is prosecuted by him from that sentence.

No question is raised as to the writ's binding the plaintiff in error, if it is a valid writ, but the sole question raised is as to the jurisdiction to allow the writ at all; and the objection urged against the jurisdiction of the court is that the judgments which the *mandamus* was issued to enforce were void for want of jurisdiction of the court to render them. The fact, however, if it be a fact, that such judgments were void did not defeat the jurisdiction of the court in the *mandamus* case. The district court has jurisdiction to issue writs of *mandamus* to compel county officers to perform duties enjoined upon them by law. It had jurisdiction of the parties in this case. If the judgments were valid, under the other facts disclosed by the record, it was the duty of the officers to issue the warrants. If they were not valid

for want of jurisdiction of the court rendering them, that would have been a defense in the *mandamus* case, and it actually was pleaded as a defense. The judgment of the district court in favor of the relators in that proceeding adjudicated the validity of the judgments. In the *mandamus* case the district court had jurisdiction to determine whether or not the judgments were void. Jurisdiction is the power to determine, and not merely the power to determine rightly; and the judgment in the *mandamus* case cannot be defeated because the court in that case erroneously determined a question properly presented to it there for determination. The remedy was by appellate procedure, but the proceedings were not void, and the *mandamus* was conclusive until reversed. (*State v. County Judge*, 13 Ia., 139.)

JUDGMENT AFFIRMED.

GEORGE BURKE ET AL. V. UTAH NATIONAL BANK OF OGDEN.

FILED FEBRUARY 18, 1896. No. 5933.

1. **Estoppel in Pais.** To constitute an estoppel *in pais* the person sought to be estopped must have conducted himself with the intention of influencing the conduct of another, or with reason to believe his conduct would influence the other's conduct, inconsistently with the evidence he proposes to give.

2. ———: COMMISSION MERCHANTS: DRAFTS: ACCEPTANCE. B. & F., live stock commission merchants at South Omaha, wrote to the U. Bank a letter saying: "We will pay H. & M.'s drafts until further notice for the cost or value of stock shipped to us here with or without bill of

lading attached." *Held*, That B. & F. thereby obligated themselves to accept drafts made in pursuance of such letter of credit, provided they were in fact for the cost or value of stock then shipped; the bank in discounting drafts taking the risk of that fact, but the risk being transferred to B. & F. upon their acceptance of the drafts.

3. ———: ———: ———: ———. Under the letter of credit above quoted, a draft was drawn October 23, and accepted October 29. On October 29 a large shipment of stock was made. November 8 another draft was drawn not covered by stock shipped, unless the shipment of October 29 should be applied thereto. There was no evidence that the bank in receiving the last draft relied on the acceptance of the former as not including the shipment of October 29. *Held*, That under the circumstances B. & F., in defense of an action based on their refusal to accept the last draft, were not estopped from showing that the earlier draft had been covered in part by the shipment of October 29, the day of its acceptance.

4. ———: ———: ———: ———: INSTRUCTIONS. An instruction under such circumstances, to the effect that the bank had a right to rely from the acceptance of the earlier draft upon the fact that stock to cover it had been shipped prior to the date of its acceptance, and that B. & F. could not apply the shipment made on that day to its payment, was erroneous.

5. ———: ———: ———: ———. The estoppel contended for would not arise beyond forbidding B. & F. to apply to the payment of the earlier draft shipments of stock of which they could not reasonably have known at the time of accepting such draft.

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

Hall & McCulloch and *Schomp & Corson*, for plaintiffs in error.

Isaac E. Congdon and *Joseph R. Clarkson, contra.*

IRVINE, C.

In 1888 one Hall and one Moore, partners under the name of Hall & Moore, and engaged, or intend-

ing to engage, in the business of purchasing live stock in the then territory of Utah, and shipping the same to market, opened negotiations with the Utah National Bank with a view to transacting business with that institution. At Hall & Moore's request a letter was written to the South Omaha National Bank inquiring as to the standing of George Burke & Frazier, a firm engaged in the live stock commission business at South Omaha, with which Hall & Moore contemplated transacting their business. This letter was referred by the South Omaha National Bank to George Burke & Frazier, and in response thereto a letter dated August 4, 1888, was addressed to the Utah National Bank by George Burke & Frazier. The letter began as follows: "The cashier of the South Omaha National Bank referred your letter to us to-day, in regard to paying Messrs. Hall & Moore's drafts. In reply would say we will pay Messrs. Hall & Moore's drafts till further notice for the cost or value of stock shipped to us here with or without bill of lading attached." The remainder of the letter is not material to the decision of the case. This letter was received by the Utah National Bank August 8, and on that day its cashier addressed to George Burke & Frazier the following: "Your favor 4th inst. has been received. We will advance Messrs. Hall & Moore such moneys as they may want to draw for on you, which is from what I can from Mr. Hall, for the cost of the cattle here. I will cheerfully reply to any who may ask regards to your standing, etc. I have been in cattle myself and will as far as I can look and see what kind and how many cattle Mr. Hall will ship next week." On that day the Utah bank discounted a draft of Hall & Moore on

George Burke & Frazier for $1,330, dated August 7; and from that time until October 23 continued to receive from Hall & Moore drafts in various amounts on George Burke & Frazier, all of which were paid. In this way something over $50,000 was drawn and paid. On October 23 a draft was drawn for $9,000, which was accepted October 29 and paid November 1. November 8 a draft was drawn for $16,000, which was in due course presented and acceptance refused. There was thereafter paid thereon about $7,000, and this action was brought by the Utah bank against George Burke & Frazier to recover the remainder, of about $9,000. There was a verdict and judgment for the plaintiff for $7,746.66, and the defendants prosecute error.

The assignments of error are quite numerous. We are practically precluded from an examination of those relating to instructions given by the court of its own motion, because in the motion for a new trial the assignment relating thereto is directed against all the instructions given *en masse*. Many of them are manifestly free from error, and the others cannot therefore be considered. A similar obstacle presents itself to assignments of error relating to the refusal of instructions requested by the defendants. Complaint is, however, made of the giving of the twelfth and fourteenth instructions requested by the plaintiff, and as in our opinion they were both erroneous, the assignment of the two together in the motion for a new trial was sufficient. As the judgment must be reversed because of error in these instructions, we will not consider the other assignments, which relate to rulings upon the evidence, as the questions thereby presented may not recur.

In addition to the facts already stated, it appeared that from October 29 to November 8 there had been drawn checks by Hall & Moore upon the Utah bank which resulted in an overdraft on November 8 to the amount of $15,549.94. The $16,000 draft was then drawn, but its amount not placed to the credit of Hall & Moore, although after November 8 several other small checks were paid. The evidence was very meager, but possibly sufficient to show that after the drawing of the $9,000 draft on October 23 there was shipped by Hall & Moore to the defendants live stock to the value of $16,000 and upwards; but in order to reach this result we must include in these shipments a large shipment made October 29, the day the $9,000 draft was accepted. The plaintiff proceeded upon the theory that the acceptance of a draft by the defendants estopped them from asserting that there had not at that time been shipped live stock to meet it; and in accordance with that theory the instructions complained of were given as follows:

"12. You are instructed that when defendants had accepted and paid the $9,000 draft drawn on October 23, 1888, that plaintiff had the right to presume and rely upon the fact that stock had been shipped prior to the date of such acceptance and payment sufficient to cover the draft, and were warranted in making the advances to Hall & Moore for the purchase of stock to be shipped thereafter to the defendants, and defendants, as against the plaintiff, had no right to apply the proceeds of such future shipments to the payment of said $9,000 draft."

"14. If you find from the evidence that stock to the cost or value of the $16,000 draft was shipped

on and after the date of the acceptance of the $9,000 draft by the defendants, then you are instructed that it is immaterial what the condition of the defendants' account was with Hall."

Now we construe the contract, so far as is material to these instructions, as follows: By the letter of credit of August 4 the defendants obligated themselves to the plaintiff to accept drafts of Hall & Moore for the cost or value of stock shipped to South Omaha by Hall & Moore. The phrase "with or without bill of lading attached" extended their obligation this far: that no duty was imposed upon the plaintiff to insist that bills of lading should be attached to the drafts, and that, therefore, if a draft should be drawn without bill of lading, the defendants were bound to accept it, provided it was for the cost or value of stock then shipped to the defendants; that is, that in accepting a draft the defendants assumed the risk of their receiving the stock to cover it. It was a condition of the letter that drafts should only be accepted to cover the cost or value of the stock shipped; and the bank in discounting drafts took the risk of their being within the terms of the letter of credit. We think, therefore, there was a substantial ground for the general application of a doctrine of estoppel based on the acceptance of the drafts; but we do not think that the instructions given stated the true rule. We realize the force of what was said in *Campbell v. Nesbitt*, 7 Neb., 300, that in regard to estoppels *in pais* "there can be no fixed and settled rules of general application to regulate them, as in technical estoppels; that in many, and probably most instances, whether the act or admission shall operate by way of estoppel or not, must depend upon the circum-

stances of each case." Still there are some general rules applicable to the doctrine of equitable estoppel. Under the circumstances of this case we would not go so far as to hold, as many courts have done, and probably correctly under the facts before them, that there must be some misrepresentation or concealment of facts known to one party and not known to the other. On the contrary, we think the following statement by the supreme court of Dakota (*Parliman v. Young*, 2 Dak., 175) is correct and applicable to such transactions as the present: "To establish an estoppel *in pais* it must be shown: first, that the person sought to be estopped has made an admission or done an act with the intention of influencing the conduct of another, or that he had reason to believe would influence his conduct, inconsistent with the evidence he proposed to give, or the title he proposed to set up; second, that the other party has acted upon or has been influenced by such act; third, that the party will be prejudiced by allowing the truth of the admission to be proved." But it is also true, as said in that case, that "Estoppels must be certain to every intent; for no one shall be denied setting up the truth, unless it is in plain and clear contradiction to his former acts." We take it that to constitute an estoppel *in pais* the conduct of the party estopped must have been such as to warrant the other party in acting on the belief that the facts were as indicated by such conduct,—that he must so have believed and acted. Now the fourteenth instruction was to the effect that if stock to the cost or value of $16,000 was shipped on and after the date of the acceptance of the $9,000 draft, then the condition of defendants' account with Hall & Moore was

immaterial. In view of the evidence this meant and could only mean that the acceptance of the $9,000 draft estopped the defendants from asserting that stock to its full amount had not been shipped before the day it was accepted. As we have said, a large shipment of stock was made the very day of its acceptance, and the plaintiff could only recover under the terms of the letter of credit and the evidence by calculating the value of the shipment of October 29 as a portion of the sum for which the $16,000 draft was drawn. This the instruction in effect required should be done, although the fact might be otherwise. It was not necessary for the plaintiff to go back to the beginning of the transaction and prove that the aggregate cost or value of the stock shipped was equal to the aggregate of the drafts made. Where a draft was accepted the plaintiff had a right to presume that the defendants found that it had been drawn in accordance with the letter of credit, and that stock to the cost or value of its amount had then been shipped; but the plaintiff had no right to presume that acceptances were given based solely on shipments made prior to the day of the acceptance. In accepting a draft the defendants did not give the plaintiff to understand anything more than that stock in value equal to the amount of the draft had at the time of the acceptance been shipped. These are days of the electric telegraph, and on the presentation of a draft for $9,000 on October 29 the defendants might accept it on the faith of information in their possession that stock had that very day been shipped to cover it. We do not say that there is evidence to support this view; but we are not dealing with the actual facts; we are

merely considering what the defendants' conduct gave the plaintiff a right to rely on. The shipment of October 29 might have been, so far as the evidence discloses, before the $9,000 draft was accepted. The plaintiff was bound to know that this might be so. It had no right in making future advances to presume that it was not so; and more than that, the evidence fails to show that in making such advances the plaintiff relied on the acceptance of the $9,000 draft, as showing that the shipment of October 29 was not yet drawn against. The estoppel contended for, therefore, could not arise beyond forbidding the defendants to apply to the payment of earlier drafts shipments of stock of which they could not reasonably have known at the time of the acceptance of such drafts, and the instruction was erroneous in that it held the defendants estopped from proving the application to the payment of the $9,000 draft the shipment of stock made the day of its acceptance. The twelfth instruction is similar in its effect to the fourteenth, except that its language leaves it uncertain whether the acceptance or the payment of the $9,000 draft created the estoppel. Now the obligations of the defendants were fixed by acceptance, and payment after acceptance and in pursuance of that obligation—at least where the paper was, or was supposed to be, in the hands of a holder for value—created no new estoppel. Aside from the injection of this element, and the uncertainty created thereby, the instruction is open to the same objections as the fourteenth.

REVERSED AND REMANDED.

THOMAS MURRAY V. ANTON LOUSHMAN.

FILED MARCH 3, 1896. No. 6150.

1. **Pleading:** AMENDMENTS. Notwithstanding the liberal provision for amendment of pleadings, the subject is one resting largely in the discretion of the trial court, and its rulings in that regard are not, in the absence of an abuse of discretion, the subject of review by this court.
2. **Chattel Mortgages:** TITLE TO CHATTELS. The title of property pledged by chattel mortgage remains in the mortgagor until divested by means of foreclosure proceedings. (*Musser v. King*, 40 Neb., 892.)
3. ———: FORECLOSURE: DELAY. One who takes possession of mortgaged chattels in order to satisfy his lien thereon by means of notice and sale in the manner prescribed by law, does so with the implied obligation to proceed without unreasonable delay and with due regard for the rights of the mortgagor.
4. ———: USE OF CHATTELS: DAMAGES. The mortgagee's right to the use of chattels mortgaged is, in the absence of a special agreement, merely such as is incident to the foreclosure proceeding, and the breach of his obligation in that regard is an actionable wrong.

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

Slabaugh & Rush, for plaintiff in error.

G. A. Rutherford, contra.

POST, C. J.

This was an action by the defendant in error, plaintiff below, who sued to recover for the use of a span of mules for the period of seven months. The answer admits the allegations of the petition, except as to the value of the use of the mules de-

scribed, and charges in justification thereof the following facts: (1) A chattel mortgage on the mules in controversy for $180, long past due; (2) that the defendant took possession of said mules for the purpose of foreclosing his mortgage September 12, 1889, and kept them at his own expense with the plaintiff's consent until May 16, 1890, when they were sold at public auction for the sum of $101. Accompanying the answer is an allegation of indebtedness by the plaintiff for rent due the defendant in the sum of $11.32, and for which judgment is asked by the latter. The reply is a general denial. A trial was had in the district court, resulting in a verdict for the plaintiff therein in the sum of $126.43. Subsequently, having remitted $95 of the amount so found, in accordance with the order of the court, judgment was entered in his favor in the sum of $30.93, and which has been removed into this court by the petition in error of the defendant below.

The first assignment of error relates to the ruling of the district court during the trial in denying the defendant's request for leave to so amend his answer as to set off against the plaintiff's cause of action the balance secured by the mortgage mentioned. The proposed amendment was not to conform the pleadings to the facts proved, but for the purpose of inserting a new and distinct cause of action in favor of the defendant. Although liberal provision is made for the amendment of pleadings (Civil Code, sec. 144), the subject is one resting largely in the discretion of the trial court, and its rulings in that regard are not, in the absence of an abuse of discretion, the subject of review by this court. (*Mills v. Miller*, 3 Neb., 87; *Hedges v. Roach*, 16 Neb., 673; *Johnson v. Swayze*,

35 Neb., 117; *Commercial Nat. Bank of Omaha v. Gibson*, 37 Neb., 750.) We are unable to say that the ruling complained of involves any abuse of discretion. The defendant was fully advised of his rights at the commencement of the action more than a year and a half previous, and had ample opportunity to interpose whatever claims were available in his favor against the plaintiff; and having failed to assert the mortgage debt until the plaintiff had rested his case, he will not now be heard to complain of the action of the court in denying his request to amend.

It is argued that the plaintiff had no right to the use of the mortgaged property after condition broken, his remedy being by an action for redemption or to recover the surplus, if any, remaining after the satisfaction of the defendant's mortgage. That argument is based upon the proposition, once recognized as the law of this state, that the effect of a chattel mortgage is to transfer to the mortgagee the legal title of the property conveyed, subject to be defeated only by performance of the stipulated conditions. But in *Musser v. King*, 40 Neb., 892, it was held, overruling *Adams v. Nebraska City Nat. Bank*, 4 Neb., 370, that the mortgagee has a lien only upon property pledged by chattel mortgage, and that the title thereto remains in the mortgagor until divested by means of foreclosure proceedings. (See, also, *Bedford v. Van Cott*, 42 Neb., 229.) The right of the mortgagee under a chattel mortgage to possession of the property conveyed pending foreclosure proceedings will not be controverted; but when he takes possession of property in order to satisfy his lien thereon by means of notice and sale in the manner prescribed by law, he does so with the implied

obligation to proceed without unreasonable delay and with due regard for the rights of the mortgagor. The mortgagee's right to the use of chattels conveyed is, in the absence of a special agreement, such only as is incident to the foreclosure of the mortgage, and a breach of his obligation in that regard is an actionable wrong.

The judgment in this case is vigorously assailed on the ground that it is clearly unsupported by the evidence. We shall not, however, attempt a synopsis of the testimony. It is conceded that, so far as the number of witnesses is concerned, the advantage is decidedly in favor of the defendant; but, as has been repeatedly held, the credibility of the witnesses is a question for the jury, and a verdict based upon conflicting evidence will not be set aside on account of any mere difference of opinion between this court and the trial judge or jury. The evidence introduced by the plaintiff below tended to prove that the mules in question were used by the defendant without the consent of the former, from the time they were taken under the mortgage in September, 1889, until the date of their sale in May, 1890, and which was worth from 75 cents to $1 per day. Assuming the defendant's claim for rent to have been established to the satisfaction of the jury, the amount of the recovery allowed on the plaintiff's cause of action, $102.25, is certainly not so unreasonable as to call for interference by this court.

Exception was also taken to the refusal of the following instruction: "You are instructed that the defendant, under the testimony, has a just and valid claim against the plaintiff for the amount due on the two notes set out in the answer, together with interest thereon." The in-

struction was rightly refused. Although the notes therein mentioned represent the debt secured by the mortgage, they are not alleged as a cause of action against the defendant. Had the action been for the wrongful conversion of the mules, it is possible that the amount due on the mortgage would, even under a general denial, have been a proper subject of inquiry, as bearing directly upon the question of the plaintiff's interest in the property converted; but that rule can have no application to the case made by the pleadings, in which the only ground of recovery is the implied obligation of the defendant below to reasonably compensate the plaintiff for the use of his mules.

There is no error in the record, and the judgment is

AFFIRMED.

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

FILED MARCH 3, 1896. No. 6273.

Res Judicata: DEFICIENCY JUDGMENTS: COURTS: JURISDICTION. Order of the circuit court of the United States for the district of Nebraska, denying a deficiency judgment in a foreclosure proceeding upon the cause of action herein alleged, *held* to involve the merits of the cause, and not the question of jurisdiction only.

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

Edward W. Simeral, for plaintiffs in error.

References: *Gould v. Evansville & C. R. Co.*, 91 U. S., 526; *Burner v. Hevener*, 26 Am. St. Rep. [W.

Va.], 948; *Ober v. Gallagher*, 3 Otto [U. S.], 199; *Ward v. Todd*, 103 U. S., 327; *Haines v. Finn*, 26 Neb., 380; *Mason v. Hartford P. & F. R. Co.*, 19 Fed. Rep., 55; *Parker v. Ormsby*, 141 U. S., 81; *Morris v. Gilmer*, 129 U. S., 315; *Des Moines Navigation & Railroad Co. v. Iowa Homestead Co.*, 123 U. S., 552; *Skillern v. May*, 6 Cranch [U. S.], 267; *McCormick v. Sullivant*, 10 Wheat. [U. S.], 192; *Holmes v. Oregon & C. R. Co.*, 9 Fed. Rep., 236; *Settlemier v. Sullivan*, 97 U. S., 444; *Erwin v. Lowry*, 7 How. [U. S.], 172; *Ex parte Watkins*, 3 Pet. [U. S.], 206; *Kennedy v. Georgia State Bank*, 8 How. [U. S.], 610; *Noonan v. Bradley*, 12 Wall. [U. S.], 129; *Whyte v. Gibbes*, 20 How. [U. S.], 541; *Daniels v. Tibbets*, 16 Neb., 666.

William A. Redick, contra.

References: *Mersneau v. Werges*, 3 Fed. Rep., 378; *Vannerson v. Leverett*, 31 Fed. Rep., 366; *Schribar v. Platt*, 19 Neb., 630; *Blacklock v. Small*, 127 U. S., 96; *Cameron v. McRoberts*, 3 Wheat. [U. S.], 591; *Bank of United States v. Moss*, 6 How. [U. S.], 31; *United States v. Huckabee*, 16 Wall. [U. S.], 414; *Morgan v. Plumb*, 9 Wend. [N. Y.], 287; *Bottorff v. Wise*, 53 Ind., 34; *Miles v. Caldwell*, 2 Wall. [U. S.], 35; *Sturtevant v. Randall*, 53 Me., 154; *Perkins v. Parker*, 10 Allen [Mass.], 22; *Hungerford's Appeal*, 41 Conn., 322; *Jackson v. Schoonmaker*, 2 Johns. [N. Y.], 229; *Clapp v. Maxwell*, 13 Neb., 542; *Taylor v. Larkin*, 12 Mo., 104; *Waddle v. Ishe*, 12 Ala., 308; *Hughes v. United States*, 4 Wall. [U. S.], 236; *Colby v. Parker*, 34 Neb., 510; *Stover v. Tompkins*, 34 Neb., 465.

POST, C. J.

On the 18th day of June, 1888, George W. Paul, a citizen of this state, executed to David Jamieson,

also a citizen of this state, a mortgage upon certain real estate in Douglas county to secure the three notes of the mortgagor bearing date of October 15, 1887, amounting in the aggregate to $2,570. Paul on the 11th day of September, 1888, sold and conveyed the mortgaged property to the plaintiff in error Tzschuck by deed containing the following recital immediately following the *habendum* clause: "Subject to a mortgage of $2,570 given to David Jamieson under date of June, 1888, and which mortgage the said George B. Tzschuck hereby assumes as a part of the purchase money for said lots and agrees to pay the same when due." Subsequently the defendant in error, William D. Mead, Jr., a citizen of the state of New York, filed in the circuit court of the United States for the district of Nebraska a bill in equity wherein he prayed for the foreclosure of said mortgage and for a deficiency judgment against Paul and Tzschuck. It was in said bill alleged that the complainant therein acquired said notes and mortgage by assignment from Jamieson, but without disclosing the citizenship of the latter, who was then, and had been since the execution of said notes, a citizen and resident of this state. Process was issued for and served upon the defendants named in accordance with the rules and practice of that court, and who in due time filed separate answers, as to which reference will be hereafter made, but in no way challenging the jurisdiction of the court over the persons of the defendants or the cause of action alleged. On July 8, 1889, a decree was entered in accordance with the prayer of said bill, accompanied by a finding that Tzschuck had assumed the payment of the mortgage therein mentioned, and was per-

sonally liable for any deficiency remaining after applying in satisfaction thereof the proceeds of mortgaged property, and which decree was on his, Tzschuck's, written request stayed for the period of nine months. The stay having expired, the mortgaged premises were, on the 4th day of October, 1890, by a special master, sold to the Mead Investment Company, of which report was in due time made to the court. Subsequently, on the 20th day of October, the complainant therein, by his solicitor, moved for a confirmation of the sale and for a deficiency judgment against Paul and Tzschuck in the sum of $2,181.82, the ascertained balance due on the original decree. Tzschuck, by whom alone said motion was resisted, on October 23 entered a special plea to the jurisdiction of the court, and praying for the vacation of the decree of foreclosure on the ground that the complainant was a citizen of New York and that Jamieson, his alleged assignor, was when said proceeding was commenced, and had been since the execution of said notes, a resident and citizen of this state. The sale was, it appears, on November 10 confirmed, and the special master ordered to execute a deed to the purchaser, although the record of said order contains no reference to the motion for a deficiency judgment, or to the defendant's plea to the jurisdiction of the court. Counsel agree, however, that the motion for deficiency judgment was, at a subsequent term, sustained as to Paul, and that the motion, so far as it related to the claim against Tzschuck, was at a still later date overruled. The record of the last mentioned order, which has never been reversed or modified, is as follows: "This cause having been heard on the motion of the complainant for judgment for

deficiency arising under the sale of the mortgaged premises under the decree herein, and the court being fully advised in the premises, doth now on this day, order, adjudge, and decree that said motion be, and the same is hereby, overruled, to which ruling and order the complainant, by his solicitor, then and there duly excepted." The complainant therein, to whom the mortgaged property in the meantime had been conveyed by the purchaser at the master's sale, in the month of June, 1891, filed in the district court for Douglas county his petition in equity, to which both Paul and Tzschuck were made defendants, praying a foreclosure of said mortgage, and alleging that the proceedings of the circuit court, there set out, were void for want of jurisdiction. There was also a further prayer for deficiency judgment against the defendants named in case the decree of foreclosure and the sale thereunder were found to be valid. To that petition the defendant Tzschuck interposed, as a defense, the decree of the circuit court, and particularly the order overruling the complainant's motion therein for a deficiency judgment. The plaintiff, by way of reply, alleged (1) that the order relied upon did not involve the merits of the motion for judgment, but the jurisdiction of the court only; (2) that the answering defendant, by his plea to the jurisdiction of the circuit court, was estopped to assert said order as an adjudication of the merits of the claim therein made. Upon the issues thus joined a decree was in due time rendered quieting the plaintiff's title to the property described as against the several defendants, in which it was found that the motion for deficiency judgment was overruled by the circuit

court on the sole ground that said court did not have jurisdiction of the cause, and the said order was accordingly no bar to that action. But instead of awarding judgment as prayed, an order was entered directing the plaintiff to so amend his petition as to declare at law against the defendant Tzschuck for the amount remaining unpaid of the mortgage debt, and, in conformity with which, pleadings were filed, upon which the cause was subsequently tried to the same judge, who found upon the issues thus joined for the plaintiff, and upon which was entered the judgment presented for review by means of this proceeding. The issues raised by the pleadings are substantially the same as those involved in the proceedings to which they are supplemental and do not require extended notice at this time.

The controversy in this court, notwithstanding the apparently complex character of the transactions shown, involves a single question, to which all others are merely incidental, and important only in so far as they assist in its solution, viz.: Did the circuit court, by the order denying the deficiency judgment, determine the merits of the complainant's claim therein against Tzschuck? The judgment below is defended on the ground, among others, that the finding of the district court in the equity case is conclusive of the present controversy; but that claim is certainly without merit, for the reason, as we have seen, that there was in that proceeding no final decree against Tzschuck. Such a record is no more available as an estoppel than would be the verdict of a jury without a judgment.

Aside from the documentary evidence bearing upon the subject, the solicitor for the complain-

ant therein testified that the only question presented to or determined by the circuit court upon the hearing of the motion was that of its jurisdiction to render a deficiency judgment against Tzschuck, although he in effect admits that there was on that occasion an intimation by the presiding judge that the complainant was entitled to a personal judgment against the party primarily liable for the mortgage debt and no other. The defendant therein testified in his own behalf that the judge in passing upon the motion remarked that the allowing of a personal judgment in a foreclosure proceeding against parties other than the mortgagor was discretionary, and had never been done in that court, in which he is to some extent corroborated by his solicitor. That evidence *aliunde* was admissible for the purpose of proving what issues were in fact tried and determined upon the hearing of the motion, is a proposition not controverted in this proceeding. We assume, therefore, that such evidence was rightly received; and if our judgment depended upon the testimony of the witnesses concerning the basis of the order in question, we could, without difficulty, agree to an affirmance of the judgment. We are, however, convinced that the trial judge either overlooked the evidence supplied by the record of the circuit court, or failed to accord it the consideration to which it is justly entitled.

We understand both parties to concede that the decree of foreclosure is valid and conclusive upon the parties thereto. It is true we find in the brief of defendant in error this language: "The United States court never had jurisdiction of the case of Mead v. Paul et al., because of the citizenship of Jamieson, assignor of the complainant,"—which

we interpret to mean that the circuit court would, had Jamieson's citizenship been disclosed before final decree, have refused to entertain the cause, or in any manner proceed therewith. That view is the correct one, and is sanctioned by numerous decisions of the supreme court of the United States in giving construction to the acts of congress defining the jurisdiction of the federal judiciary. (See *Blacklock v. Small*, 127 U. S., 96; *Parker v. Ormsby*, 141 U. S., 81.) Further reference to the statutes mentioned is deemed unnecessary for the purposes of the present controversy. Nor would a review of the decision upon the subject by the federal courts, in this connection, be of profit to the parties or to the profession. It is sufficient for our purpose that the circuit court, according to the bill of the complainant therein, had jurisdiction of the cause, and the decree rendered thereon cannot be regarded as a nullity. True, it might perhaps have been reversed or vacated on appeal, or even by that court, but its validity cannot be assailed in a strictly collateral proceeding. (See *Erwin v. Lowry*, 7 How. [U. S.], 172; *Des Moines Navigation & Railroad Co. v. Iowa Homestead Co.*, 123 U. S., 552.) It follows, as a necessary deduction from the foregoing proposition, that the circuit court was possessed of jurisdiction to make such orders, and take such steps as were necessary and appropriate for the enforcement of its decree, by sale of the mortgaged property, and by means of judgments and execution against the parties personally liable for the debt thereby secured.

Let us again, in the light of these rules, briefly summarize the essential facts of the case. The circuit court on November 10, 1890, expressly asserted its power to enforce the decree, by overrul-

ing Tzschuck's objection to its jurisdiction, and by confirming the master's sale previously made. It also at a subsequent day further asserted its jurisdiction by awarding personal judgment against Paul for the balance due on the notes executed by him; and later still denied the complainant's motion for judgment against Tzschuck. A reference to the last mentioned order (above set out) discloses no doubt in the mind of the court with respect to its jurisdiction over the subject involved, while on the contrary it clearly appears to include the merits of the motion. Had the decision involved the question of jurisdiction only, the complainant would, we are bound to presume, have insisted upon preserving his rights by a truthful recital of that fact in the record of the court. We are, therefore, in order to reach the conclusion of the district court, required to infer, upon extrinsic and conflicting evidence, not that the ruling of the circuit court is erroneous merely, but an intentional reversal by it of a previous ruling in the same cause, deliberately made and confessedly sound. Such an inference will not be indulged, since it is unreasonable and altogether inconsistent with the presumption which exists in favor of the judgments of courts of general jurisdiction. The judgment will accordingly be reversed and the cause remanded for further proceedings therein.

REVERSED.

EDITHA H. CORBETT ET AL. V. JOHN C. FETZER.

FILED MARCH 3, 1896. No. 6164.

1. **Parol Evidence:** NEGOTIABLE INSTRUMENTS: INDORSEMENTS. The words "without recourse," following the name of the first, and preceding the name of the second indorser of a bill or note, may be shown by parol evidence to apply to the former instead of the latter.
2. **Negotiable Instruments:** INDORSEMENTS: EVIDENCE. As against a subsequent *bona fide* holder, the liability created by the indorsement in blank of a bill or note cannot be varied by parol evidence; but, as between the original parties to such an indorsement, the terms of the contract is a proper subject of inquiry, and may be established by parol evidence. (*Holmes v. First Nat. Bank of Lincoln*, 38 Neb., 326.)
3. ——: ——: ——. Plaintiffs in error, on the evidence in the record, *held* not liable as indorsers.

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

B. G. Burbank, for plaintiffs in error.

J. J. O'Connor, contra.

POST, C. J.

This was a proceeding by Fetzer, the defendant in error, in the district court for Douglas county to foreclose fifty-seven different mortgages executed by William B. Cowles and wife to Editha H. Corbett, upon certain property in North Side Addition to the city of Omaha, to secure payment of as many notes of even date therewith, payable by said Cowles to the order of the mortgagee named. It is alleged in the petition that the said Editha H. Corbett, Charles Corbett, Day & Cowles, and

R. W. Day, who were made defendants, indorsed said notes and thus became liable thereon. The prayer is for a foreclosure of the mortgages and for personal judgment against Day & Cowles, R. W. Day, and the Corbetts for any balance remaining due on their said indebtedness, after applying thereon the proceeds of the mortgaged property. Of the defendants named the Corbetts (husband and wife) only answered, admitting the allegations of the petition, except as to their personal liability, and charging that the notes above described were indorsed without recourse upon them. The reply is a general denial. The district court, upon the issues joined, found generally for the plaintiff, accompanied by a special finding that the Corbetts were liable as indorsers of said notes, and a decree was entered in accordance therewith, which has been removed into this court for review.

Practically the only question presented by the motion for a new trial and the petition in error relates to the liability of the Corbetts as indorsers of the notes above described. On the back and near the top of each of said notes appears the following: "E. H. Corbett. Chas. Corbett. Without recourse on us. Day & Cowles. R. W. Day." Said notes, according to the claim of the Corbetts, had been pledged to Samuel R. Johnson, bearing their indorsement in blank, as collateral security, and shortly before the consummation of the sale thereof to Fetzer the words immediately following their names, as shown above, were added in order to limit their liability thereon. The transaction which resulted in the purchase of the notes by Fetzer was conducted on the part of the Corbetts by R. W. Day, one of the defendants named,

who testified that the indorsements "Day & Cowles" and "R. W. Day" were made during such negotiations at the request of the plaintiff, and that previous to such indorsement the words "without recourse on us" were written thereon in his presence by C. W. Johnson, a clerk in the office of Mr. Corbett, and in which he is corroborated by both Johnson and Corbett. There are observable from the record facts which tend strongly to sustain the contention that the words of limitation were intended to apply to the indorsement of the Corbetts rather than to that of Day & Cowles or R. W. Day. They were in the first place written with different ink, apparently at a different time, and certainly in a different hand from that employed in the subsequent indorsements. They were also written by Corbett's clerk, by his order and direction, pending the negotiations for the sale of the notes and at a time when the question of their liability upon paper of like character would naturally be uppermost in the minds of solvent indorsers, as the Corbetts are shown to have been. Johnson was asked on cross-examination why the words "without recourse" were not written over the names of the indorsers, to which he answered, in substance, that Mrs. Corbett's name was written so near the upper margin of the note as to leave no room therefor,—an explanation which is shown by the record to be entirely consistent with the facts. Again, the claim that the subsequent parties, instead of the Corbetts, indorsed without qualification finds support in the fact that both R. W. Day and the firm of Day & Cowles were beneficially interested in the sale of the notes, and the further fact that their absolute liability thereon is established by the per-

sonal judgment entered against them in this case by default, as also by the admission under oath of Day, who testified in behalf of the defendants. On the part of the plaintiff below, Fetzer, it is shown that when the notes were first exhibited to him by Day, four or five days previous to the close of the transaction, they bore no indorsements aside from the names of the Corbetts, and that when next seen by him they were indorsed as now, except the name of Mr. Day, which was added in his, Fetzer's, presence at the time they were delivered to him. He testified also that he purchased the notes described, relying upon the indorsements of the Corbetts, paying therefor seventy-eight per cent of their face value, and that at the same time he purchased other notes executed by Cowles and indorsed by the Corbetts without recourse, at fifty-four per cent of the amount due thereon. He is also corroborated to some extent by his brother, William Fetzer, and Mr. Martin, who were present during the several interviews with Day. A final analysis of the evidence shows the following facts, as to which there is no substantial controversy: (1.) When the notes were first offered for sale to Fetzer they bore the blank indorsement of the Corbetts. (2.) Afterward, pending negotiations for the sale thereof, Charles Corbett, for the purpose of limiting the liability of himself and wife as indorsers of said notes, caused to be written thereon immediately below their names the words "without recourse on us." (3.) The names of the said Editha H. Corbett and Chas. Corbett were written so near the margin of said notes and each of them as to leave no room for the words quoted above their names. (4.) R. W. Day, one of the subsequent indorsers,

has expressly admitted his liability on said notes, and the absolute liability of the firm of Day & Cowles thereon is established by the decree in this case entered by default. (5.) That said notes, when finally purchased by Fetzer, bore all the indorsements now appearing thereon, except the name of R. W. Day, and were at said time indorsed by said Day at his, Fetzer's, request. (6.) Fetzer purchased said notes, paying therefor seventy-eight per cent of their face value, relying upon the indorsement of the Corbetts, who were then solvent.

The remaining questions merely involve the application of the law to the facts above stated. A case in point is *President of Fitchburg Bank v. Greenwood*, 84 Mass., 434. Upon the back of the note produced at the trial of that case there appeared in three successive lines the following indorsements: "Greenwood & Nichols—without recourse—Asa Perley, 2d." Parol evidence was offered by Greenwood & Nichols tending to prove that the words "without recourse" were written by them for the purpose of limiting their liability as indorsers and rejected in the absence of an offer to prove notice by the plaintiff, a remote indorsee and alleged *bona fide* holder. In reversing the judgment of the lower court Bigelow, C. J., said: "There is no rule of law which requires a party to limit or qualify his indorsement by any writing preceding his signature. Such qualification may and often does follow the name of the party. Text-writers of approved authority recognize this mode of limiting the liability of an indorser as regular and appropriate." The doctrine of that case is sustained by the following authorities therein cited: Chitty, Bills (10th Am. ed.),

234, 235; Story, Promissory Notes, sec. 138 and note; and in 2 Randolph, Commercial Paper, sec. 720, we observe it is approved in the following emphatic language: "The words 'without recourse,' following the name of an indorser, A, and preceding the name of indorser B, may be shown by A to apply to his indorsement, even against a *bona fide* holder who supposed it to apply to B's." It may be, as intimated, that there existed a purpose, shared by Day and Corbett, to deceive the plaintiff by inducing him to purchase the notes in the belief that the Corbetts were liable thereon. Such a contention has, however, no foundation either in the pleadings or the proofs, which show that he, Fetzer, throughout the entire transaction, relied upon his own judgment respecting the value of the paper in question; nor is there any force in the objection that the evidence explanatory of the indorsement of the notes by the Corbetts tends to change or vary their written obligation. As bearing upon that question we quote further from the opinion above cited: "It [the evidence offered] had no tendency to vary or control the written contract, or to change the legal effect of the indorsement. It only proved what the contract really was, at the time it was entered into by the defendants. * * * The attempt in this case is not merely to hold the defendants on a contract according to its meaning and legal effect, but to fasten on them a contract into which they never entered. If the plaintiffs mistook the application of the words which were written for the purpose of qualifying the indorsement of the defendants on the note, this fact furnishes no ground for enlarging or changing their liability on the contract

into which they in fact entered." It will be remembered, too, that this cause presents no question of fraud or estoppel, nor is the action one between the indorser and a *bona fide* holder of commercial paper, but between the parties to the contract of indorsement, and, therefore, within the rule recognized in *Holmes v. First Nat. Bank of Lincoln*, 38 Neb., 326. It was held in the case last cited that, as against a subsequent *bona fide* holder, the liability created by the indorsement in blank of a bill or note cannot be varied by parol evidence; but that, as between the original parties thereto, the precise terms of such contract is always a subject of inquiry, and that parol evidence is admissible for that purpose. The conclusion we reach is that the provision of the decree of the district court for a deficiency judgment against Corbett and wife is unsupported by the evidence, for which it should be reversed and the cause dismissed as to the plaintiffs in error.

REVERSED.

IRVINE, C., not sitting.

JOHN BARSBY V. N. H. WARREN & COMPANY.

FILED MARCH 3, 1896. No. 6126.

Action Upon a Conditional Promise: JUDGMENT FOR DEFENDANT. Evidence examined, and *held* to sustain the judgment complained of.

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

John Barsby, pro se.

Sedgwick & Power, contra.

POST, C. J.

This was an action by the plaintiff in error in the district court for Fillmore county, who sought to recover upon the following agreement:

"Whereas, a certain agreement was made and entered into the 22d day of July, 1885, by and between the village of Fairmont, Fillmore county, and state of Nebraska, party of the first part, and Ira E. Williams, of said Fairmont, party of the second part, whereby the said village of Fairmont agreed to pay to the said Williams the sum of eight thousand nine hundred and sixteen dollars, upon the completion of a system of water-works described in said agreement, and the acceptance of said works by the said village of Fairmont; and whereas, said agreement has been assigned by the said Ira E. Williams to James Peabody, and the said James Peabody has assigned the same to N. H. Warren & Co.; and whereas, the said Ira E. Williams has agreed to pay John Barsby five hundred dollars out of the money to be paid by the said village of Fairmont under the said contract: Now, we, the undersigned, in consideration of the premises, agree to hold for and pay to the said John Barsby the sum of ($500) five hundred dollars as soon as we shall receive from the said village of Fairmont the said sum of eight thousand nine hundred and sixteen dollars as provided in said contract.

"Witness our hands, Chicago, March 4, 1886.

"N. H. WARREN & CO."

The breach alleged is the sale and assignment by the defendants of the contract mentioned in the foregoing written agreement to Palmer, Fuller & Co. and their failure to complete the system of water-works therein referred to, whereby they, defendants, were unable to demand or receive from the village of Fairmont the sum of $8,916, or any other sum of money. Reference will hereafter be made to the answer, so far as essential to a consideration of the questions presented by the record. At the conclusion of the plaintiff's evidence a verdict was returned for the defendants under the direction of the court, upon which judgment was subsequently entered, and which it is sought to reverse by means of this proceeding.

We find in the record nothing to indicate whether or not the water-works had been completed at the date of the assignment by defendants to Palmer, Fuller & Co. It does, however, appear that the village, for reasons not disclosed, refused to pay the stipulated price of $8,916, and that an effort was made to compromise the claim for $7,000, which was defeated, the village board being evenly divided thereon, and the plaintiff, the acting mayor, declining to vote. A compromise was, however, subsequently effected, whereby Palmer, Fuller & Co. received the sum of $6,500 in village warrants in full satisfaction of their claim under and by virtue of said contract. It is evident from the pleadings that the defendants' liability is not absolute. Their undertaking, on the contrary, was to hold for and pay to the plaintiff the sum of $500 on the receipt by them of the full sum of $8,916. It is not at this time necessary to determine whether an action would

lie for a breach of the particular agreement set out, except upon the actual receipt by the defendants of the sum of money therein named. It is sufficient that they would be legally answerable for any act of theirs which would incapacitate them to demand or receive the money due from the village, to the plaintiff's damage. The rights of the plaintiff appear to have been protected in assignment by the defendants to Palmer, Fuller & Co., judging by the following letter:

"CHICAGO, Dec. 11, '90.

"JOHN BARSBY: We sold our interest in the water-works claim to Palmer, Fuller & Co., showing them our contract with you, which they assumed. As by the contract, 'we agree to hold for and pay to the said John Barsby the said sum of $500 as soon as we shall receive from said village of Fairmont the sum of $8,916, as provided in said contract.' P. & F., attorneys, when shown the contract and required by us to assume it, said, 'Very well, we will, and hope we shall have it to pay.'

"Yours truly, N. H. WARREN & CO."

Defendants, by their answer, in effect charge that Palmer & Fuller were unable, with their assistance, after making all reasonable and necessary efforts, to collect from the village any sum on said contract in excess of the $6,500 above mentioned, and that they are not answerable for the loss resulting from such failure to the plaintiff or to Palmer, Fuller & Co. The necessary inference from the plaintiff's evidence is that the $6,500 finally paid by the village represents the amount actually due from the latter at the time of the assignment of the contract to the defendants, as well as at the date of the assignment by them to Palmer, Fuller & Co. It follows there-

from that the plaintiff's loss did not result from the defendants' alleged wrongful act, but from antecedent causes for which they, the defendants, are in nowise responsible. It follows that the judgment is right and should be

AFFIRMED.

EMMA L. VAN ETTEN v. WILLIAM COBURN.

FILED MARCH 3, 1896. No. 6014.

Action Against Sheriff for Fees Wrongfully Received and Retained: JUDGMENT FOR DEFENDANT. Evidence in the case examined, and *held* not to sustain the finding and verdict of the jury in the trial court.

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

David Van Etten, for plaintiff in error.

Thomas D. Crane, contra.

HARRISON, J.

In this action, commenced in the district court of Douglas county, the plaintiff, also plaintiff in error, asked the recovery from the defendant of the sum of $11.70, fees received by him as sheriff, he then being such officer in Douglas county. It was claimed by the plaintiff that the amount sued for was illegally received by the officer as fees, and that he was thereby liable for their repayment and also a statutory penalty of $50. A portion of the petition is as follows, after an allegation that the defendant was sheriff of Douglas

county from about January 1, 1886, to about January 1, 1890: "The plaintiff complains of said defendant for that, on or about the 19th day of June, 1888, he, acting as said sheriff, illegally and wrongfully, without plaintiff's knowledge or consent, took, retained, appropriated, and converted to his own use and benefit $11.70 of plaintiff's money, under the pretense and claim that he had, on or about the 14th and 15th days of March, 1886, served for said plaintiff and at her instance and request subpœnas upon A. Gsantner, N. Spellman, Wm. Klatt, Jacob Neu, Sullivan Bros. (Dan and John H.), John Libbie, N. J. Sander, James Morton, Charles Kosters, S. D. Crawford, and A. L. Wiggins, upon which he so took, appropriated, retained, and converted to his own use and benefit $7.20 in fees and mileage, claiming and pretending he had served said subpoenas at the instance and behalf of said plaintiff as defendant in the action entitled George A. Hoagland v. Emma L. Van Etten et al., docketed in the district court of Douglas county, Nebraska, in Appearance Docket X, number 375, and that he had done and performed said services as said official for plaintiff and at her instance and request, when in truth and in fact she had not caused said subpœnas to issue and he had not done and performed any of said services for her or in her behalf, or at her instance or request, and she has not at any time become liable therefor, and said defendant has not at any time become entitled to recover from plaintiff any of said fees which said defendant, as aforesaid, illegally and wrongfully took and retained from her and as said official so appropriated and converted to his own use and benefit; and that said defendant, on the same

day, illegally and wrongfully took, retained, appropriated, and converted to his own use and benefit in the same action and for other pretended services therein for plaintiff, and as such official, other $4.50 of plaintiff's money, without her knowledge or consent, when in truth and in fact said defendant, as said official or otherwise, had not done or performed any services in said action or otherwise, or upon which he was or might be entitled to recover from plaintiff, for which he had not been paid in full at or before the doing and performing of any such services, and whereby said defendant, illegally and wrongfully, took, retained, appropriated, and converted to his own use and benefit said $11.70 greater fees than the fees limited and expressed by law to said official for any and all services done and performed by him for plaintiff in said action or otherwise, and so illegally and wrongfully took, retained, appropriated, and converted to his own use and benefit said $11.70 of plaintiff's money as fees for such official, where the business chargeable for such fees was not actually done and performed for said plaintiff or in her behalf, or wherein she was liable or might become liable, and which said $11.70 said plaintiff has demanded of said defendant, and he has neglected and refused to pay the same, or any portion thereof. Whereby said defendant has become indebted to said plaintiff in said sum of $11.70, and interest from June 19, 1888, and she has become entitled, under and by virtue of said facts, to recover from defendant, in addition to said $11.70 and interest, the sum of $50 debt, and an action has accrued against said defendant in favor of said plaintiff for the sum of $61.70 and interest on $11.70 thereof from June

19, 1888." The answer of the defendant admitted that he was the sheriff of Douglas county at the time stated in the petition and denied each and every other allegation thereof. There was a trial and a verdict and judgment in favor of defendant, and the plaintiff brings the case to this court for review by proceedings in error.

The evidence in this case discloses that there was an action commenced in the district court of Douglas county, by George A. Hoagland, against Emma L. Van Etten et al., in which the sheriff served several subpœnas, one or two ordered by the defendant Emma L. Van Etten and the others by the plaintiff Hoagland. On June 19, 1888, Hoagland's attorney paid into court $89.15. Why, or on what account, does not appear, further than is shown in an entry in the appearance docket of the district court, wherein it was stated, "Received of plaintiff, by Mr. Switzler, his attorney, $89.15, account of costs paid by defendant Van Etten." The $11.70, for which this suit was instituted, was, so far as is shown by the testimony introduced during the trial in the district court, composed of fees charged and received by the sheriff for serving subpœnas in the case of Hoagland v. Emma L. Van Etten et al. Two of these subpœnas were issued, the evidence shows, for witnesses on the part of the defendant in the action, and the amount of fees charged for their service was $4.50, $3.90 for one and 60 cents for the other. This sum the plaintiff in the present suit claimed was paid to the sheriff in advance of the service, but the testimony on this point in the case was directly conflicting, and the jury having determined it in favor of the defendant, the sheriff, and the evidence being amply sufficient to sus-

tain such finding, in accordance with a well established rule of this court it will not be disturbed. The only issue raised in the trial as to this $4.50 of the amount claimed was that it had been paid in advance, and hence the sheriff was not entitled to receive it from the moneys paid into court, and nothing further is advanced in the discussion in the brief as a reason why he should not have been paid it by the clerk, and we conclude that if determined that it had not been so paid, it was or will be conceded that he was entitled to receive it of the money paid into court of the money in Hoagland v. Van Etten as costs. Of the $11.70 claimed by plaintiff in the case at bar, $7.20 was the amount of fees charged by the sheriff, defendant in the action, for service of subpœnas in the case of Hoagland v. Van Etten et al., issued for witnesses in behalf of the plaintiff in such action, and were not chargeable primarily against defendant Emma L. Van Etten, and, though it was not shown, or attempted to be, that any portion of the amount was illegal or excessive as fees, or that the services for which it was charged had not been performed, yet, if the money paid into court was paid for Mrs. Van Etten and belonged to her,—and from the evidence adduced we must conclude that this was true,—it could not be applied in payment on account of fees for services performed in the case by the officer at the instance and request of the opposing party, at least not until it had been finally determined that she was liable for the payment of such costs, and no such final determination was shown in this case, and if so applied, it may be recovered of the party receiving it. This is within the doctrine announced in the case of *Cady v. South Omaha Nat. Bank*, 46 Neb., 756.

The facts or circumstances do not sustain a finding or verdict in favor of defendant as to $7.20 of the amount involved in the action, hence such finding must be set aside. There are other errors assigned and argued, but as there must be a new trial, we need not now discuss them.

REVERSED AND REMANDED.

C. W. GOODIN V. J. H. PLUGGE.

FILED MARCH 3, 1896. NO. 6274.

Alteration of Instruments: PROMISSORY NOTES: EVIDENCE. Where a promissory note is offered in evidence, and it is apparent from an inspection that there had been a material alteration thereof it may generally be received. Whether so altered prior or subsequent to its execution and delivery, is a question, finally, for the determination of the trial court or the jury, as is any controverted fact in the case, from a consideration of all the competent evidence adduced by the parties explanatory or tending to settle the disputed point. (*Bank of Cass County v. Morrison*, 17 Neb., 341.)

ERROR from the district court of Colfax county. Tried below before SULLIVAN, J.

Phelps & Sabin, for plaintiff in error.

T. W. Whitman and *H. C. Russell, contra.*

HARRISON, J.

An action was instituted on a promissory note in the county court of Colfax county, and from a judgment rendered there was appealed to the district court of the same county. The defenses in-

terposed were that there had been a material alteration in the note subsequent to its execution, and duress. There was a trial to the court and a jury, resulting in a verdict and judgment for defendant; hence these proceedings in error on behalf of the plaintiff.

With reference to the defense of duress it may be said that there was not sufficient evidence to sustain it, and we will turn our attention to that in relation to a material alteration of the instrument. Counsel for plaintiff contend that it devolved upon the defendant to show by a preponderance of the evidence that there had been such an alteration, and further, that it was made subsequent to the execution and delivery of the note. The trial judge instructed the jury in reference to the burden of proof, as follows: "As to each of said defenses the burden of proof is on the defendant, and before you can find in his favor on either of said issues, he must produce a preponderance of the evidence thereon. If the evidence on either of said issues is equally balanced, or if the preponderance is with the plaintiff, you should find for the plaintiff as to such issue." The contention in behalf of defendant is, in substance, that when the defendant had offered proof which tended to show a material alteration, the burden of proof was then upon the plaintiff to explain it or establish the fact that it was made before execution. In cases in which the point here involved has arisen and been discussed and decided there appears great contrariety in the opinions, and different and opposite rules have been announced. In *Neil v. Case*, 25 Kan., 510, it was said with reference to this subject: "This is a vexed question and the books

are full of diverse decisions. Four different rules are generally stated: First, that an alteration apparent on the face of the writing raises no presumption either way, but the question is for the jury; second, that it raises a presumption against the writing, and requires, therefore, some explanation to render it admissible; third, that it raises such a presumption when it is suspicious, otherwise not; fourth, that it is presumed, in the absence of explanation, to have been made before delivery, and therefore requires no explanation in the first instance. * * * The question as to the time of the alteration is, in the last instance, one for the jury. It is, like any other fact in the case, to be settled by the trier or triers of the facts. Generally, the instrument should be given in evidence, and in a jury case should go to the jury dence, and in a jury case should go to the jury, parties to such explanatory evidence of the alteration as they may choose to offer. * * * Perhaps there might be cases where the alteration is attended with such manifest circumstances of suspicion that the court might refuse to allow the instrument to go before the jury until some explanation." The rule governing this question in this state was announced by the court in the case of *Bank of Cass County v. Morrison*, 17 Neb., 341, as follows: "Where a material alteration is apparent on the face of a written instrument offered in evidence, the question as to whether such alteration was made before or after the execution and delivery of such instrument is, in the last instance, one for the jury or trial court. It is, like any other fact in the case, to be settled by the trier or triers of facts. Generally, in such case, the instrument may be given in evidence, and may go to

the jury or trier of fact, leaving the parties to such explanatory evidence of the alteration as they may choose to offer." The facts and circumstances of the present case bring it within the doctrine thus announced, hence it will be adopted and applied herein.

The claim in regard to the alteration of the note in suit was that it was originally made for the sum of "seventy-four and 35-100 dollars," and that in the body of the note and immediately in front of the above named words, as they there appeared, there were inserted the words "one hundred," thereby increasing it by the amount shown by the two added words, and further, that the figures in the upper left-hand corner of the note had been so changed as to indicate the note to be for the sum of $174.35, when, as executed, such figures had shown it to be for $74.35. There was evidence more or less positive in relation to any alteration havig been made, and, if so, the time when; and we cannot say that the finding of the jury was plainly opposed to the weight of the testimony or clearly wrong. This being true, it will not be disturbed or reversed. (*McLaughlin v. Sandusky*, 17 Neb., 110, and cases cited.)

The court, in two of the paragraphs of its instructions, each referring to the alleged alterations of the note, mentioned the insertions of the words "one hundred" and the figure "1" in the same connection, coupling them together in a statement of what effect the alterations would have upon the rights of the parties to the action, and making no distinction between them. Counsel for plaintiff state in their brief: "The court erred in submitting to the jury, as the material part of the note, the question as to whether or not

the figure '1' in the left-hand top of the note had been placed there before or after its execution. These figures are not a material part of the note, and the jury should have been told that they could only consider such change in figures, if any, upon the question whether there was any alteration in the body of the note." The record discloses that the court submitted to the jury a special finding. We here give it with the answer: "The jury will answer these questions: First, was the note in suit altered after the execution by the insertion therein of the words 'one hundred'? Answer: Yes." From this it clearly appears that the verdict of the jury was based in part, if not as a whole, on a finding that the note had been altered after its execution by the insertion of the words "one hundred," and this being ascertained, it becomes evident that the fact that the question of the insertion of the figure "1" entered into the deliberations of the jury, and, by sanction of the instructions of the court, jointly with the question of the addition of the words did not prejudice the rights of the plaintiff.

Counsel for plaintiff prepared five instructions and presented them with a request that they be read to the jury. This request was refused. In the motion for new trial the action of the court in this respect was assigned for error as follows: "The court erred in refusing instructions numbered 1, 2, 3, 4, and 5, requested by the plaintiff." In the argument in the brief filed counsel for plaintiff refer to but two of these instructions, the fourth and fifth. It seems plain that the purpose for which the fifth instruction was prepared, and it was expected its giving would subserve or accomplish, was fully covered and

effected by instructions numbered 2 and 3, given by the court on its own motion. If so, it was not error to refuse to give the one requested by counsel for plaintiff. This being our conclusion, we need not further examine any alleged errors in the refusal to give these instructions, as they were grouped in the assignment. (*Rea v. Bishop*, 41 Neb., 202.)

There are no other or further questions raised or discussed in the briefs, and, in accordance with the views herein expressed and conclusions announced, the judgment of the district court will be

AFFIRMED.

A. OLTMANNS ET AL. V. JOHN FINDLAY ET AL.

FILED MARCH 3, 1896. No. 6170.

1. **Review:** ASSIGNMENTS OF ERROR: INSTRUCTIONS. An assignment of error as to the giving of a number of instructions grouped in the assignment will be considered no further than to ascertain that any one of the group was correctly given.
2. **Bill of Exceptions:** REVIEW. To present for the consideration and determination of this court errors alleged to have occurred during the trial of a cause in district court, a bill of exceptions, settled and allowed in accordance with the legal requirements, is indispensably necessary.
3. **Instructions:** ASSIGNMENTS OF ERROR: REVIEW. If an assignment of error, which is predicated on the action of the trial court in giving several instructions, is determined to be without force as to one of the instructions given, it must be overruled as to all.
4. **Review:** BILL OF EXCEPTIONS. If in a case before this court the record of which contains no bill of exceptions, or one not authenticated as prescribed by law and which cannot be used, error is assigned based on the action of the trial

court in giving instructions to the jury, such instructions will be presumed to be free from error, if they do not contain misstatements of the law and do not contain statements which could not be faultless under any possible conditions of the proof competent in the case, as error must affirmatively appear. If it does not, the presumption that the proceedings of the trial court were regular and without error must prevail. (*Willis v. State*, 27 Neb., 98.)

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

John S. Stull and *Stull & Edwards*, for plaintiffs in error.

W. H. Kelligar, contra.

HARRISON, J.

The defendants in error commenced this action against the plaintiffs in error, alleging as the cause thereof, in substance, that on or about the 15th day of August they purchased of plaintiffs in error a horse, or stallion for general breeding purposes; that the value of a horse for such use depends largely upon his being well bred or pure stock; that plaintiffs in error, to induce defendants in error to purchase the horse, falsely and fraudulently represented to "them that said horse was a thoroughly bred German coach horse, registered in the stud book of Germany, and that they would furnish and deliver to the plaintiffs (defendants in error) a certificate of such registration from the stud books of Germany, showing the registration of such horse therein; that the registration number of said horse in said stud books of Germany was No. 51. Plaintiffs (defendants in error), relying upon such representations, did then

purchase said horse for the sum of $2,200, then duly paid to the defendants (plaintiffs in error) in the negotiable promissory notes of the plaintiffs (defendants in error) delivered to defendants (plaintiffs in error)." Here followed a statement in detail that the horse was not in any of the particulars as represented, and also the failure of the parties to furnish the certificate of registration as promised, and the consequent and resulting uselessness of said horse to the purchasers for the purpose for which they had bought him, and a prayer for damages in the sum of $1,900. The answer of plaintiffs admitted the sale of the horse to defendants in error for the sum of $2,200, and the execution and delivery of the promissory notes of the defendants in error to plaintiffs in error in that amount; that they represented the horse to be a thoroughly bred one, averred that no part of the purchase price of the horse had ever been paid, and denied each and every other allegation of the petition. There was a trial to the court and a jury, resulting in a verdict for $1,100 in favor of defendants in error, from which there was afterwards remitted $400, and for the balance judgment was rendered.

One assignment of the petition in error is as follows: "The court erred in giving the 1st, 2d, 3d, 4th, 5th, 6th, and 7th paragraphs of the instructions given by the court upon its own motion." Under this, objections to some of the instructions enumerated are urged in the arguments contained in the brief filed for the complaining parties. Of the instructions against which this assignment is directed, the one designated as "1st" therein is a part of a statement of the issues, or of the cause of action as outlined in

the petition in the case, and as such is proper and not erroneous, and this being determined, it disposes of the entire assignment, as the alleged errors in relation to giving the instructions designated are not separately assigned, but *en masse*, and need not be further examined or considered.

Another assignment of error is as follows: "The court erred in giving the 1st, 2d, and 3d paragraphs of the instructions asked by the defendant in error." Instruction numbered 2, included in this assignment, reads as follows: "The court instructs the jury that if you find from the evidence that the paper introduced in evidence as plaintiff's Exhibit B was given by defendants to plaintiff, and represented at the time by defendants to be a certificate of registration or pedigree, when in fact it was neither, this fact is alone a circumstance tending to prove fraud." It is contended by counsel for plaintiff in error that the trial court, by the use of the words "when in fact it was neither," referring to Exhibit B, told the jury that the paper was not a certificate of registration or pedigree, and that this should not have been done, but the jury should have been instructed to determine from the evidence whether it was or was not such a certificate. Let it be conceded, for the purpose of argument, that the instruction was open to the objection urged against it; then, whether or not the court erred in giving it must depend upon the answer to another question, viz., was there or not uncontroverted testimony introduced that such paper was not a certificate of registration, or was such fact fully proved and without conflict in the evidence adduced in relation to it? If so, the court did not err in giving the instruction. The determination of this latter query ne-

cessitates a reference to and examination of the testimony. The document attached to the record which purports to be a bill of exceptions has never been allowed as required by law. The parties, by their counsel, stipulated that the clerk of the district court might sign and allow the bill of exceptions, but he failed to exercise the power or right thus conferred, or to perform the duty of signing and allowing it. To present for the consideration and determination of this court errors alleged to have occurred during the trial of a case in the district court, a bill of exceptions, settled and allowed in accordance with the legal requirements, is indispensably necessary, and if not authenticated it cannot be examined or used in the cause for any purpose. (*Scott v. Spencer*, 42 Neb., 632; *Glass v. Zutavern*, 43 Neb., 334.) This being true, we cannot inspect the evidence in this case to ascertain whether the fact stated to the jury by the court in the instruction requested and given was thereby proved and undisputed or not, and cannot say but that it was entirely proper for the court to give the instruction. It will not be presumed that the trial court erred. Error must be affirmatively shown. If not, the presumption must prevail that the court acted and proceeded correctly, and that the testimony was such as fully warranted the giving the instruction as read to the jury. (*Willis v. State*, 27 Neb., 98; *Romberg v. Hediger*, 47 Neb., 201.) The assignment of error was not directed to each of the instructions, but to all, and as it was without force as to one, in accordance with the well established rule of this court, it fails and must be overruled as to all. (*Wax v. State*, 43 Neb., 18.)

There are other and further assignments of

error which are urged in the brief filed for plaintiff in error, but to arrive at a decision of the questions raised by each and all of them an inspection or investigation of the testimony given at the trial must be made, or of portions of it. We have hereinbefore determined that such evidence has not been preserved in the manner provided by law and is not before us and cannot be used herein; that errors must be affirmatively shown, and if not, it will be presumed that the proceedings of the trial court were without error in the particular of which complaint is made. It follows that the further assignments of error must be overruled and the judgment of the district court

AFFIRMED.

F. A. PJARROU V. STATE OF NEBRASKA.

FILED MARCH 3, 1896. No. 8212.

1. **Robbery**: CONVICTION. Evidence examined, and *held* sufficient to support the verdict.

2. **Criminal Law**: DUTY OF COURT TO INSTRUCT. It is the duty of the trial judge, particularly in criminal actions, to instruct the jury as to the rules of law governing the disposition of the cause, whether he is requested to do so or not, and if a charge to a jury, by omission to instruct on certain points, in effect withdraws from the consideration of the jury an essential issue of the case, it is erroneous. (*Dolan v. State*, 44 Neb., 643.)

3. ———: ———: HARMLESS ERROR. Where there is such an omission to instruct, but it is clear that the jury have formed the right conclusion and no prejudice has resulted from the omission, it is not error which calls for a reversal of the judgment.

4. **Robbery**: INSTRUCTIONS: EVIDENCE. An instruction in this,

a prosecution for the crime of robbery, was objected to by counsel on the ground that the instruction was erroneous, in that it submitted to the jury the question of whether the accused, "either alone or in company with others," committed the acts alleged in the complaint, for the reason that there was no evidence that the defendant acted alone at any time or without the co-operation of others in the matters charged, *held*, that the testimony sustained the instruction given, in the particular indicated by the objection.

5. **Instructions:** FAILURE TO REQUEST: WAIVER OF ERROR. Where it is urged as error that a designated instruction was not sufficiently explicit in its statement of the law applicable to a certain portion of the issues in the case, and it appears that no instruction was prepared by the complaining party and requested to be given in an effort to correct the alleged error, the objection cannot be sustained.

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

Pratt & Walkup, for plaintiff in error.

A. S. Churchill, Attorney General, and *George A. Day, Deputy Attorney General, contra.*

HARRISON, J.

October 10, 1895, there was filed in the district court of Douglas county an information in which Patrick Ford, Jr., James Gallagher, and the plaintiff in error were jointly charged with the commission of the crime of robbery in said county on September 24, 1895. Plaintiff in error was given a separate trial, convicted, and, after motion for new trial was heard and overruled, was sentenced to serve a term of three years in the penitentiary.

The first alleged error to which our attention is directed by the brief filed by counsel for plaintiff

in error refers to the fourth instruction given by the court on its own motion, and which was as follows: "If the state has proven beyond a reasonable doubt that defendant, either alone or in company with others, at and within the county of Douglas and state of Nebraska, and at any time within three years prior to the commencement of this prosecution, forcibly and by violence, or by putting in fear, unlawfully and feloniously made an assault upon the said August Volter, and that he alone, or with others, did then and there take from the person of the said August Volter money of some value with the intent to rob said August Volter, or steal said money, you should convict the defendant." It is claimed that by this instruction the jury were told that they could find the plaintiff in error guilty of robbery, or if not, must acquit him. In this connection attention is challenged to the failure of the trial court to define the crimes of larceny from the person, or assault, or any of the lesser crimes included in the crime charged in the information, and it is strenuously urged that the effect of giving the fourth instruction, and the failure to further instruct the jury, to which reference has just been made, combined, was to withdraw from the consideration of the jury the lesser crimes of which he might have been determined guilty. That it was not alone a failure to instruct in regard to the essential issues of the case or a non-direction, but amounted to more, practically to a misdirection. The information charged, as was necessary according to the definition of the crime of robbery contained in our Criminal Code, (1) the taking of the money; (2) that it was from the person of the party alleged to have been robbed; (3) with a felonious intent; (4) by

force or by putting in fear; and this charge, it is clear, included the lesser crimes of larceny,—assault with intent to commit a robbery, or a simple assault. By the plea of not guilty the charge of the information was traversed and put in issue in all its constituent elements, and to the extent that the lesser crimes were included and entered into the charge of the greater they became the subjects in the case for necessary and strict proof. The fourth instruction, the objection to which we are now considering, was, in and of itself, a fair and sufficient statement of the general rule of law applicable to the charge of the crime of robbery, and the proof necessary to be produced to warrant a conviction of such crime, and was proper in the case at bar, or, at least, was not open to this objection. There is another urged which we will notice in its order. The instructions examined and held vicious, in the opinions in several of the cases cited by plaintiff in error to sustain this contention in particular, each contained a further statement than did the one here, to the effect that if the jury did not reach the conclusion indicated by the instruction, the defendant in the case should, by the verdict, be declared not guilty, thereby precluding the consideration of the guilt or innocence of the party as to any except the direct crime charged. Such was the instruction in *State v. Vinsant*, 49 Ia., 241; also in *Beaudien v. State*, 8 O. St., 636, *Vollmer v. State*, 24 Neb., 839, and *Dolan v. State*, 44 Neb., 643.

There were no instructions given in which the lesser crimes were defined or submitted to the consideration of the jury, and allowing the return of a verdict of guilty of either of such lesser crimes, if the evidence warranted it, and did not

convict of the principal one stated in the information. There were no instructions prepared on any of these points by counsel for plaintiff in error and presented to the trial court with a request that they be read to the jury. If we view the failure of the court to instruct the jury in respect to the lesser crimes as a mere non-direction, then it may be said: "Mere non-direction by the trial court is not sufficient grounds for reversal on appeal, unless proper instructions have been asked and refused. That rule rests upon the soundest reasons and applies to criminal prosecutions as well as civil cases. (*Jones v. State*, 26 O. St., 208; *Sioux City & Pacific R. Co. v. Finlayson*, 16 Neb., 578; Thompson, Trials, 2339 *et seq.*)" (*Hill v. State*, 42 Neb., 503.) But if we look upon such action as more than a non-direction, as, in effect, a withdrawal of such matters from the consideration of the jury and a practical denial of the right to determine the grade of the crime committed, if any, then it may be said to amount to a misdirection, not actively or by commission, but by omission, and if by it essential issues of the case were withdrawn from the consideration of the jury, it may be reversible error. (*Carleton v. State*, 43 Neb., 373; *Dolan v. State*, 44 Neb., 643; *Metz v. State*, 46 Neb., 547; *Stevens v. State*, 19 Neb., 647.)

The defenses made in the case at bar were the general issue and the affirmative one, an *alibi*, that the plaintiff in error was not at the place of commission of the alleged crime at the time it was stated in the information to have occurred, but was then at another or different place. The plea of the general issue raised for determination the question of the guilt or innocence of plaintiff in error of the principal crime charged, or of the

lesser ones included within such charge, and the jury should have been instructed in relation to the lesser crimes, and this notwithstanding no request for such action was proffered in behalf of plaintiff in error; but, from a full and careful review of all the evidence, we are satisfied that the jury reached a correct conclusion without such instructions, and that the plaintiff in error was not prejudiced by the failure of the trial court to instruct the jury in the particulars indicated in the objection now under consideration. This being true, it was error without prejudice and not cause for a reversal of the judgment and awarding a new trial. (*Sandwich Mfg. Co. v. Shiley*, 15 Neb., 109; *Loew v. State*, 60 Wis., 559; *York Park Building Association v. Barnes*, 39 Neb., 834; *Head v. State*, 44 Miss., 731.)

It is further urged that there is error in the fourth instruction, containing the words "defendant, either alone or in company with others," referring to the committal of the acts alleged to have constituted the robbery; that there is no evidence that he, or any of the parties informed against, acted at any time alone or without the co-operation of others. This is wrong. There is testimony, in regard to the plaintiff in error, fully warranting the submission of the question of the plaintiff in error's having committed the crime charged, alone, or in connection with his co-defendants. The determination of this question also disposes of the objection urged against instruction numbered 5.

It is contended that No. 8 of the instructions, which was in regard to the defense of an *alibi*, interposed for plaintiff in error, was vague and not a plain and explicit statement of the law gov-

erning such defense. This instruction, while it might have been so worded and framed as to make the meaning clearer and given it better expression, we think conveyed the correct sense of the rule embodied therein so clearly that no prejudice could have resulted to the rights of plaintiff in error from any possible obscurity or ambiguity in its terms. If a more explicit instruction was desired, it should have been requested. (2 Thompson, Trials, sec. 2341.)

It is urged that the evidence was insufficient to sustain the verdict. We have carefully weighed all the evidence and need not quote from or summarize it here. From our examination we are convinced of its sufficiency to support the verdict rendered. The judgment of the district court is

AFFIRMED.

UNION STOCK YARDS COMPANY, LIMITED, V. GEORGE E. WESTCOTT ET AL.

FILED MARCH 3, 1896. No. 6076.

1. **Custom and Usage:** EVIDENCE. Proof of knowledge is required to give effect to a custom, unless it is so widely and generally known, and so well established, as that knowledge thereof may well be presumed.

2. **Carriers:** WRONGFUL DELIVERY OF CONSIGNMENT: DAMAGES. A carrier who delivers property, for which a bill of lading has been issued, to any one except the owner and holder of such bill is liable for the loss thereby incurred.

3. ———: BILL OF LADING: DELIVERY OF GOODS. Directions contained in a bill of lading to notify a certain person of the arrival of the shipment at the place of destination is no authority to the carrier to make delivery of such ship-

ment to the person so to be notified, without the production of the bill of lading.

4. **Action on Indemnity Bond: LIABILITY OF SURETIES: PLEADING.** *Held*, That the petition states a cause of action against the sureties upon an indemnity bond given to a stock yards company to secure it against any act or negligence of a certain firm of commission merchants.

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

The facts are stated in the opinion.

James M. Woolworth and *Frank T. Ransom*, for plaintiff in error.

Reference: *Ryder v. Burlington, C. R. & N. R. Co.*, 1 N. W. Rep. [Ia.], 747.

George G. Bowman, contra:

The sureties have a right to stand upon the strict terms of their obligations. (*People v. Chalmers*, 60 N. Y., 154; *Chase v. McDonald*, 7 Har. & J. [Md.], 160; *Law v. East India Co.*, 4 Ves. [Eng.], 824; *Lang v. Pike*, 27 O. St., 498.)

Where carriers deliver, without the production of the bill of lading, property consigned to them for transportation, they wrongfully deliver it and assume the risk. (Hutchinson, Carriers, sec. 130; *Weyand v. Atchison, T. & S. F. R. Co.*, 75 Ia., 573; *Nat. Bank of Chester v. Atlanta & C. A. L. R. Co.*, 25 S. Car., 216; *Furman v. Union P. R. Co.*, 106 N. Y., 579; *Pennsylvania R. Co. v. Stern*, 119 Pa. St., 24; *McAleer v. Horsey*, 35 Md., 439; *Joslyn v. Grand Trunk R. Co.*, 51 Vt., 92; *Hieskell v. Farmers & Mechanics Nat. Bank*, 89 Pa. St., 155; *Dows v. Nat. Exchange Bank*, 91 U. S., 618; *Stollenwerck v. Thacher*, 115 Mass., 224; *McEntee v. New Jersey*

Steamboat Co., 45 N. Y., 34; *Houston & T. C. R. Co. v. Adams*, 49 Tex., 748.)

The custom pleaded, being opposed to the rule that a carrier is liable for a wrongful delivery without the surrender of the bill of lading, can have no effect. (*Greene v. Tyler*, 39 Pa. St., 361; *Holmes v. Johnson*, 42 Pa. St., 159; *Delaplane v. Crenshaw*, 15 Gratt. [Va.], 457; *Bassett v. Lederer*, 1 Hun [N. Y.], 274; *Barnard v. Kellogg*, 10 Wall. [U. S.], 383; *Southwestern Freight & Cotton Press Co. v. Stanard*, 44 Mo., 77; *Randall v. Smith*, 63 Me., 105; *New York Firemens Ins. Co. v. Ely*, 2 Cow. [N. Y.], 678; *Perkins v. Franklin Bank*, 21 Pick. [Mass.], 483.)

A person is not bound by a custom unless he has personal knowledge thereof. (*Walsh v. Mississippi Valley Transportation Co.*, 52 Mo., 434.)

NORVAL, J.

This was an action against A. V. Miller and C. C. Miller, as principals, and George E. Westcott, Eli H. Doud, W. G. Sloane, and Frank Pivonka, as sureties, upon a bond of indemnity. Two general demurrers were interposed to the petition, one by the principals upon the said bond, and one by their sureties. The demurrer of the Millers was overruled, and the court entered judgment against them for the amount claimed. The demurrer filed by the sureties was sustained and the action dismissed as to them. Plaintiff complains of the judgment sustaining this demurrer. The following is a copy of the bond upon which the suit is brought:

"Know all men by these presents, that we, A. V. Miller and C. C. Miller, under the firm name

of Miller Bros., as principal, and George E. Westcott, Eli H. Doud, W. G. Sloane, and Frank Pivonka, as sureties, are held and firmly bound unto the Union Stock Yards Company, Limited, of Douglas county, state of Nebraska aforesaid, in the sum of ten thousand dollars, good and lawful money of the United States, to be paid to the Union Stock Yards Company, Limited, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, firmly by these presents. Signed and sealed with our seal.

"Dated this 9th day of July, A. D. eighteen hundred and ninety.

"The consideration of this obligation is such that if the above bound, or either of them, or their heirs, executors, and administrators, shall well and truly pay, or cause to be paid, to the Union Stock Yards Company, Limited, as follows: All accounts, consisting of railroad freight charges, or advanced freight charges, all feed and yard charges, and other charges that may occur, or for any damage that may occur, in the handling of stock in the aforesaid stock yards in consequence of the mixing or turning out wrong stock, or any act of A. V. Miller or C. C. Miller as principal, or their agents or employes, by reason of which the said Union Stock Yards Company, Limited, shall suffer loss or damage, or by the negligence of the said A. V. Miller and C. C. Miller's agents or employes, and to fully satisfy and to pay the same upon demand, and to deliver up all keys or other property, if any, belonging to the said Union Stock Yards Company, Limited, when called upon so to do, then this obligation to be

void; otherwise to remain in full force and effect.

"Dated July 9, 1890.

"MILLER BROS. [L. S.]
"GEO. E. WESTCOTT. [L. S.]
"ELI H. DOUD. [L. S.]
"FRANK PIVONKA. [L. S.]
"W. G. SLOANE.

"Signed and sealed in presence of
"____ ____."

The petition alleges, in substance, the incorporation of the plaintiff, and that it owns and operates the stock yards at South Omaha; that the Millers were partners engaged in the live stock commission business in said city, under the name of Miller Bros.; that about the time they commenced said business at said place, and in order to receive permission to carry the same on, in, and upon plaintiff's premises, and to secure plaintiff against all acts, doings, or default of said Miller Bros. in and about the conducting of said business of live stock commission merchants, the defendants executed and delivered to plaintiff the bond set out above; that in January, 1891, one E. B. Rogers was the owner of fifty head of cattle, which he had purchased with funds furnished him by the Merchants Bank of Sidney, which cattle were then in the possession of said bank, and held by it to secure the sum of $1,250, the amount so advanced; that said Rogers, as further security, made and delivered to said bank a draft, in words and figures as follows:

"$1,250. SIDNEY, NEBRASKA, January 19, 1891.

"Pay to the order of Edward M. Mancourt, cashier, twelve hundred and fifty dollars, for value received, and charge the same to the account of E. B. ROGERS.

"To Miller Bros., South Omaha, Nebraska."

That when said sum was so advanced, it was understood between the bank and Rogers that said cattle were to be shipped to South Omaha in the name of the bank, and that the bill of lading therefor should be taken from the railway company conveying said cattle and attached to a draft for the amount of the bank's advances; that on January 20, 1891, the bank shipped for its own benefit, in its cashier's name, from Sidney to South Omaha over the Union Pacific railway all of said cattle, taking the bill of lading for said shipment, showing Mancourt, the cashier, to be both consignor and consignee; that said bill of lading had the words "Notify Miller Bros." written thereon, which was a direction to plaintiff when the cattle were received in its yards to notify Miller Bros. of their arrival; that the bank attached said draft to the bill of lading and forwarded the same through the usual mode to South Omaha for collection against Miller Bros., and that by reason of said facts they were not entitled to receive said cattle until they paid said draft and obtained the bill of lading attached thereto; that said cattle were carried to, and received by, plaintiff at its yards in South Omaha, and placed in pens to await the orders of the owner, and while there Miller Bros. called upon and produced to plaintiff a written order purporting to be signed by said Mancourt, in whose name they had been shipped, directing the delivery of said cattle to Miller Bros. by plaintiff; that said order had not been signed by said Mancourt nor by his authority, but was forged, which Miller Bros. at the time well knew, yet they represented to the plaintiff that the same was genuine and that they were authorized to receive said cattle; that thereupon

plaintiff, not knowing of the rights of said bank in and to said cattle, but believing said order to be genuine, and relying thereon, and upon said representations, delivered said cattle to Miller Bros., who sold them upon the market, received the proceeds, and retained the same, and refused to pay such proceeds over to said bank or the plaintiff, or to pay said draft; that it was the custom with the plaintiff, at and before the execution of said bond, and ever since has been, to permit live stock commission men, whom the way-bill of shipment of cattle directed plaintiff to notify of the arrival thereof, to receive such cattle without the production of the usual bill of lading, and it is customary for the live stock commission merchant so notified to demand and receive the shipment without waiting the arrival of the usual bill of lading, which custom was well known to Miller Bros. and observed by them. The petition further alleges that the bank brought suit against this plaintiff for the value of the cattle, and at the request of Miller Bros., the Stock Yards Company employed counsel and defended said action upon a statement of facts furnished by Miller Bros.; that the bank recovered a judgment therein for the sum of $1,317.07, and costs taxed at $58.83, which sums the Stock Yards Company was compelled to and did pay, and the further sum of $150 expended by it for attorneys' fees in defending said action, no part of which amounts have been paid by Miller Bros., although requested so to do, save the sum of $700.

The question raised by the demurrer is whether the acts of the plaintiff in turning out the cattle in question to Miller Bros., the sale thereof by the latter, and the conversion by them of the proceeds

arising from such sale are covered by the conditions of the bonds in suit, so as to bind the sureties therein. It must be conceded that the conditions contained in this bond are broad and comprehensive in their scope and nature. They, among other things, bind the sureties to pay all loss or damages which the obligee shall sustain resulting from any act or negligence of Miller Bros. or their agents or employes. If the plaintiff was justified in delivering this shipment of cattle to Miller Bros. without requiring the production by them of the bill of lading, then it is entitled, upon the facts pleaded, to recover against the defendants sureties; otherwise the demurrer was rightly sustained. The important inquiry in the case is whether plaintiff was or was not in fault in delivering the cattle to Miller Bros. Defendants insist that the delivery was an act of negligence on the part of the plaintiff, while the Stock Yards Company contends against the proposition.

It is conceded by counsel for plaintiff that where a person delivers property, for which a bill of lading has been issued, to any one except the owner and holder of said bill, he does so at his own risk, and is liable for the value of the property. The proposition is sound and abundantly sustained by the authorities. (Hutchinson, Carriers, sec. 130, and cases cited in brief of defendants; *Shellenberg v. Fremont, E. & M. V. R. Co.*, 45 Neb., 487.) As an excuse for the delivery of the cattle without the production of the bill of lading issued by the railway company, plaintiff relies upon the custom which it alleges existed at the time the delivery was made as well as when the bond was executed. Undoubtedly it is competent in many cases for a party to allege and prove that

a particular custom existed. As was said by the present chief justice in his opinion in *Milwaukee & Wyoming Investment Co. v. Johnston*, 35 Neb., 561: "Custom or usage in a trade or business may be shown for the purpose of interpreting a contract or controlling its execution, but not for the purpose of changing its intrinsic character, provided it is known to the party sought to be charged thereby, or is so well settled and so uniformly acted upon as to create a reasonable presumption that it was known to both contracting parties, and that they contracted with reference to it." A custom which is uniform, long established, and generally acquiesced in, and so widely and generally known as to induce the belief that the parties contracted with reference to it, is binding without proof of actual notice thereof to the parties. But a person is not bound by the custom or usage of an individual unless personal knowledge thereof is brought home to the party sought to be charged. In 27 Am. & Eng. Ency. of Law, p. 749, it is said: "In regard to the usage of a particular individual, it may be said that no person without knowledge of such usage can be bound by it in his dealings with the individual. It would be unfair to hold that the business usage of a particular bank, or merchant, or manufacturer, or hotel-keeper, could have any effect upon the rights of a person dealing in ignorance of such usage. But if the usage be known and assented to, and dealings are had with such knowledge and assent, the usage impliedly forms a part of the contract between the parties, and is therefore binding." (See *Walsh v. Mississippi Valley Transportation Co.*, 52 Mo., 434; *Stout v. McLachlin*, 38 Kan., 121; *Bliven v. New England Screw Co.*, 23 How. [U. S.], 420; *Loring v. Gurney*,

5 Pick. [Mass.], 15; *Keogh v. Daniell*, 12 Wis., 181; *Celluloid Mfg. Co. v. Chandler*, 27 Fed. Rep., 9; *Scott v. Maier*, 56 Mich., 554.) Applying the doctrine stated to the case at bar, it is obvious that the sureties are not bound by the custom set up in the petition. No general custom or usage among stock yards companies is pleaded, but that it was customary with this plaintiff alone to deliver cattle to commission men whom the way-bill directed it to notify of the arrival of the shipment, without producing the usual bill of lading. Notice of such custom to Miller Bros. is alleged, but it is not averred that the sureties had any knowledge of its existence, therefore it cannot be said that they signed the bond with reference to plaintiff's custom.

Reliance is made by plaintiff upon the fact that the bill of lading accompanying this shipment contained directions to notify Miller Bros. of the arrival of the stock at plaintiff's yards in South Omaha. It is argued that the clause referred to in the bill of lading was evidence to plaintiff that it was the intention of the shipper that the persons designated to be notified were his agents to make the sale of the cattle, and the stock yards company had a right to rely upon the honesty of such agents and trust them with the shipment. If this were true, it would have been sufficient to defeat the action brought by the Merchants Bank of Sidney against this plaintiff for the value of the stock. But the direction in the bill of lading to notify Miller Bros. did not authorize the plaintiff herein to deliver the stock without the production of the bill of lading. Hutchinson, Carriers [2d ed.], sec. 131*b*, in discussing this subject, says: "It is a common practice, where the bill of lading pro-

vides for delivery to the consignor's order and has gone forward attached to a draft on the purchaser or other person by whom payment is to be made, to give directions that such person be notified of the arrival of the goods in order that he may pay the draft and procure the goods. Such a direction to notify, however, does not dispense with the production of the bill of lading as in other cases, and if the carrier delivers the goods to the person so to be notified without requiring him to produce the bill of lading, he will be liable for the loss thereby incurred." The following cases are directly in line with the above decision: *Bank of Commerce in Buffalo v. Bissell*, 72 N. Y., 615; *Furman v. Union P. R. Co.*, 106 N. Y., 579; *Myrick v. Michigan C. R. Co.*, 107 U. S., 102; *North P. R. Co. v. Commercial Bank of Chicago*, 123 U. S., 727; *Joslyn v. Grand Trunk R. Co.*, 51 Vt., 92; *Libby v. Ingalls*, 124 Mass., 503; *North v. Merchants & Miners Transportation Co.*, 146 Mass., 315; *Nat. Bank of Chester v. Atlanta & C. A. L. R. Co.*, 25 S. Car., 216. Whilst Miller Bros. were to be notified of the arrival of the stock, yet this fact did not authorize them to receive the cattle without the production of the bill of lading. The use of the words "Miller Bros." in the bill of lading showed that they were not intended as the consignees, but indicated merely that they were to be advised of the arrival of the cattle. Besides, it was stated in the bill of lading that Mancourt was the consignee, and this the plaintiff knew, or should have ascertained, before parting with the possession of the stock. Delivery could alone be safely made to the consignee or to some one authorized by him to receive the cattle.

Considerable stress is laid upon the fact that

Miller Bros. obtained possession of the cattle by reason of a spurious order for their delivery purporting to have been signed by the consignee. Of course, as between the owner of the bill of lading and this plaintiff, that fact could make no difference, since the forged order conferred no authority upon plaintiff to deliver the cattle to the persons presenting it. This is too obvious to require discussion. That the Stock Yards Company was liable to the consignee of the cattle for their value, there can be no question. If the sureties are liable to the plaintiff, it is by reason alone of the fact that their principals obtained possession of the cattle upon the fictitious order already mentioned, and failed to account for the proceeds. The question, therefore, presented for determination is whether the receiving of the shipment in controversy by Miller Bros. upon an order which they at the time knew to be forged, and which they falsely represented to plaintiff to be genuine, is within the stipulations or conditions of the bond which is the foundation of this action. Although, where a person delivers property consigned for transportation without the production of the bill of lading therefor, if one is issued, it is at his own risk, it does not follow that he is liable in damages in case the delivery is made to the party entitled to receive the same, notwithstanding the bill of lading is not exhibited or produced. The bill of lading is the evidence of the holder of his right to receive the shipment, but its surrender or production is not indispensable to a proper delivery. It would be difficult, we apprehend, to find any one to contend against this proposition. The important thing is that the shipment is received by the person entitled thereto. Had the cashier of the

bank given an order to plaintiff to deliver these cattle to Miller Bros., then it is obvious plaintiff would have been protected in turning out the stock to them though no bill of lading was produced. But that was not done. On the contrary, possession of the cattle was obtained from plaintiff by Miller Bros., who had no right to them, upon an order presented by them which they represented to be the genuine order of the owner of the stock, when they knew it was fictitious. It was this act that occasioned the loss to plaintiff, and it falls within the scope of the bond, since the sureties obligated themselves to indemnify plaintiff against loss or damage it might sustain by reason of "any act" of their principals. As between these sureties and the plaintiff, the latter, under the facts pleaded, cannot be charged with negligence in making the delivery.

It is said that the shipment would have been delivered, even though the order had not been presented, inasmuch as it was the custom with plaintiff to allow commission men to whom the way-bill directed it to notify, to receive the shipment without waiting the arrival or production of the bill of lading. Although such custom is pleaded, it does not appear that the delivery of the stock would have been made without the order, or if the fraud had not been practiced. On the contrary, it is affirmatively stated that plaintiff in making the delivery relied upon said order and the representations of Miller Bros. that it was genuine, and that they were entitled to receive the cattle thereon. It is sufficient that plaintiff had a right to, and did in fact, rely upon the genuineness of the order and the representations of Miller Bros. in parting with the possession of the cattle, although it, in

part, may have been influenced by its local custom. Whether reliance was placed upon the order is a question of fact for the jury upon the trial of the case. From the views expressed it follows that the petition states a cause of action against the sureties, and the court erred in sustaining their demurrer. The judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

CITY OF OMAHA V. ALEXANDER MCCAVOCK.

FILED MARCH 3, 1896. No. 6046.

1. **Municipal Corporations:** CONSTRUCTION OF VIADUCT: DAMAGES: EVIDENCE. *Held*, That the evidence set out in the opinion was competent for the jury to consider in connection with the other evidence adduced on the trial, for the purpose of determining whether the plaintiff's property was damaged by reason of the location and construction of the viaduct in the street in front of said premises.

2. **Instructions:** EXCEPTIONS: REVIEW. The refusal of an instruction must be excepted to in the trial court, in order to lay the foundation for its review in this court.

3. ———: ———: ———. A general exception to instructions, whether given or refused, is not sufficient. Exception must be specifically taken to each instruction in order to have the same considered by the supreme court.

4. **Action Against City for Damage to Property by Construction of Viaduct:** VERDICT FOR PLAINTIFF. The verdict is supported by sufficient evidence.

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

E. J. Cornish and *J. H. Macomber*, for plaintiff in error.

Francis A. Brogan, contra.

NORVAL, J.

Alexander McGavock recovered a judgment in the court below against the city of Omaha in the sum of $2,374.50, for damages alleged by him to have been sustained by the reason of the location and construction of the Tenth street viaduct in said city, upon which street plaintiff's property abuts. To review said judgment the city has removed the cause into this court.

The assignments of error argued in the brief of the city attorney may be divided into three groups, namely, (1) those relating to the rulings of the court upon the admission of testimony; (2) alleged errors in the giving and refusing of instructions; (3) the damages assessed by the jury are excessive and contrary to the evidence. We will consider them in the order stated.

Complaint is made of the introduction of certain testimony of J. J. Berger and John W. Bell, witnesses for the plaintiff below. The former was tenant of the plaintiff, occupying the premises in controversy for business purposes, prior and subsequent to the erection of the viaduct, which structure was completed in 1891. He testified that the travel over and along Tenth street in front of plaintiff's property previous to the construction of the viaduct was fair, and the premises were in a first-class location for the business in which the witness was engaged, but that since the completion of the viaduct only a small portion of the traffic over this street; the major portion

goes over the viaduct and some over the Eleventh street viaduct. The witness being interrogated by plaintiff's attorney, testified, over the objections of the city, as follows:

Q. What portion of the traffic has gone over the street since the construction of the viaduct?

Objected to by the defendant, as incompetent, immaterial, and not the proper way to prove damages, too remote and uncertain. Overruled and defendant excepts.

A. I should judge it was a small one-third.

Q. How does the change in the amount of traffic affect business in stores fronting on Tenth street?

A. It affects it quite an extent.

Q. To what an extent in your business?

Objected to by the defendant, as calling for a conclusion, improper, immaterial, and not the proper way to prove damages, and too remote. Overruled and defendant excepts.

A. I should guess it was about one-third; that is, I am getting one-third I used to have.

John W. Bell was called and examined as a witness on the part of the plaintiff, who, after testifying that he was engaged in the drug business in a part of plaintiff's premises, that he was familiar with the traffic on Tenth street before and since the viaduct was constructed, that prior to the commencement of the erection of the viaduct plaintiff's property was an elegant location for retail purposes, and that the construction of the viaduct destroyed the traffic and affected the business on Tenth street, testified as follows:

Q. Now, you may state in your particular case what effect the construction of that viaduct and the traffic on the old surface Tenth street have on your business.

Objected to by defendant, as incompetent, immaterial, irrelevant, and calling for a conclusion of the witness. Objection overruled. Defendant excepts.

A. It made a difference in my business by about three thousand in a year.

Q. What proportion was that of your entire business?

Objected to, as incompetent, immaterial, and irrelevant, and calling for the conclusion of the witness. Objection overruled. Defendant excepts.

A. About one-quarter.

Q. Do you mean that your gross receipts fell off by that much, or your profits?

Objected to by defendant, as incompetent, immaterial, and irrelevant, and calling for the conclusion of the witness. Objection overruled. Defendant excepts.

A. Do you mean from the time the viaduct was completed until I moved?

Q. I would rather take it from some definite period—some per annum, if you know.

A. My business was destroyed by that much.

Q. Can you state by what proportion your custom suffered by reason of the construction of the viaduct?

Objected to by defendant, as incompetent, immaterial, irrelevant, and calling for the conclusion of the witness. Objection overruled. Defendant excepts.

A. From a good business to none at all.

It is argued by the city that it did not have a fair trial by reason of the introduction of the foregoing testimony. It was shown upon the trial, by numerous witnesses, the value of the real estate

in controversy, both before and after the location and erection of the Tenth street viaduct. The testimony of the witnesses upon that branch of the case was exceedingly contradictory. It is believed by my associates, although I cannot fully yield assent thereto, that the testimony quoted was competent, as tending to show that the market value of the property was greatly diminished by the building of the viaduct. If by reason of such structure the travel was diverted from the surface of the street, and the premises were not so desirable or accessible for business purposes, that was a matter for the jury to take into consideration in arriving at a verdict. So, too, it was pertinent to show that the business of the occupants of the property was affected by the improvement. Not that it was proper for the jury to base their verdict upon such fact or testimony alone, but it should be considered in connection with the other testimony adduced in determining whether plaintiff has been damaged or not. Suppose the situation of the property had been such that by the building of the viaduct it would have been more desirable for the uses for which it was intended or devoted, or for any other purpose, and the volume of business of the occupants had been greatly increased thereby. Could there be any room for doubt that the city might not have shown such facts? Clearly not. It was equally proper in the case at bar to show that the decrease of travel along and upon the surface of the street, and the destruction of the business of plaintiff's tenants was attributable to the location and erection of the viaduct. The assignments relating to the admission of the testimony above set out are overruled.

Objections are urged in the brief of the city to the giving of the fourth and fifth instructions requested by the plaintiff, and the refusing of the defendant's fifth, eighth, ninth, and eleventh. The defendant's eleventh instruction was not excepted to in the trial court, therefore no foundation is laid for its review here. (*Scofield v. Brown*, 7 Neb., 221; *Warrick v. Rounds*, 17 Neb., 412; *Nyce v. Shaffer*, 20 Neb., 507; *Darner v. Daggett*, 35 Neb., 695; *Barr v. City of Omaha*, 42 Neb., 341.) The other instructions,—those given as well as the ones refused,—of which complaint is made cannot be considered by us, because no exception was specifically taken to any of them in the district court. A general exception was taken to all, which was insufficient for the purpose of review in this court. (*Brooks v. Dutcher*, 22 Neb., 644; *First Nat. Bank of Denver v. Lowrey*, 36 Neb., 290.)

It is finally insisted that the evidence fails to show that McGavock has sustained any damages by the building of the viaduct. The testimony introduced by the plaintiff in error tended to show that the fair market value of the property was not depreciated by the improvement. Some of the witnesses on that side testified to the effect that the value was the same after the construction of the viaduct as immediately prior to its location, while the construction to be placed upon the testimony of others called and examined by the city is that the property was enhanced in value by the erection of the viaduct. The several witnesses examined by the plaintiff,—the most of whom appear to be disinterested, and familiar with the property and the value of real estate in Omaha,—placed the market value of the premises before the location from $16,000 to $20,000, and that by

reason of the construction of the viaduct they have been depreciated from one-third to one-half. If the jury had accepted and acted upon the testimony of the plaintiff's witnesses alone, they would have been warranted in finding a verdict for a much larger sum than was returned. Considering all the testimony relating to the damages, we are satisfied it is ample to support the findings of the jury. The judgment is

AFFIRMED.

CARL STRAHLE V. FIRST NATIONAL BANK OF STANTON.

FILED MARCH 3, 1896. No. 6048.

1. **Replevin:** PLEADING: EVIDENCE: CHATTEL MORTGAGES. An allegation of general ownership, in a petition and affidavit in replevin, is not supported by the introduction of the chattel mortgage under which the plaintiff claims the right of possession of the property replevied. (*Musser v. King*, 40 Neb., 892; *Randall v. Persons*, 42 Neb., 607; *Sharp v. Johnson*, 44 Neb., 165; *Camp v. Pollock*, 45 Neb., 771.)

2. **Replevin by Mortgagee:** VERDICT FOR PLAINTIFF. *Held*, That the evidence fails to sustain the verdict.

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

Mapes & Licey, for plaintiff in error.

John A. Ehrhardt, *W. W. Young*, and *A. A. Kearney*, *contra*.

NORVAL, J.

This was an action in replevin for a stock of merchandise brought by the First National Bank of Stanton against Carl Strahle. The plaintiff claimed the property under two chattel mortgages executed to the bank by one Theodore G. Asch, and the defendant claimed under the levy of an execution, placed in his hands as constable, issued upon a judgment recovered against the mortgagor. Upon the trial the jury, by direction of the court, returned a verdict for the plaintiff, and judgment was entered thereon. The chattel mortgages under which the bank claims and the notes which they were given to secure, were introduced in evidence by the plaintiff over the objections of the defendant, which rulings are assigned for error.

The petition and affidavit in replevin do not set up a special ownership in the goods and chattels in the plaintiff by reason of the giving of the chattel mortgages, but plead that plaintiff is the general owner of the property replevied. The record discloses that when the mortgages were tendered in evidence the defendant objected to their admission, "for the reason that the plaintiff has not pleaded any special ownership in the property in controversy in this action, and for the further reason that it is irrelevant, immaterial, and incompetent, and that no proper foundation has been laid for the introduction of the chattel mortgages, * * * and the affidavit upon which the action is founded makes no plea of special ownership and does not allege that any of the conditions of the chattel mortgages are broken." *Adams v. Nebraska City Nat. Bank*, 4 Neb., 370, to

the effect that a chattel mortgage transfers the legal title to the mortgaged chattels to the mortgagee, is cited to sustain the rulings of the trial court. Since the case at bar was decided by the district court, this court has overruled the decision mentioned above. (*Musser v. King*, 40 Neb., 892.) In this last case it was decided that the legal title to mortgaged chattels remains in the mortgagor until divested by foreclosure proceedings, and until then the mortgagee has merely a lien on the property; that in an action of replevin to recover the possession of mortgaged chattels by the holder of the mortgage the facts constituting his special ownership or lien must be pleaded, and that under allegations of ownership and right of possession the note and chattel mortgage under which plaintiff bases his right of possession are inadmissible in evidence. The same doctrine was held and applied in *Randall v. Persons*, 42 Neb., 607; *Sharp v. Johnson*, 44 Neb., 165; *Camp v. Pollock*, 45 Neb., 771; *Murray v. Loushman*, 47 Neb., 256. Inasmuch as no claim of special ownership was made in the pleadings in the case before us, it was error to admit the mortgages and notes in evidence. There was likewise error in the ruling of the court in directing a verdict for the bank, for the obvious reason there was no evidence to show that the plaintiff was the owner of the property. At most it had but a special interest therein by virtue of the mortgages. The *allegata et probata* did not agree; hence the plaintiff failed to make out its cause of action. It follows that the judgment of the district court must be reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

JAMES H. JOHNSON V. DAVID REED.

FILED MARCH 3, 1896. No. 6036.

1. **Pleading and Proof.** A party is not required to prove an averment which is admitted by the pleading of his adversary.

2. **Action on Appeal Bond:** EXECUTIONS. The issuing of an execution is not a condition precedent to the right of a judgment creditor to maintain an action against the surety on an appeal undertaking given to enable the judgment debtor to appeal. (*Flannagan v. Cleveland*, 44 Neb., 58.)

3. **Principal and Surety:** APPEAL BONDS: CONTINUANCE. The mere continuance of a cause on appeal, without the consent of the surety on the appeal bond, will not release such surety. (*Howell v. Alma Milling Co.*, 36 Neb., 80.)

4. ———: ———. Judgment was recovered before a justice of the peace against two makers of a promissory note, who jointly appealed to the district court. The undertaking of the surety on the appeal bond was to pay any judgment rendered against the appellants. *Held*, That the surety is liable, notwithstanding judgment in the appellate court was only against one of the appellants.

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

L. D. Holmes, for plaintiff in error.

Robert W. Patrick, contra.

NORVAL, J.

This was an action brought by James H. Johnson against David Reed in the county court upon the following appeal undertaking:

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

"JAMES H. JOHNSON, PLFF.,
v.
GEORGIANNA E. CROSSLE AND
HENRY W. CROSSLE, DEFTS.

"Before A. C. Read, a justice of the peace of Omaha precinct, Douglas county, Nebraska.

"Whereas, on the 27th day of December, 1888, James H. Johnson recovered a judgment against Georgianna E. Crossle and Henry W. Crossle before A. C. Read, a justice of the peace, for the sum of $156.98, and costs of suit taxed at $2.50, and the said defendants intend to appeal said cause to the district court of Douglas county:

"Now, therefore, I, David Reed, do promise and undertake to the said James H. Johnson, in the sum of three hundred and thirteen dollars, that the said Georgianna E. Crossle and Henry Crossle shall prosecute their appeal to effect, and without unnecessary delay, and that said appellants, if judgment be adjudged against them on the appeal, will satisfy such judgment and costs.

"DAVID REED.

"Executed in my presence, and surety approved by me, this 5th day of January, 1889.

"A. C. READ,
"*Justice of the Peace.*"

The petition alleges the execution and delivery of the undertaking, the approval thereof, the prosecution of the appeal to the district court, the recovery therein by the plaintiff of a judgment against Henry W. Crossle for the sum of $182.90 and costs of suit, and that the whole of said judgment is unpaid. The answer sets up affirmative

defenses, all of which, except that no execution has been issued upon the judgment recovered in the appellate court, were put in issue by the reply. At the close of the plaintiff's testimony in the suit on the undertaking the defendant moved for a nonsuit upon the following grounds:

"1. No evidence has been introduced showing that this defendant ever signed any bond as in the petition herein alleged.

"2. No execution has been issued in pursuance of the judgment in said petition alleged to have been obtained against the principals in the bond, nor any proof that any attempt has been made to collect such judgment from the said principals.

"3. That there was an alteration in the terms of the bond in the said petition pleaded without the consent of this defendant.

"4. That there was an alteration of the relations between the principals named in the bond in this petition pleaded."

This motion was sustained by the county court, and the cause dismissed. Thereupon plaintiff prosecuted error to the district court, where the judgment and ruling of the county court were sustained. To obtain a reversal of said judgment of affirmance is the object of these proceedings.

Did the district court err in affirming such judgment of the county court? The proper determination of the question requires an examination and consideration of the different grounds set forth in the motion to dismiss, which we will take up in their order.

As to the lack of evidence on the part of plaintiff to show that the defendant signed the appeal undertaking, all that we need say is that the answer admits the signing of the instrument by

the defendant. Plaintiff, therefore, was not called upon to prove the execution of the bond.

The second ground urged for the dismissal was equally untenable. There is no provision of statute which requires that an execution shall be issued upon a judgment before an action can be maintained upon an appeal bond. The conditions in the bond in suit are in the language of the statute,—that appellants will prosecute their appeal to effect and without unnecessary delay, and that said appellants, if judgment be adjudged against them on appeal, will satisfy such judgment and costs. Upon the recovery of the judgment against the principal in the bond the surety became at once absolutely liable for the payment thereof, upon the default of the principal to do so. The right of action accrued upon the bond upon the rendition of the judgment; and the failure to issue an execution is no defense. (*Flannagan v. Cleveland*, 44 Neb., 58.)

The third ground of the motion is without merit. The question of the alteration of the terms of the bond could not have arisen at the time plaintiff closed the case; but in any event no such issue was tendered by the pleadings. The alleged alteration pleaded in the answer consisted in the continuance of the cause from which the appeal was taken, when it was reached for trial, without the knowledge and consent of the surety. This constituted no defense, as it did not operate to release the surety. (*Howell v. Alma Milling Co.*, 36 Neb., 80.)

We presume the decision in the county court, as well as in the district court, was based upon the fourth or last subdivision of the motion. The judgment from which the appeal was taken was

against both Georgianna E. Crossle and Henry W. Crossle, while on the trial on appeal plaintiff recovered judgment against Henry W. Crossle alone. As the judgment appealed from was against two defendants, and in the appellate court plaintiff recovered against one of them alone, the question is squarely presented whether the surety is liable, under the terms of his bond, for the payment of this last judgment. Section 1006 of the Code declares: "In all cases, not otherwise specially provided for by law, either party may appeal from the final judgment of any justice of the peace to the district court of the county where the judgment was rendered." Section 1007 reads as follows: "The party appealing shall, within ten days from the rendition of judgment, enter into an undertaking to the adverse party, with at least one good and sufficient surety, to be approved by such justice, in a sum not less than fifty dollars in any case, nor less than double the amount of judgment and costs, conditioned: First—That the appellant will prosecute his appeal to effect and without unnecessary delay. Second—That if judgment be adjudged against him on the appeal, he will satisfy such judgment and costs. Such undertaking need not be signed by the appellant." Section 1014 reads thus: "When any appeal shall be dismissed, or when judgment shall be entered in the district court against the appellant, the surety in the undertaking shall be liable to the appellee for the whole amount of the debt, costs, and damages recovered against the appellant." The undertaking under consideration is purely statutory, and we must look to the statute under which it was executed in determining its legal effect. In speaking of the appellants the statute

uses the singular number alone. It in unequivocal language makes the surety liable for any judgment recovered by the appellee against the appellant in the district court. Here judgment was against two in the justice court, upon a promissory note, a joint and several obligation. Either one of the defendants alone had a perfect right, under the statute, to prosecute an appeal upon giving an undertaking, and had that method been adopted it would have brought up the case as to both (*Wilcox v. Raben*, 24 Neb., 368; *Polk v. Covell*, 43 Neb., 884); and there can be no room for doubt that the surety on such undertaking would have been liable for any judgment recovered in the district court against the defendants, or either of them. While one out of two or more persons against whom a judgment has been rendered may alone appeal, he may, if he so prefers, unite with the others in the appeal by giving a single undertaking, in which event the surety on the appeal bond is liable thereon when judgment in the district court is against part of the appellants only. When two or more appeal by uniting in a single undertaking, the sureties thereon are the sureties of all, and must answer for any judgment which shall be recovered against one or all of the appellants. The effect of executing this single undertaking was to prevent an execution issuing out of the justice's court upon the judgment, against either of the appellants. The appeal, in effect, was several by each defendant, and it would be a narrow construction of the statute, and against the manifest intention of the law-makers, to hold that the surety in this case is released from his obligation merely because the judgment in the appellate court was not against both the appel-

lants. The precise question has been considered and passed upon by other courts in harmony with the conclusion reached by us, as an examination of the following cases will disclose: *Seacord v. Morgan*, 35 How. Pr. [N. Y.], 487; *Potter v. Van Vranken*, 36 N. Y., 629; *Bentley v. Dorcas*, 11 O. St., 398; *Alber v. Froelich*, 39 O. St., 245; *Helt v. Whittier*, 31 O. St., 475; *Hood v. Mathis*, 21 Mo., 308. The only case we have found in our investigation of the question which holds a contrary doctrine is *Lang v. Pike*, 27 O. St., 498, which was decided by a divided court, and that decision was expressly overruled by a united court in *Alber v. Froelich*, reported in 39 O. St., 245.

None of the reasons assigned in the motion made in the county court for granting a dismissal of the cause being well taken, and no other sufficient cause appearing for sustaining said motion, the district court erred in affirming the judgment of the county court. The judgment of the district court must be reversed and the cause remanded to that court, with directions to reverse the judgment of the county court.

REVERSED AND REMANDED.

JERRY DENSLOW V. IDA DODENDORF.

FILED MARCH 3, 1896. No. 6108.

1. **Justice of the Peace: FINAL ORDER: APPEAL.** It is only from a final judgment of a justice of the peace that an appeal lies. (*Riddle v. Yates*, 10 Neb., 510.)
2. **Dismissal of Appeal.** Where a district court has properly dismissed an appeal from a justice of the peace, such order

of dismissal will not be reversed merely because a bad reason was assigned for the decision. *Leake v. Gallogly*, 34 Neb., 859, followed.

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

A. H. Briggs, for plaintiff in error.

T. M. Franse, contra.

NORVAL, J.

Ida Dodendorf brought suit before Hal Christy, a justice of the peace of Cuming township, in Dodge county, against Jerry Denslow to recover the sum of $82.41 for work and labor. The parties appeared, and trial was had before the justice on July 20, 1892, who on said date spread upon his docket the following entry: "Upon the hearing of the evidence I find that there is due the plaintiff from the defendant the sum of $82.41, and costs of this action, taxed at $6.05. Dated this 20th day of July, 1892. Hal Christy, Justice of the Peace." On July 27 the defendant filed with the justice an appeal bond, which was duly approved. A transcript of the proceedings, including the appeal undertaking, was filed by the defendant in the district court on the 20th day of August, 1892. Subsequently the plaintiff and appellee filed in the district court a motion to dismiss the appeal, because the transcript was filed after the expiration of the time required by law, which motion was sustained and the appeal dismissed. To obtain a reversal of this decision is the purpose of this proceeding.

It is conceded by plaintiff in error that the transcript was filed in the office of the clerk of the

district court one day beyond the period allowed by statute within which to perfect an appeal, but he insists that the delay was not occasioned through his fault or laches; hence the appeal should not have been dismissed. It is disclosed that the transcript was obtained by the plaintiff in error from the justice on August 18, and upon the same day it was inclosed in an envelope addressed to the clerk of the district court of Dodge county, with postage prepaid thereon, and deposited in the post-office at Scribner, Nebraska, which was in ample time for it to have reached its destination by the usual course of mail, and to have been received and filed by said clerk within the statutory period. It is insisted by plaintiff in error that he had a right to rely upon the United States mail for the transmission of his transcript, and having mailed it in time, he exercised that degree of diligence which the law required of him in perfecting his appeal, and *Cheney v. Buckmaster*, 29 Neb., 420, is cited to sustain the proposition. That case lacks analogy. There the request for the transcript was, it is true, made by mail four days after the entry of the judgment, yet the letter making the demand was promptly received by the county judge, who negligently failed to make a transcript of the proceedings until the expiration of more than thirty days after the entry of the judgment. It was ruled that the right to appeal was not lost by the neglect or failure of the county judge to prepare the transcript in time. No laches of a public officer is imputed in this case. The question discussed by counsel herein was not involved in *Cheney v. Buckmaster*. Nor do we now propose to express an opinion thereon. Conceding that Denslow exercised due

diligence in attempting to perfect his appeal, and that he had a right to rely upon one of the agencies of the general government for the prompt transmission of the transcript, which we do not decide, nevertheless the appeal was rightly dismissed, for the reason no final judgment was rendered by the justice. He made findings, but rendered no judgment thereon, therefore the cause was not appealable. (*Nichols v. Hail*, 5 Neb., 191; *Riddle v. Yates*, 10 Neb., 610; *Daniels v. Tibbets*, 16 Neb., 666; *Stone v. Necley*, 34 Neb., 81.)

It is probably true the learned district judge predicated his decision upon the ground the appeal was not taken in time, and not because there was no final order or judgment to appeal from, but that is unimportant. The essential thing is that the appeal was properly dismissed, even though the decision of the court below may have been predicated upon grounds that were not tenable. This was expressly held in *Leake v. Gallogly*, 34 Neb., 859. The judgment dismissing the appeal is

AFFIRMED.

W. T. SCOTT ET AL. V. AB. KIRSCHBAUM ET AL.

FILED MARCH 3, 1896. NO. 6247.

1. **Attorneys: COLLECTIONS: UNAUTHORIZED APPEARANCE: DAMAGES.** In an action solely for money alleged to have been collected by the defendants, to whom, as attorneys at law, the collection of the same had been intrusted, a recovery for damages resulting from an unauthorized appearance by defendants as attorneys at law in an action entirely independent of the aforesaid collection cannot be sustained.

2. **Attachment: PAYMENT BY GARNISHEES: JURISDICTION.** Garnishees, who, in good faith, pay into court money due from them to an attachment defendant, not exceeding the attachment creditor's claim in such court, cannot be held liable afterwards to pay the same amount at the suit of the attachment debtor, even though such payment as garnishees was made before jurisdiction had been acquired of the person to whom the debt was originally due from the garnishees.

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

Harwood, Ames & Pettis and *Sedgwick & Power*, for plaintiffs in error.

References: *Wilson v. Burney*, 8 Neb., 39; *Rochereau v. Guidry*, 24 La. Ann., 294; *Ohio & M. R. Co. v. Alvey*, 43 Ind., 180; *Clough v. Buck*, 6 Neb., 343; *Meyer v. Shamp*, 26 Neb., 729.

Halleck F. Rose and *John S. Bishop, contra.*

References: *Russell v. Rosenbaum*, 24 Neb., 769; *Laidlaw v. Morrow*, 44 Mich., 547; *Roy v. Baucus*, 43 Barb. [N. Y.], 310; *State v. Duncan*, 37 Neb., 631; *Bryan v. Duncan*, 19 D. C., 379; *Turner v. Sioux City & P. R. Co.*, 19 Neb., 247.

RYAN, C.

In the district court of Lancaster county the defendants in error brought suit for the recovery of the sum of $100, and interest from February 1, 1888, and recovered judgment as prayed. In the petition Kirschbaum & Co. was described as a partnership firm doing business in Philadelphia, and the defendants were alleged to have been partners engaged in practicing law in York, Nebraska. For a cause of action in favor of the first named firm it was alleged that the firm last

named had, as attorneys at law, collected for the first named firm about February 1, 1888, the sum of $100, which they had failed and refused to pay. By answer, Scott & Gilbert admitted that, as attorneys at law in the employ of Kirschbaum & Co., they had collected $497.15 on February 9, 1888, but they alleged that on the same day, and immediately after the receipt of such money, said firm of Scott & Gilbert had been garnished under an attachment against Kirschbaum & Co. The action in which the garnishment process issued had been brought before a justice of the peace of York county by J. H. Hamilton, formerly sheriff of York county, upon an indemnity bond, for the recovery of certain expenses and attorney's fees which he had been compelled to advance in defending a suit brought against himself as sheriff on account of an attachment which he had levied to enforce the collection of a claim upon which suit had been brought by Kirschbaum & Co.

The case at bar has heretofore been before this court, upon which occasion a judgment in favor of Scott & Gilbert was reversed. In the opinion then delivered it was said that the questions to be determined in the district court, upon proper issues, were whether or not the garnishment was in good faith, and whether or not the action was one in which an attachment would lie. (*Kirschbaum v. Scott*, 35 Neb., 199.) As these requirements as to pleading have been satisfactorily met, there is no occasion for further reference to the former opinion. Not only have the issues presented these questions, but the evidence leaves no reason for doubt that Scott & Gilbert acted in the utmost good faith in respect to the notice of garnishment served upon them, and, having paid into court

only what they were therein required to pay by due order of the court, they have satisfactorily to Kirschbaum & Co. accounted for the balance of the collection which they held at the time notice of garnishment was served upon them.

Upon request of Kirschbaum & Co. the district court gave three instructions upon the theory which is sufficiently illustrated by the first instruction, which was in the following language: "In this case it is urged that the money sought to be recovered is in part proceeds of a collection sent by L. C. Burr, attorney for plaintiffs, to the defendants, and that, respecting the collection thereof, the defendants had no direct communication with the plaintiffs on the funds being attached. As appears from the evidence, it was the duty of the defendants to follow the directions of Mr. Burr, from whom they received the collection, in the matter of protecting the funds arising therefrom; and if you find in this case that said Burr instructed defendants that the claim was unjust, the enforcement of which was sought by an attachment, and not to appear in such case, but to require notice to non-residents to be published as required by law, and await word from their principals, and that defendants, in violation of such direction, wrongfully assumed to appear in said cause for their principals, the owners of the attached fund, and on a judgment based on such wrongful appearance, without any service of summons made or notice published therein, paid out said funds or any part thereof, then such payment would be voluntary and wrongful and defendants are liable for any sum withheld from plaintiff on account thereof." It is but fair, before discussing the principles contained in the

above instructions, to say that, as soon as the notice of garnishment was served upon Scott & Gilbert, one of these garnishees telephoned Mr. Burr's law partner of the said garnishment. The garnishment was on February 9, and in a letter of Mr. Burr's, of the date of five days thereafter, he admitted that he had knowledge of the garnishment. It was scarcely true,—certainly it was not fair to Scott & Gilbert,—to state in the instruction that it was agreed that the defendants had no direct communication with the plaintiffs on the funds being attached. As appears from the evidence, Mr. Burr was the attorney for Kirschbaum & Co., by whom their claim for collection had been sent to Scott & Gilbert; and, while in strictness these latter attorneys did not communicate the fact of the garnishment directly to plaintiffs, they did immediately notify the firm of attorneys of which Mr. Burr was a member. Perhaps a reversal should not be predicated on this part of the instruction quoted. It is, however, dangerously near prejudicial error. As we understand the theory of the above instruction, the liability of Scott & Gilbert was thereby made dependent upon either of two propositions: First, because before summons served the court had no jurisdiction, and, therefore, the failure of the garnishees to contest that fact rendered them liable to Kirschbaum & Co.; and second, because Scott & Gilbert appeared without authority as attorneys for the defendant and thereby conferred jurisdiction upon the court to render judgment against the firm of Kirschbaum & Co. In respect to this second ground of alleged liability it may properly be remarked that, so far as this record shows, Kirschbaum & Co. have never sought to have set

aside the judgment which they now claim should never have been rendered against that firm, neither has the justness of the claim of Hamilton in any way been called in question. There is, however, one thing very certain, and that is, that by the petition there was presented no such question as the right to recover damages caused by the unauthorized appearance of Scott & Gilbert as attorneys for Kirschbaum & Co. The instructions which assumed that a right of recovery had by the petition been predicated upon their alleged unauthorized appearance misstated the issues and was prejudicially erroneous.

In respect to the assumption that Scott & Gilbert were bound to contest the jurisdiction of the justice of the peace before paying money upon garnishment, defendants in error, perhaps unconsciously, assume that these garnishees were attorneys for Kirschbaum & Co. As ordinary garnishees Scott & Gilbert were entitled to be discharged from their liability to Kirschbaum & Co. by paying just as they did pay. (Code of Civil Procedure, sec. 222.) The requirement that these particular garnishees should have defended upon the ground of a want of jurisdiction of the persons of the attachment defendants certainly could not have been predicated upon the mere fact that they were garnishees. Probably the theory on which the recovery was for the most part held justifiable was that before and without service of summons the attachment had no binding force and consequently payment under and because of it, afforded no protection to the garnishees. The very well considered opinion in *Darnall v. Mack*, 46 Neb., 740, has destroyed whatever of plausibility there may theretofore have been in this con-

tention, and no amplification of argument could do more. In any possible view of this case a recovery could not be justified, and the judgment of the district court is therefore

REVERSED.

STATE OF NEBRASKA, EX REL. EMILY J. COOLEY, EXECUTRIX, V. EMAN J. SPIRK, TREASURER.

FILED MARCH 3, 1896. No. 7403.

School-Land Contracts: FORFEITURE: NOTICE: REVIEW. There is, in this error proceeding, involved only a question of fact determined by the district court upon conflicting evidence. Its judgment is therefore affirmed.

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

Joshua Palmer and *Abbott & Abbott*, for plaintiff in error.

A. S. Churchill, Attorney General, George A. Day, Deputy Attorney General, and *J. H. Grimm, contra.*

RYAN, C.

Emily J. Cooley, as relator, applied in the district court of Saline county for a *mandamus* requiring the county treasurer of said county to accept the money she had tendered him, and apply the same to the payment of delinquent interest, and receipt for the same according to law. The relator was the wife of Rufus Cooley, who died March 18, 1894, and she became his executrix June 15, immediately thereafter. On July 18,

1883, said Rufus Cooley purchased of the state of Nebraska the northwest quarter of the southeast quarter of section 16, in township 8, range 2 east, 6th principal meridian. This land was about three miles distant from the town of Friend and was situate in Saline county. The purchase price of the land was $277.50, due July 18, 1893. On this sum, meantime, he was required to pay on the 1st day of January of each year $14.98. These installments of interest he had paid for the years 1885, 1886, and 1887, but, as alleged in the petition, through mistake or inadvertency he failed to make any further payment. In 1889 Mr. Cooley took a government homestead in Cheyenne county and remained there until some time in 1890. On March 12, 1890, the contract of Mr. Cooley was declared forfeited by proper state authority, and the only question presented by the record in this case is whether or not this forfeiture was without proper notice to Mr. Cooley. It is not clear just where Mr. Cooley was living when this forfeiture was declared, but we infer from all the evidence submitted on this question that he was in Cheyenne county. His wife and children, according to the testimony of Mrs. Cooley, had their home in Lincoln, Nebraska, during the years 1889 and 1890, but she further said that her children were attending the state university, and that she and her children vibrated back and forth between Lincoln and Cheyenne county. She further testified that her husband's business address during 1889 and 1890 was in Lincoln. There were introduced in evidence a tax receipt and a redemption certificate issued by the treasurer of Saline county, both of which Mrs. Cooley testified had been sent to her

at Lincoln by the aforesaid treasurer. These were of date March 4, 1890. There was also introduced a letter from J. P. Clary, county treasurer of said county of Saline, addressed to R. Cooley at Lincoln, but as this was dated December 15, 1887, it had but little bearing upon the important fact in this case of the knowledge possessed by another county treasurer of the whereabouts of Rufus Cooley in 1889 and in the fore part of 1890. Mr. Sadilek, who was treasurer of Saline county in 1889 and 1890, and Mr. Spirk, who was during said time his deputy, each testified that he had no knowledge during that time of Mr. Cooley, and that, not being informed as to his place of residence, one of them sent a registered letter addressed to Mr. Cooley at Friend, the post-office nearest the land described in the school-land contract, in which letter was enclosed due and timely notice of the proposed forfeiture of Cooley's said contract. This registered letter was returned uncalled for, and thereafter, as shown by proof of publication thereof, there was notice published in the Wilber *Republican*, a weekly newspaper published in said county, for three consecutive weeks, being on September 5, 12, and 19, 1889, that within ninety days from the date of said notice, August 9, 1889, said school-land contract would be forfeited. This forfeiture, in fact, as already stated, was declared on March 12, 1890. In the same newspaper there was published a notice that if the amount due were not meantime paid up, the commissioner of public lands and buildings of the state would, on and after April 19, 1890, at the office of the county treasurer of Saline county, offer for lease the land described in the aforesaid school-land contract. No payment having been

made, there was made by the proper state authorities another lease of this land on February 11, 1892, to John Jahn, Jr. The district court found adversely to the relator's contention, and from a judgment to that effect she prosecutes error proceedings to this court.

Upon the question whether or not the county treasurer knew of the place of residence or address of Mr. Cooley in 1889 or 1890 there was such an amount of merely conflicting evidence that we cannot ignore the conclusion of the court in respect thereto. There seems to be no attempt by the plaintiff in error to controvert the proposition that if this fact must be taken as established, then service by publication was proper, and that, under the rules laid down in *State v. Clark*, 39 Neb., 899, the conclusions of the trial court must be sustained. We think counsel are correct in this assumption, and the judgment of the district court is

AFFIRMED.

BANKERS LIFE ASSOCIATION V. SARAH G. LISCO.

FILED MARCH 3, 1896. No. 6340.

1. **Life Insurance:** WRITTEN APPLICATIONS: MISREPRESENTATIONS: EVIDENCE OF ORAL STATEMENTS. In an action upon an insurance contract in the nature of a life insurance policy, the defendant, having alleged that the misrepresentations upon which it had acted to its own disadvantage were contained in the written application of the assured, was properly held not entitled on the trial to show what oral representations the insured had made to a physician at the time the examination was being made with a view to the approval or rejection of the insurance applied for.

2. ———: ———: AFFIDAVITS: CONTRADICTORY EVIDENCE. On the trial of an action for the recovery of the amount of a life insurance policy, an affidavit of the beneficiary, which tended to show that, contrary to the representation of the assured in his application, said insured had been subject to epileptic fits, it was proper to permit such affiant to show that she never knowingly subscribed to or made the statements in the affidavit contained.

3. **Misconduct of Attorneys:** OBJECTIONS: WAIVER OF ERROR. Alleged misconduct of the counsel in the course of the trial in the district court, to which no objection was ruled upon, and as to which ruling consequently no exception was taken, cannot be considered in the supreme court. Following *Gran v. Houston*, 45 Neb., 813.

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

Gregory, Day & Day and *Sullivan & Sullivan*, for plaintiff in error.

Cowin & McHugh, contra.

RYAN, C.

In this action in the district court of Douglas county the plaintiff in that court recovered judgment upon a verdict in her favor in the sum of $2,341.97. To reverse this judgment the Bankers Life Association, the judgment defendant, prosecutes error proceedings in this court.

Sarah G. Lisco, the defendant in error, was the wife of John Lisco, who, on October 28, 1889, effected an insurance upon his life by becoming a member of the aforesaid Bankers Life Association. On the 28th day of November, 1889, John Lisco died, and the present action was rendered necessary by the refusal of the plaintiff in error to pay the amount to which the defendant in error

was apparently entitled by the terms of the contract under which its membership had been bestowed upon the deceased. In brief, the refusal to make the payment was, as stated in the answer, because of misrepresentations of John Lisco as to the history and condition of his health and as to his habits, which were made in his application for membership as aforesaid. In respect to his habits it was alleged by the answer that the drinking of wine, spirits, or malt liquor had been falsely represented by the applicant not to be with him a daily habit. It was further alleged that by his excessive use of intoxicating liquors after he became a member of said association John Lisco forfeited his rights as such member. In respect to the applicant's health and the true history thereof it was by answer averred that he was subject to epileptic fits, which fact he failed by his application to disclose, though one question therein answered falsely by him should have disclosed that fact had it been answered truly. By the answer it was furthermore alleged that the death of John Lisco was caused by an epileptic fit, and that by the terms of the express conditions of the contract between the Bankers Life Association and John Lisco the above misrepresentations rendered void the claim of the defendant in error.

The evidence as to whether John Lisco was in the daily habit of using intoxicating liquors was very contradictory, and, therefore, the special finding of the jury upon that proposition cannot be disturbed. There was also evidence from which the jury might have inferred that John Lisco had been subject to epilepsy for some years before he made application for membership in the Bankers Life Association, but there was no evi-

dence that his death was caused by epilepsy. There was an apparent preponderance contrary to the showing that he had ever been subject to epilepsy, and upon this the special finding cannot be disturbed.

Of the evidence tending to establish the affirmative of the proposition last above referred to, one portion was an affidavit made by Sarah G. Lisco, the defendant in error, on January 11, 1890, in which was the following language: "I am the wife of the deceased, John Lisco, and my lamented husband has not, to my knowledge, had an epileptic fit for the last five or six years, and no other sickness, only occasionally that of sick headache, and, prior to that time not to exceed two or three fits a year—some years not any at all." This affidavit, it would seem, was sent to the Bankers Life Association at Des Moines, Iowa, and was introduced in evidence in connection with a deposition of one of the officers of the aforesaid association. It is insisted that there was error in permitting Mrs. Lisco to testify as to the ill-health with which she was suffering at the date of said affidavit, and that she never knowingly subscribed or swore to the above quoted statements. We have had called to our notice, and have been able to discover, no good reason why Mrs. Lisco should not have been permitted to deny these statements imputed to her. The weight to be given such denial was solely a question of fact to be considered by the jury.

The matters of defense pleaded in the answer to avoid the alleged liability of the plaintiff in error were all predicated upon written statements made in the application of Lisco. It was therefore improper to prove that oral statements were made by Lisco to the medical examiner outside the writ-

ten matters pleaded as aforesaid for the purpose of obtaining insurance,—at least, we are unaware of any theory on which such evidence could be competent, and upon this point there was no attempt to enlighten by offers of what the proposed testimony would disclose, if permitted to be given. The district court therefore properly sustained an objection to the question propounded as to what these statements were, which were made to the medical examiner, and which were not included in the written application.

It is urged in the petition in error that the court erred in failing to state to the jury that in the answer it was pleaded that John Lisco warranted his statements in the application to be true. It may be that the force of this objection is not clearly understood, but it does seem to us that plaintiff in error has no just cause of complaint in view of the following considerations: The court in describing the answer used this language: "The defendant claims in its answer that the said Lisco in his application for insurance misrepresented, and made untrue answers of his physical conditions, and that by reason thereof said certificate had become null and void." The certificate referred to in the above instructions, in so far as it should be considered in this case, was described in the pleadings, and throughout the trial was treated as performing the same offices as are ordinarily performed by an insurance policy. In the first, fourth, and sixth instructions given upon the request of the plaintiff in error the jury were in express terms told that the several representations amounted to warranties, and we cannot see why any failure in the description of the issues in this respect raised by the answer was not cured,

if indeed a fuller description thereof was necessary, which we greatly doubt.

To instructions 1, 2, 3, and 4, given by the court upon its own motion, a single exception, in gross, was taken, and in the motion for a new trial the same method was pursued. Although by the amended petition in error the correctness of the particular instruction given by the court numbered 2 is challenged separately from any other, we are not justified in overlooking the above described previous grouping of the instructions, and, as some of them were undoubtedly given properly, we cannot consider whether or not there was error in giving instruction numbered 2, separately assailed by the amended petition in error.

It is finally urged that there was misconduct upon the part of the counsel for the defendant in error, as asserted, in presenting as facts a whole series of matters which were outside the record, were not embraced in any evidence, and in reality were untrue. While the fact that objection was made to this language was recited in the affidavit, in which alone is there found any reference to this part of the trial, there was no ruling upon or exception as to such ruling taken by the plaintiff in error. This was indispensably necessary to secure a review of alleged errors of this nature. (*Gran v. Houston*, 45 Neb., 813.)

There being discovered no prejudicial error in the record, the judgment of the district court is

AFFIRMED.

R. A. MOORE, APPELLANT, V. C. R. SCOTT ET AL., APPELLEES.

FILED MARCH 3, 1896. No. 5983.

1. **Vendor and Vendee:** MISREPRESENTATIONS: EVIDENCE: RESCISSION. One who, as an inducement to a sale of land, in good faith states to the vendee that reliable third persons have represented the land to him as being of a certain character, and who at the same time states that he has no personal knowledge in regard to the land, does not thereby adopt such representations as his own, and rescission cannot be had merely because they prove false.

2. ———: ———: ———: ———. The statement that such third persons are reliable, being merely the expression of an opinion, is insufficient to charge the vendor in an action to rescind, at least where he honestly believed them reliable when the statement was made.

3. **Mistakes:** EQUITY: MISREPRESENTATIONS. The jurisdiction of equity to relieve against mutual mistakes is, in general, confined to cases where, because of such mistake, the minds of the parties never met, and there was therefore no contract, and to cases where the contract made was not correctly expressed by the instrument evidencing it. Relief cannot be given because of misapprehensions in regard to a collateral matter, as in regard to a fact incidentally affecting the value of the subject-matter of the contract, there being no deception or wrongful concealment.

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

R. A. Moore, pro se.

References: *Hoock v. Bowman*, 42 Neb., 80, 87; *Mead v. Bunn*, 32 N. Y., 275; *Olson v. Orton*, 28 Minn., 36; *Harvey v. Smith*, 17 Ind., 272; *Wilson v. Yocum*, 42 N. W. Rep. [Ia.], 446; *Armstrong v. Helfritch*, 51 N. Y., 856; *McClellan v. Scott*, 24 Wis., 87;

Simar v. Canaday, 53 N. Y., 298; *Syms v. Benner*, 31 Neb., 593; *McKnight v. Thompson*, 39 Neb., 752; *King v. Sioux City Loan & Investment Co.*, 39 N. W. Rep. [Ia.], 919; *Galloway v. Merchants Bank of Neligh*, 42 Neb., 259; *Barnard v. Roane Iron Co.*, 2 S. W. Rep. [Tenn.], 21; *Union Central Life Ins. Co. v. Huyck*, 32 N. E. Rep. [Ind.], 580; *Fisher v. Mellen*, 103 Mass., 505; *Busterud v. Farrington*, 31 N. W. Rep. [Minn.], 361; *Billings v. Aspen Mining & Smelting Co.*, 2 C. C. A., 260; *Wheeler v. Smith*, 9 How. [U. S.], 55; *Smith v. Richards*, 13 Pet. [U. S.], 26; *Berrer v. Moorhead*, 22 Neb., 691; *Singer Mfg. Co. v. Doggett*, 16 Neb., 611; *Evarts v. Smucker*, 19 Neb., 43; *Carmichael v. Dolen*, 25 Neb., 335; *Klosterman v. Olcott*, 25 Neb., 387; *Hale v. Wigton*, 20 Neb., 83; *Holcomb v. Noble*, 37 N. W. Rep. [Mich.], 497; *Bridge v. Penniman*, 12 N. E. Rep. [N. Y.], 19; *Reeve v. Dennett*, 11 N. E. Rep. [Mass.], 938; *Baughman v. Gould*, 45 Mich., 483; *Wagner v. Lewis*, 38 Neb., 320; *Groppengiesser v. Lake*, 36 Pac. Rep. [Cal.], 1036.

C. R. Scott, contra.

IRVINE, C.

In January, 1888, a contract was entered into between Moore and Scott, whereby Scott assigned to Moore his rights under a contract for the purchase of 1,600 acres of land in Lincoln county. The consideration for this transaction was a conveyance by Moore to Scott of a lot in the city of Kearney, the transfer of a note for $300 made by F. H. Gilcrest & Co., a note of Moore's to Scott for $50, $5 in cash, and a box of cigars. This action was brought by Moore to rescind the contract. The Kearney Savings Bank and F. H.

Gilcrest were made defendants under allegations that the bank held the Gilcrest note and was about to collect it and pay its proceeds to Scott, the object of joining them being to obtain an injunction against the payment of the note to the bank by Gilcrest and its collection and payment of the proceeds to Scott. The Bandera Flag Stone Company intervened, claiming to be a *bona fide* purchaser from Scott of the Gilcrest note. The rights and claims of all the defendants except Scott may, however, be disregarded as the case turns upon the issues joined between Moore and Scott and the decree thereon. The court found the issues generally in favor of the defendants, and from a decree of dismissal entered upon that finding the plaintiff prosecutes an appeal.

The ground upon which rescission was sought by Moore was false representations in regard to the character of the land, alleged to have been made by Scott. These were, in brief, that the land was nearly all good tillable land, a little rolling, but with valleys in it, and covered with a good growth of grass; that there was not enough sand upon it to prevent its being good farming land; that water could be obtained at a depth of fifty or sixty feet, and that the land was actually worth $4.50 an acre. It may be assumed as established that the land was not in these respects as plaintiff claims it was represented. Scott, however, denies that he made such representations, but avers the fact to be that he informed the plaintiff that he had never seen the land and had no personal knowledge of its character, quality, or value, and would not be responsible for its character or quality upon that account. This was the controlling issue

presented by the pleadings, as determined by their legal effect. As determined by their volume, the issues presented were more of the character indicated by the following excerpts from the answer and reply: The answer pleads that Scott was at the time in Kearney attending court, and that "while so in attendance upon said court, said plaintiff, through the kindness of his heart and realizing that this defendant was a stranger in that part of God's heritage, kindly took this defendant in and gave him meat and drink; that this defendant was then wholly unacquainted with the ways that are dark and the tricks that are vain on the part of said plaintiff, partook of his hospitality, being captivated by his blandishments and pretexts of friendship for the stranger." This allegation is met in the reply by the following: "Admits that part of the answer where the defendant alleges that he was given meat and drink by this plaintiff, and this plaintiff alleges that it was the most expensive meat and drink he ever dealt out to friend or foe; that relying upon the former friendship existing between this defendant and plaintiff, and not realizing that he was a wolf in lamb's clothing, and supposing that he was a friend, this plaintiff invited him into his home and sat down with him in his parlor and introduced him to his family, and that many a time since he has had reason to repent in sackcloth and ashes that he ever proffered said act of friendship and kindness; that the said defendant sat at his table, broke his bread and ate of his salt and drank of his wine and smoked his Havana cigars." Disregarding such issues as these and the evidence which incidentally crept in in an attempt to support them, the case may be sum-

marized by stating that the plaintiff's evidence tended strongly to support the allegations of his petition; while the evidence on the part of the defendant was equally positive to the effect that the defendant had at all times disclaimed personal knowledge of the character and value of the land; but that he had told the plaintiff that certain persons, whom he deemed reliable and to whom he had been referred by his own vendor, had made statements in regard to the land substantially similar to those which the plaintiff charged the defendant with making. On this conflicting evidence the finding of the trial court must be accepted as conclusive of the facts in favor of the defendant; and the question is, therefore, assuming those facts to be in accordance with defendant's testimony, did the plaintiff make out his case?

It is true, as contended by plaintiff, that this court has repudiated the doctrine that in order to make out a case of deceit, it must be shown that the defendant knew his representations to be false. The *scienter* is not material. (*Foley v. Holtry*, 43 Neb., 133; *Phillips v. Jones*, 12 Neb., 213; *Hoock v. Bowman*, 42 Neb., 80; *Johnson v. Gulick*, 46 Neb., 817:) But in all of these cases it is either expressly stated or necessarily implied that in order to be actionable the representations must have been made as a positive statement of existing facts. Now in this case, assuming, as we must, that the defendant's account of the transaction is correct, the fact represented was that persons whom the defendant deemed reliable so represented the land to him. The defendant did not represent these matters in regard to the character of the land as facts within his knowledge, but he

affirmatively disclaimed all knowledge in relation thereto. There is a class of cases where a party to a contract refers the other party to a third person for information, where it is held that in so doing he makes such third person his agent for the purpose of making the representations and binds himself by the representations so made to the other party in pursuing that recommendation. A case of this class is *Witherwax v. Riddle*, 121 Ill., 140. But in addition to there having been an express reference to the third person held out as knowing the facts, this third person was represented as being a reliable man, whereas in fact he was a fugitive from justice, and the decision of the court to a certain extent was based upon the fact that he was held out as a reliable man, when the defendant knew otherwise. In the case before us the same representation was made as to the reliability of the persons from whom defendant obtained his information; but the case is distinguishable on two grounds: In the first place, when a man is held out simply in general terms as a truthful and reliable man, this must necessarily be merely the expression of an opinion; and there is here nothing to show that the reputation and character of the men named by the defendant were not as represented. In the second place, Scott did not refer Moore to these men for information. He merely stated to Moore what they had informed him; and there is nothing to show that he did not truthfully state it. A case directly in point is *Cooper v. Lovering*, 106 Mass., 77. In that case a vendor read to the vendee certain letters received from his brother, containing statements in regard to the property. The court said: "If he intentionally misstated their contents, that

would amount to a misrepresentation of a material fact, and would come within the established definition of deceit. If he knew that the information contained in the letters was false, and that the writer was not 'trustworthy and reliable,' it would of course be fraudulent if by words or acts he induced the defendant to act and rely upon them, and to incur damage and loss by such reliance; but if he himself believed the information contained in the letters to be true, and the writer to be entitled to confidence, and if he truly and honestly stated the contents of the letters, and explained to the defendant that he had no other personal knowledge on the subject-matter, such representations on the plaintiff's part would not be fraudulent."

At some time during the trial the plaintiff asked leave to amend his petition by asking rescission on the ground of mistake. Leave to so amend was refused. The amendment tendered alleged the same representations as the original petition and averred that the contract was entered into because both parties by mistake believed the facts to be as represented. We do not think that a ground for relief from mistake was shown, and, therefore, there was no error in refusing the amendment. As we understand the law, the jurisdiction of equity to relieve against mutual mistakes does not extend to all cases where the parties to a contract at the time it was made were in ignorance of, or misapprehended some matter incidental to the subject of the contract. If that were so, and A sold his farm to B, he might rescind on its being subsequently discovered that there was a valuable vein of coal or other mineral underlying the land. As we understand it, the

mistake against which a court of equity grants relief is such as either discloses that the minds of the parties never met, and that there was, therefore, no contract; or else where the contract was defectively executed so as not to express the real agreement of the parties. (Pollock, Contracts, p. 392*; 1 Story, Equity Jurisprudence [13th ed.], sec. 140, note A; 2 Pomeroy, Equity Jurisprudence, sec. 853.) Thus, if a contract be made for the sale of land to which it turns out that the vendor had no title, relief may be had; and likewise if the conveyance misdescribed the land actually sold. In one case there may be a rescission, in the other a reformation. But where there is actually sold the land which the parties had in contemplation, a mere erroneous impression in regard to a collateral matter affecting the value of the land is not a mistake justifying the interposition of a court of equity. In *Billings v. McCoy*, 5 Neb., 187, the case made was that a number of cattle had been sold at the price of four and one-half cents per pound; that a mistake had been made in keeping account of the weight of the cattle, whereby too large a sum had been paid. It was held that the excess could be recovered back. But when this transaction is scrutinized, it was a sale of cattle at so much per pound, so that the purchaser did not get what he had paid for in consequence of the mistake. If the contract had been for the sale of so many head of cattle at an aggregate price, or at so much per head, the parties merely believing that the cattle weighed a certain number of pounds, when in fact they did not weigh so much, there certainly could have been no recovery.

There are other assignments of error, but they

relate to the admission of evidence which it is claimed was incompetent or immaterial. Under the long established rule a judgment in a case tried without a jury will not be reversed on account of errors in admitting evidence where there is sufficient competent evidence to sustain the finding.

JUDGMENT AFFIRMED.

J. M. BARRY ET AL. V. M. DELOUGHREY ET AL.

FILED MARCH 3, 1896. No. 6194.

1. **Highways:** JURISDICTION OF COUNTY BOARD. No petition is necessary to confer power upon a county board to open a section line road.
2. **Opening Section Line Roads:** NOTICE: DAMAGES. The county board may, without petition or notice, make a preliminary order establishing a section line road, or declaring that it shall be opened; but before it can be actually opened there must be proceedings upon proper notice to ascertain damages.
3. ———: PROCEDURE. To authorize the opening of a section line road a finding that the public good requires it need not be made of record by the county board.
4. ———: ———. The county board may in one proceeding open roads on different section lines, provided they connect with one another and form a single scheme of highway improvement. Whether the opening of disconnected roads may be embraced in a single proceeding, *quære*.

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

Jay & Beck, for plaintiffs in error.

R. E. Evans, *contra*.

IRVINE, C.

The object of this proceeding is to procure a reversal of a judgment of the district court which reversed, on proceedings in error in that court, an order of the county board of Dakota county relating to the establishment of a highway. Unfortunately most of the information sought to be afforded us is contained in the briefs, and finds little support in the record, by which alone we are governed. The record discloses that on April 23, 1892, there was filed with the county board a petition purporting to be signed by a large number of electors residing within five miles of the proposed roads, asking the establishment of two roads along section lines, joining at a section corner. To this a numerously signed remonstrance was filed, accompanied by specific objections to the opening of the roads. A notice was published, which will be referred to later. Thereafter certain of the remonstrants asked to have their names stricken from the remonstrance. Thereafter, at a meeting of the county board, the following record was made: "Now at this time in the matter of the Ryan section line road the same came up for final hearing and was allowed as prayed for. The remonstrants duly except to the action of the board. Motions of R. E. Evans, attorney for remonstrators in the location of Ryan road, were overruled and remonstrators except." From this order the proceedings in error were prosecuted in the district court, resulting in a judgment of reversal, the reason stated being "that said board of supervisors had no jurisdiction of the subject-matter of the action and no authority to render such judgment or order."

In support of the judgment of the district court counsel argue that the board was without authority, because no sufficient petition was filed, because no proper notice was published, because there was no finding that the roads were required for the public good, and because the opening of two roads was embraced in a single proceeding. The district court must have proceeded on one or another of these grounds, because the other assignments of error are not based on any facts disclosed by the record. All section lines are by statute declared to be public roads. (Compiled Statutes, ch. 78, sec. 46.) The law establishes them as highways, and the county board is empowered, whenever the public good requires it, to open such roads without preliminary survey, the sole limitation being that damages shall be appraised as nearly as practicable in the manner provided for the opening of other highways. Under this section it has been held that the board may in its discretion open any section line road without a petition first presented. (*Throckmorton v. State*, 20 Neb., 647; *McNair v. State*, 26 Neb., 257; *Howard v. Brown*, 37 Neb., 902; *Rose v. Washington County*, 42 Neb., 1.) In *Howard v. Brown*, *supra*, it was held that section 46, being a special provision in relation to section line roads, prevailed over the general provisions of the chapter; but, of course, in appraising damages section 46 requires the procedure in relation to other roads to be followed so far as practicable. The procedure provided for such other roads is the presentment of a petition and deposit by the petitioners of a sufficient sum to pay for laying out such road. Thereupon the county clerk appoints a commissioner to examine into the expediency of the road.

The commissioner makes his report and a notice is published fixing the time wherein all objections to the road or claims for damages must be filed. Thereafter the board, after considering such matters, determines upon the establishment of the road. A portion of this procedure is clearly inapplicable to section line roads; but there can be no doubt that it must be followed in so far as the procedure for ascertaining damages is concerned. Before making the order here complained of the county board had undertaken to publish a notice; but it may be assumed that it was not in substantial compliance with the statute and was insufficient to justify the board in proceeding with the actual opening of the road; but the order made was not one for such final action. It is unintelligible, except through the petition to which it refers; and the petition is for the establishment of the road. We regard the order as merely a preliminary order looking to the opening of the road. Section line roads being opened in the discretion of the board without the necessity of a petition, survey, or commissioner's report, some such preliminary action must be taken before damages can be ascertained. In *McNair v. State*, *supra*, the proceedings were instituted by a motion adopted by the county board establishing the road, and thereafter the statutory notice was published. This court held that a road so opened was lawfully opened and could not be vacated except by regular procedure. It was also held in *McNair v. State* that a finding that the public good required the road need not be entered of record. As to the objection that the proceedings referred to two roads, as these were both along section lines, joined one another and formed a single scheme of

highway improvement, there could be no objection to the procedure on this ground. Whether two disconnected roads can be opened by a single proceeding we need not determine. The proceedings of the county board, so far as they had progressed, were not without authority of law; and the record discloses no irregularity presented by proper assignments of error. The judgment of the district court is reversed and the order of the county board affirmed.

JUDGMENT ACCORDINGLY.

A. NORRIS DOUGLAS ET AL., APPELLEES, CARRIE I. HAWKS ET AL., APPELLANTS, V. FANNIE E. CAMERON ET AL., APPELLANTS.

FILED MARCH 3, 1896. No. 8190.

1. **Descent and Distribution:** CONSTRUCTION OF STATUTE. A. died intestate, leaving surviving him neither issue, nor father, mother, brother, or sister. There were surviving four children of a deceased brother, eight children of a deceased sister, and three children of a deceased daughter of such sister. *Held*, That under our statute of descent the twelve surviving nephews and nieces took each one-twelfth part of the intestate's land, *per capita*, and that the grand-nephews and grand-nieces took nothing.

2. ———. Such a case falls within the fifth subdivision of section 30, chapter 23, Compiled Statutes, and not within the third subdivision.

3. ———. Inheritance *per stirpes* does not obtain under our law except where affirmatively provided.

4. ———. The rule of inheritance *per stirpes* is in general applied only from necessity, as where the heirs are of unequal degree of kinship to the intestate. Where they are of equal degree, they take as principals.

5. ———. It is the object of our statute to cut off inheritance *per stirpes* among collaterals where at any point beyond the children of brothers and sisters the surviving kindred are of unequal degrees. In such case those nearest in degree take the estate to the exclusion of those more remote.

APPEAL from the district court of Cedar county. Heard below before NORRIS, J.

W. E. Gantt, for appellants.

References: *Ewers v. Follin*, 9 O. St., 327; *Dutoit v. Doyle*, 16 O. St., 400; *Cox v. Cox*, 44 Ind., 368; 24 Am. & Eng. Ency. Law, 391, and cases cited; *Van Cleve v. Van Fossen*, 41 N. W. Rep. [Mich.], 258; *Blake v. Blake*, 85 Ind., 65; *Snow v. Snow*, 111 Mass., 389; *Knapp v. Windsor*, 6 Cush. [Mass.], 156; *Balch v. Stone*, 20 N. E. Rep. [Mass.], 322; *Nichols v. Shepard*, 63 N. H., 391; *Wagner v. Sharp*, 33 N. J. Eq., 520; *White v. Williamson*, 2 Grant [Pa.], 249; *Miller's Appeal*, 40 Pa. St., 387; *Jackson v. Thurman*, 6 Johns. [N. Y.], 322*; *Pond v. Bergh*, 10 Paige Ch. [N. Y.], 140.

J. M. Woolworth and *J. P. English, contra.*

References: *Schenck v. Vail*, 24 N. J. Eq., 538; *Quinby v. Higgins*, 14 Me., 309; *Davis v. Stinson*, 53 Me., 493; *Wimbles v. Pitcher*, 12 Ves. [Eng], 433; *Bigelow v. Morong*, 103 Mass., 287; *Conant v. Kent*, 130 Mass., 178; *In re Curry's Estate*, 39 Cal., 529; *Clayton v. Drake*, 17 O. St., 368.

IRVINE, C.

Abijah Hart Norris died intestate August 31, 1894, seized of a large quantity of land in Dixon county. He left no issue, and no surviving father, mother, brother, or sister. A brother and a sister

had, however, died before him. The sister had nine children, eight of whom survived the intestate, as did three children of the deceased daughter of the sister. Four children of the brother survived the intestate. This was an action for partition brought by the eight children and three grand-children of the deceased sister, as plaintiffs, against the four children of the deceased brother. The district court held that the three grand-children of the deceased sister took no estate, and confirmed in each of the surviving children of the brother and sister a one-twelfth interest,—that is, the estate was divided among the intestate's surviving nephews and nieces *per capita*. From this judgment the defendants, the four children of the deceased brother, appeal, contending that the estate should have been divided into halves, one-half to be subdivided among them, and the other half among the children of the deceased sister,—that is, their contention is that the inheritance was *per stirpes* instead of *per capita*. The three grand-children of the deceased sister also appeal, contending that their exclusion was erroneous; that the intestate's nephews and nieces should take *per capita*, each one-thirteenth; and that they should take among them the portion which would have gone to their mother had she survived the intestate.

The question presented is purely one of statutory construction. But little direct light is thrown upon it by the authorities, because,—as aptly suggested in one of the briefs,—cases relating to the construction of statutes, especially such statutes as we must now consider, depend so much upon the peculiar phraseology of the statute that apparently slight differences in language may

have a most important bearing, and render a foreign adjudication a source of danger rather than an aid. None of the statutes passed upon by the cases to which we have been cited is exactly like our own, although those of Michigan and Massachusetts are so nearly like ours as to render the decisions of those states helpful in a general way. We will, therefore, forbear reference to cases of other states, except where those cases tend to throw light upon the general theory of modern statutes of descent and the policy of their construction; but this last phrase suggests a comment which should be made in answer to certain arguments in the briefs. With the wisdom or justice of the statute we have nothing to do. The statutes of descent are creations of positive law, and effect must be given to them according to their obvious meaning, regardless of contingencies which the court might think the legislature should have provided for, and regardless of our own notions of abstract justice. (*Shellenberger v. Ransom*, 41 Neb., 631.) In cases of ambiguity the fact that a particular construction would lead to an absurd or manifestly unjust result may be a reason for presuming that the legislature did not intend such construction. Beyond this such reasoning is without value. Our statute is as follows: "When any person shall die seized of any lands, tenements, or hereditaments, or of any right thereto, or entitled to any interest therein in fee-simple, or for the life of another, not having lawfully devised the same, they shall descend, subject to his debts, in the manner following: First—In equal shares to his children, and to the lawful issue of any deceased child by right of representation; and if there be no child of the intestate

living at his death, his estate shall descend to all his other lineal descendants; and if all the said descendants are in the same degree of kindred to the intestate, they shall have the estate equally; otherwise they shall take according to the right of representation. Second—If he shall have no issue, his estate shall descend to his widow during her natural lifetime, and, after her decease, to his father; and if he shall have no issue nor widow, his estate shall descend to his father. Third—If he shall have no issue, nor widow, nor father, his estate shall descend in equal shares to his brothers and sisters, and to the children of any deceased brother or sister, by right of representation; *Provided*, That if he shall have a mother also, she shall take an equal share with his brothers and sisters. Fourth—If the intestate shall leave no issue, nor widow, nor father, and no brother nor sister living at his death, his estate shall descend to his mother, to the exclusion of the issue, if any, of the deceased brother and sister. Fifth—If the intestate shall leave no issue, nor widow, and no father, mother, brother, nor sister, his estate shall descend to his next of kin, in equal degree, excepting that when there are two or more collateral kindred in equal degree but claiming through different ancestors, those who claim through the nearest ancestor shall be preferred to those claiming through an ancestor more remote; *Provided, however*, Sixth—If any person shall die, leaving several children, or leaving one child, and the issue of one or more other children, and any such surviving child shall die under age, and not having been married, all the estate that came to the deceased child, by inheritance from such deceased parent, shall descend in equal shares to the

other children of the same parent and to the issue of any such other children who shall have died, by right of representation. Seventh—If, at the death of such child who shall die under age, and not having been married, all the other children of his said parent shall also be dead, and any of them shall have left issue, the estate that came to said child, by inheritance from his said parent, shall descend to all the issue of other children of the same parent; and if all the said issue are in the same degree of kindred to said child, they shall share the said estate equally; otherwise they shall take according to the right of representation. Eighth—If the intestate shall leave a widow and no kindred, his estate shall descend to such widow. Ninth—If the intestate shall have no widow, nor kindred, his estate shall escheat to the people of this state." (Compiled Statutes, 1895, ch. 23, sec. 30.) The first group of appellants claims that the case falls under the third subdivision of the section quoted; while the second group, the sister's grand-children, claims that it falls under the fifth subdivision. Strictly speaking, it must fall within one or the other of these provisions, although in determining which, and the construction to be given the clause found to apply, the whole section must be construed together. Indeed, the grand-children referred to, in order to make out their claim, are compelled not only to bring the case within the fifth clause, but to engraft upon that clause the principle of representation found in the third clause.

We shall first consider the contention of the four defendants, the children of the deceased brother. Sir William Blackstone, after defining inheritance *per stirpes*, says, speaking of the civil

law: "And so among collaterals, if any person of equal degree with the persons represented were still subsisting (as if the deceased left one brother * * *), the succession was still guided by the roots; but, if both of the brethren were dead leaving issue, then (I apprehend) their representatives in equal degree became themselves principals, and shared the inheritance *per capita*,—that is, share and share alike; they being themselves now the next in degree to the ancestor, in their own right, and not by right of representation. So, if the next heirs of Titius be six nieces, three by one sister, two by another, and one by a third, his inheritance, by the Roman law, was divided into six parts, and one given to each of the nieces, whereas the law of England in this case would still divide it only into three parts, and distribute it *per stirpes*, thus: one-third to the three children who represent one sister, another third to the two who represent the second, and the remaining third to the one child who is the sole representative of her mother." (2 Blackstone, Commentaries, 217.) This is stated as the common law rule; but immediately following what we have quoted the reason therefor is given that it is a necessary consequence of the preference given at the common law to male issue and to the first-born among the males, to both of which the Roman law is a stranger. (2 Blackstone, Commentaries, 218.) Blackstone's discussion of the canons of descent has been by no means free from criticism; but whether or not he in this respect accurately stated the provisions of the civil and of the common law, and the reasons for their distinction, his words are of great importance, because during the whole formative period of the American law of descent, at least

outside of the original colonies, Blackstone's Commentaries was generally accepted as the embodiment of the common law. Every student resorted to it as teaching the elements of his profession. Most practitioners regarded it as the authoritative statement of the English law at the period of separation. So that those who framed the existing statutes of descent may safely be presumed to have been guided largely by what is there said as to rules of law which they were about to redeclare or alter, and as to the reasons for their existence. Referring to the text in this light, it is significant that in America the most general and earliest departures from the common law were in the abolishment of primogeniture and the preference of males. These changes swept away the reasons given by Blackstone for representation among collaterals; and it must have been in the minds of the framers of the statutes to follow another maxim frequently expressed by Blackstone, and sweep away the law itself, together with the reasons for its existence. Accordingly we find Chief Justice Shaw saying in 1850: "It is a plain rule of law, that those who take property, as a class of persons described, where there is nothing in the law making the appropriation to distinguish their respective rights, take in equal shares" (*Knapp v. Windsor*, 6 Cush. [Mass.], 156); and elsewhere in the opinion it is said that the expression in the statute, of a preference in the same words as that contained in the fifth clause of our statute, shows that in other cases heirs take *per capita*, and again: "The rule of representation applies only from necessity, or where there are lineal heirs in different degrees." As before remarked, the statute of Massachusetts is very much like our own. So

similar in fact that it is more than probable that directly or indirectly ours was modeled upon that upon which Chief Justice Shaw was commenting; so that his language is entitled to especial weight. The point, however, we desire to impress is that at the time he wrote, representation in America was not presumed, but was only applied where the statute affirmatively provided therefor. Other Massachusetts cases of less weight as indicating a general policy of the law, but more directly in point as to interpretation, are *Snow v. Snow*, 111 Mass., 389, and *Balch v. Stone*, 149 Mass., 371. The significance of these cases is chiefly in the fact that they construe such language as "next of kin in equal degree" as implying a taking *per capita* by the class described. The case of *Houston v. Davidson*, 45 Ga., 574, is also instructive as indicating that a *per capita* distribution is intended except within the degrees where representation *per stirpes* is expressly provided. Indeed we understand counsel for the defendants to practically concede this point by admitting that if the case does not fall within the third subdivision, which provides for representation, a distribution *per capita* must be made. We think, however, the case falls within the fifth and not the third clause. The section undertakes to provide a complete scheme of descent, beginning with the issue of the intestate, exhausting all blood kindred, providing for a single case, that of the widow, where the inheritance is made to pass by affinity in the absence of kindred by blood, and ending with escheat to the state. The first clause provides that the children shall take in equal shares, and the lawful issue of any deceased child by right of representation. This is followed by an express provision

whereby if no child of the intestate survive him, the estate shall descend to the more remote descendants *per capita*, if they are all in the same degree, otherwise *per stirpes*. This clause is significant on the question before us, in this: that thus at the very outset we find that the rule is different where one child survives, and where they are all dead. Representation is almost uniformly recognized more fully in the case of direct descendants than in the case of collaterals; and, therefore, it would be a strange thing if the legislature should provide for a descent *per capita* among lineal heirs under circumstances where the descent would be *per stirpes* among collaterals. The fact that this distinction is created in the first clause is of service in construing the third, fourth, and fifth. The second clause is unimportant to the discussion, except that by the joint effect of the first and second, lineal heirs, both in the ascending and descending line, are provided for, so that with the third clause the consideration of collateral begins. The third provides that in the absence of issue, widow, and father, the estate shall descend in equal shares to brothers and sisters "and to children of any deceased brother or sister, by right of representation." It is contended that the case before us is covered by this clause, and that the provision for representation in favor of the children of "any" deceased brother or sister extends to the case where all brothers and sisters are deceased. If this were true, as we have already suggested, it would be somewhat remarkable in view of the express provision to the contrary in the case of deceased children, but we think the subsequent clauses show that it is not true, and expressly carry out the analogy of the

first clause. The third provides for the absence of issue, widow, and father; and the prior death of "any deceased brother or sister." The fourth provides for a case where there is neither issue, widow, father, "and no brother nor sister living at his death." In this case the estate goes to the mother to the exclusion of the issue of any deceased brother or sister. Here, then, is evidently a case not within the third section, for the sole reason that there is no surviving brother or sister. In determining whether or not a case falls within the third or fourth clause it becomes absolutely necessary to interpret the third clause as, if following the phrase "any deceased brother or sister," there was added "a brother or sister surviving." Then comes the fifth clause, which provides for the case where there is left neither issue, widow, father, brother or sister, nor mother, which is the case before us, and which differs from the fourth section only in that it excludes the case of a surviving mother. These three clauses, therefore, form a scheme of inheritance among collaterals, embracing incidentally the case of the mother. They pursue an exclusive process, and must be read, in order to give the whole effect, as if, in addition to stating what kindred do not survive, they also stated that there were surviving those next in degree not named in the excluding clauses. As the case falls within the fifth clause, it follows from what has already been said that a distribution *per capita* is required.

The case of the sister's grand-children is perhaps less clear, but we think the district court was also correct in its ruling upon their claim. What we have already said in regard to the general policy, whereby representation exists only by ne-

cessity or in cases expressly provided, is applicable to this branch of the case. Among lineal descendants representation is expressly provided for, without limitation as to degree, the language being, "If all the said descendants are in the same degree of kindred to the intestate, they shall have the estate equally, otherwise they shall take according to the right of representation." The sixth and seventh clauses, containing additional provisions for lineal descent, are in similar language. The language of the fifth clause is that the estate shall descend "to his next of kin in equal degree, excepting that when there are two or more collateral kindred in equal degree, but claiming through different ancestors, those who claim through the nearest ancestor shall be preferred to those claiming through an ancestor more remote." By section 33, degrees of kindred are to be computed according to the civil law; so that these three plaintiffs, whom for convenience we have referred to as grand-children, stand one degree more remote than the other parties to the action. The first, sixth, and seventh clauses provide for representation among lineals of unequal degree. The fifth clause provides that those who are nearest shall be preferred to those who are more remote. The seventh canon of descent as stated by Blackstone is, "that in collateral inheritances the male stock shall be preferred to the female." (2 Blackstone, Commentaries, 234.) The term "preferred" was there used in the sense of entirely excluding the female stock provided male stock survived, and that, we think, is the general use of the term in such connection. It seems to be the policy of all the statutes at some point more or less remote to cut off representation entirely among

collaterals, and where, because of unequal degrees of kinship, representation would otherwise be necessary, to defeat it by making a *per capita* distribution among those nearest in degree and excluding the more remote. Our law seems to reach that period where, at any point among collaterals beyond the children of brothers and sisters, the surviving kindred fall into unequal degrees. This is the construction given elsewhere to statutes resembling ours. (*Van Cleve v. Van Fossen*, 73 Mich., 342; *Schenck v. Vail*, 24 N. J. Eq., 538; *Bigelow v. Morong*, 103 Mass., 287; *Davis v. Stinson*, 53 Me., 493; *Conant v. Kent*, 130 Mass., 178.) Cases holding a different rule, so far as we have found any, have been under statutes which by their clear language required a different construction.

The judgment of the district court was in all respects correct.

JUDGMENT AFFIRMED.

GEORGE HERZOG V. JENNIE CAMPBELL.

FILED MARCH 3, 1896. No. 6253.

1. **Instructions:** FAILURE TO NUMBER: REVIEW. In order to present for review the failure of the district court to properly number instructions, exception must at the trial have been taken on that especial ground.

2. ———: CITATIONS: HARMLESS ERROR. While instructions should not be submitted to the jury with authorities noted thereon, still prejudice will not be presumed from the mere citation on the instruction of a volume and page of the reports. *Sioux City & P. R. Co. v. Finlayson*, 16 Neb., 578, followed.

3. **Slander:** SPECIAL DAMAGES. Words spoken imputing an

indictable offense are actionable *per se*, and no special damage need be proved.

4. ———: MEASURE OF DAMAGES. Evidence examined, and *held* sufficient to sustain a verdict for $1,000.

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

Thomas H. Matters, for plaintiff in error.

Leslie G. Hurd, contra.

IRVINE, C.

The assignments of error in this case demand no protracted discussion. The first one urged in the brief is that "the court erred in giving instructions of the plaintiff as requested, instructions not being numbered, more than one instruction being given upon the same sheet without number, and further giving the instructions as requested by the plaintiff citing authorities in the instructions." From the argument it would seem that the assignment is merely directed to the formal matters referred to; that is, to the failure to separately number the instructions and to the citation of authorities. No request to have the instructions numbered was made on the trial, and no exception was taken to the failure to number them. It is well settled that while the provisions of the statute requiring instructions to be separately numbered and marked "given" or "refused," as the case may be, are mandatory, still the failure to observe those requirements presents nothing for review, unless exception was specially taken on that ground. (*Tagg v. Miller*, 10 Neb., 442; *Fry v. Tilton*, 11 Neb., 456; *Gibson v. Sullivan*, 18 Neb., 558; *Omaha & Florence Land & Trust Co. v. Hansen*,

32 Neb., 449; *City of Chadron v. Glover*, 43 Neb., 732; *Jolly v. State*, 43 Neb., 857.)

At the end of one of the instructions appears in parentheses the following: "28 Neb., 330." This is, we presume, the citation referred to in the assignment. In *Sioux City & P. R. Co. v. Finlayson*, 16 Neb., 578, there was a similar complaint. The court disapproved the practice and intimated that when instructions are requested, accompanied by such notations, the court, before giving them, should erase the notations; but held that in the absence of special circumstances the error was without prejudice, and that a judgment should not be reversed for such a reason, unless prejudice be made affirmatively to appear. This case is precisely like the one cited.

The other assignments argued reduce themselves to two grounds—that the verdict was not sustained by the evidence and that the damages were excessive. The action was for slander by the defendant in error, a girl of sixteen, against the plaintiff in error, a farmer, and presumably a man who should have reached the age of discretion. The words charged imputed that the plaintiff was pregnant by reason of incestuous intercourse with her father. The answer was a general denial. Witness after witness testified to the publication of the slanderous words in substance as laid in the petition. The defendant did not directly contradict the testimony of a single witness. As to some of the witnesses he said that a portion of their testimony was true and a portion not, without saying what was true and what untrue. As to another, the question and answer were as follows: "Did you make the statement concerning Jennie Campbell as related by George

Hutton before the jury? A. No, sir; not in the shape he has given it." In other words, his testimony, by negatives pregnant, substantially corroborated the plaintiff's witnesses and confessed the charge. But it is said that the evidence rebutted the presumption of malice; and there was no evidence of express malice. We need not in this case inquire how far the rules of the common law in regard to the admission of evidence establishing and rebutting actual malice in slander cases must be modified because of our rule forbidding punitive damages. The publication of words imputing an indictable offense was here shown beyond question. No justification was attempted. No privilege was claimed. Conceding that under such circumstances the presumption of malice is a rebuttable presumption, it was not here rebutted. The defendant bases his argument on this point upon the fact which the evidence tends to establish, that each publication of the slanderous words was accompanied by a statement that the girl's father had endeavored to procure the defendant to marry her, intimating that he was responsible for her alleged condition. If this were true, which there is no evidence to show, the fact that the defendant was smarting under an unjust charge made by the plaintiff's father would be no justification or excuse for his slandering the girl. It would tend rather to prove than to disprove malice in its legal signification.

The verdict was for $1,000, which defendant calmly argues is excessive. His counsel seem to be under the impression that proof of special damage was necessary. It is elementary that words imputing an indictable offense are actionable *per se*, and that no special damage need be proved.

(*Boldt v. Budwig*, 19 Neb., 739; *Hendrickson v. Sullivan*, 28 Neb., 329; *Barr v. Birkner*, 44 Neb., 197.) The jury had a right, and it was its duty on proof of the cause of action, to award such damages as in its judgment would fairly compensate the plaintiff for the injury sustained; and it requires some hardihood to contend that a verdict of $1,000 for a charge of incest, repeated over and over again, against a girl just on the verge of womanhood, is more than adequate compensation.

JUDGMENT AFFIRMED.

PYTHIAN LIFE ASSOCIATION V. MARY A. PRESTON.

FILED MARCH 4, 1896. No. 6225.

Life Insurance: MEMBERSHIP FEES: AUTHORITY OF AGENT TO EXTEND CREDIT: SUBAGENTS: DELIVERY OF POLICY. A life insurance association approved an application and issued and forwarded to its general agent a policy for delivery to the applicant. The application and policy each contained a condition providing, in substance, that there should be no binding contract of insurance until the written application was received and accepted and the policy issued by the association and delivered to the proposed member in person during his lifetime and good health, nor until the admission fee and advance premium was paid thereon; that no agent of the association had authority to make, alter, or discharge contracts, waive forfeitures, extend credit, or grant permits, and no alteration of the terms of this contract shall be valid, and no forfeiture thereunder shall be waived, unless alteration or waiver shall be in writing and signed by the president and another officer of the association. By a contract appointing this general agent of the association, which was signed by the president and secretary thereof, his compensation for soliciting and obtaining parties to be-

come members of the association and insured therein was fixed at the whole sum of the admission fees and advanced premiums to be paid by each person insured. *Held*, That the part of the contract in relation to the compensation of the general agent gave him the right to collect of each person of whom he received an application, when he delivered the policy, the membership, or admission fees and advance premiums and keep them; that in collecting he might, at his option, demand immediate payment or extend credit, and that if he extended credit it was not for the company but for himself; that the association had surrendered the right to any further control or direction of the collection of the fees and advance premiums to be paid by persons insured through this general agent; that the contract with the general agent was inconsistent with their right to insist on the enforcement of the stipulations in regard to payment contained in the application and policy; that a delivery of the policy to the applicant, made, or caused to be made, by such general agent, was good and the contract of insurance binding, notwithstanding credit was extended for the payment of the membership fees and advance premiums.

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

The opinion contains a statement of the case.

Jacob Fawcett, for plaintiff in error:

The agent had no power to waive the condition of prepayment of the premium. (*Brown v. Massachusetts Mutual Life Ins. Co.*, 59 N. H., 307; *Porter v. United States Life Ins. Co.*, 35 N. E. Rep. [Mass.], 678; *Buffum v. Fayette Mutual Fire Ins. Co.*, 85 Mass., 360; *Dircks v. German Ins. Co.*, 34 Mo. App., 31; *Greenwood v. New York Life Ins. Co.*, 27 Mo. App., 401; *Marvin v. Universal Life Ins. Co.*, 85 N. Y., 281; *Todd v. Piedmont & Arlington Life Ins. Co.*, 34 La. Ann., 67; *New York Life Ins. Co. v. Fletcher*, 117 U. S., 536; *Franklin Life Ins. Co. v. Sefton*, 53

Ind., 387; *Morgan v. Bloomington Mutual Life Benefit Ass'n*, 32 Ill. App., 79; *Jeffries v. Life Ins. Co.*, 22 Wall. [U. S.], 47; *Ætna Life Ins. Co. v. France*, 91 U. S., 510; *Johnson v. Maine & New Brunswick Ins. Co.*, 83 Me., 183; *McGeachie v. North American Life Assurance Co.*, 14 Can. L. T., 326; *Levell v. Royal Arcanum*, 30 N. Y. Supp., 205.)

The policy and application constitute the contract. (*Adema v. Lafayette Fire Ins. Co.*, 36 La. Ann., 662; *Chrisman v. State Ins. Co.*, 18 Pac. Rep. [Ore.], 466; *Byers v. Farmers Ins. Co.*, 35 O. St., 606; *Fitzrandolph v. Mutual Relief Society*, 17 Can. S. C., 333.)

The provisions of the contract could only be waived in the manner provided by the policy. (*Birmingham Fire Ins. Co. v. Kroegher*, 83 Pa. St., 64; *Kyte v. Commercial Union Assurance Co.*, 10 N. E. Rep. [Mass.], 518; *Smith v. Niagara Fire Ins. Co.*, 15 Atl. Rep. [Vt.], 353; *Hankins v. Rockford Ins. Co.*, 35 N. W. Rep. [Wis.], 34; *Enos v. Sun Ins. Co.*, 8 Pac. Rep. [Cal.], 379; *Kirkman v. Farmers Ins. Co.*, 57 N. W. Rep. [Ia.], 952; *Burlington Ins. Co. v. Campbell*, 42 Neb., 208.)

W. C. Van Gilder, also for plaintiff in error.

H. C. Brome and *I. R. Andrews, contra:*

We submit that with reference to the provision of the policy upon which the only defense interposed here is based it appears that the insured acted in the utmost good faith. The policy was delivered to him. He paid the admission fee and first premium, and he understood, and the insurance company knew that he understood and had been led by it to believe, that his policy was in full force and effect. Under these circumstances,

in view of the facts of the case, the provision of the policy imposing a limitation upon the authority of agents has no application. (*Phœnix Ins. Co. v. Rad Bila Hora Lodge*, 41 Neb., 21; *Haight v. Continental Ins. Co.*, 92 N. Y., 51; *Whited v. Germania Fire Ins. Co.*, 76 N. Y., 415; *Shafer v. Phœnix Ins. Co.*, 53 Wis., 361; *American Central Ins. Co. v. McCrea*, 8 Lea [Tenn.], 513; *Story v. Hope Ins. Co.*, 37 La. Ann., 254; *Elliott v. Ashland Mutual Fire Ins. Co.*, 117 Pa. St., 548; *Maryland Fire Ins. Co. v. Gusdorf*, 43 Md., 506.)

HARRISON, J.

The defendant in error instituted this action in the district court of Douglas county against the Pythian Life Association to recover the sum of $2,000 alleged to be due her from the life association under and by virtue of a membership certificate therein, or a policy of insurance, claimed to have been issued of date May 31, 1890, upon the life of Willet C. Preston, who was the husband of the defendant in error, and who had died since that date and prior to the commencement of this suit. The plaintiff in error, it appears, was a corporation, organized and existing under the laws of this state, engaged in the business of life insurance, with its general offices or headquarters in the city of Omaha; that on or about the 31st day of May, 1890, one David H. Caldwell, who was then its general agent, received the application of Willet C. Preston, in the city of Minneapolis, Minnesota, for membership in the association, or a policy of insurance upon his life, to be issued by it. This application was not procured by the general agent personally, but was solicited and procured by one Josiah Towne, who, Caldwell

testifies, was a special agent appointed by him, and who, it further appears, was acting and working under him and his directions and occupying the same office with him. The application was forwarded to the association at Omaha in the regular course of business and was approved, and a certificate or policy, the one upon which this suit was predicated, was issued and sent to Caldwell at Minneapolis for delivery to the insured party. The articles of agreement, under and by which David H. Caldwell was appointed agent of the association and so acted, were signed by its president and secretary, and by the appointee, and as portions of these articles may play a more or less important part in the final disposition of at least some of the vital questions to be herein decided, we deem it best to notice them here. They were as follows:

"This agreement, made this 4th day of January, 1890, between the Pythian Life Association, of Omaha, Nebraska, party of the first part, and David H. Caldwell, of Geneva, Nebraska, party of the second part,

"Witnesseth, That the party of the first part hereby appoints the said party of the second part its general agent for the purpose of procuring and effecting applications for membership in said association that will be satisfactory to said party of the first part, and of collecting membership fees on application thus effected, and for the further purpose of appointing and supervising district, special, and local agents. * * * The appointing of all subagents shall be at the sole expense of the party of the second part. The party of the first part to be in no way chargeable or responsible to the agents thus appointed for

any salary, commission, or expenses incurred by them or any of them in procuring applications or prosecuting the business of any agency created hereby or hereunder, except as hereinafter stipulated. The party of the second part to be responsible to the party of the first part for the good behavior of his subagents and for their fidelity to the interests of the party of the first part. * * * The compensation allowed said party of the second part for his services rendered under the terms of this contract shall be 100 per cent of the membership fee or advance premium adopted by the party of the first part and collected by the party of the second part, or his subagents, if applications are written for insurance on the mortuary rate or quarterly premium-paying plans; but if written on the natural premium or endowment rate plan, with payments due semi-annually, then an additional compensation of 50 cents per $1,000 of insurance shall be allowed to said party of the second part, to become due and payable when the first semi-annual premium is paid to and received by the said party of the first part; but if application and policy is written on the natural premium or endowment-rate plans and premiums are paid annually, then the sum of $1 per each $1,000 shall be allowed in addition to the membership fee, to be due and payable when the first annual premium is paid to and received by the party of the first part. * * * The territory assigned to said party of the second part shall consist of the state of Minnesota, and such other territory as may be hereafter agreed upon."

In regard to the connection of Josiah Towne, who personally solicited and received Mr. Preston's application, with the business of the associa-

tion at Minneapolis, where it was taken, and the relation existing between Towne and Caldwell, its general agent, the latter testified as follows:

Q. Are you acquainted with Josiah Towne?

A. I am.

Q. What relation did he occupy to you while you were general agent?

A. As special agent.

Josiah Towne himself testified on this point as follows:

Q. What was your business during the months of June and July, 1890?

A. Soliciting insurance for the Pythian Life Association.

Q. With whom were you associated?

A. D. H. Caldwell.

The president of the life association says:

Q. I will ask you whether or not the defendant company had, to your knowledge, during the months of May, June, and July, 1890, an agent in Minneapolis or Minnesota, by the name of Josiah Towne?

A. No, sir; we did not.

The application for insurance contained the following statements: "It is further agreed that under no circumstances shall the certificate hereby applied for be in force until the actual payment to and acceptance of the advance dues by the association, and actual delivery of the certificate to the applicant during his lifetime and good health, with a receipt for the payment of the advance dues. It is further agreed that this application, its warranties and agreements, together with all the conditions and stipulations contained in the certificate now applied for, shall be binding on me and on any further

legal holder of the policy now applied for. I hereby agree to pay to said association, the money required to keep the certificate issued hereon in full force and effect as provided by the by-laws of said association, and I hereby adopt said by-laws and agree to be governed by them and will obey and comply with every article, its subdivisions, and its stipulations or provisions contained therein;" and on the same subject there was in the policy: "This contract is not binding until the written application therefor shall have been received, accepted, and this policy of insurance issued by the association and delivered to such member in person during his lifetime and good health, nor until the admission fee and advance premium is paid thereon. No agent of the association has authority to make, alter, or discharge contracts, waive forfeitures, extend credit, or grant permission, and no alteration of the terms of this contract shall be valid, and no forfeiture thereunder shall be waived, unless alteration or waiver shall be in writing and signed by the president and one other officer of the Pythian Life Association."

It is contended by counsel for plaintiff in error:

"First—Towne was not in any manner connected with plaintiff in error. He was not its agent or solicitor. He had never been authorized by it to do any business for it. He had absolutely no authority to make any oral agreement for credit, or any other kind of an agreement, either orally or in writing, for plaintiff in error.

"Second—Even if he had been a regular or general soliciting agent of plaintiff in error, he could not bind plaintiff in error by a delivery of the policy in question without full payment of the premium."

David H. Caldwell testified in regard to the delivery of the policy to the insured, as follows:

Q. What did you do with the policy after you received it?

A. In company with Mr. Towne, delivered it to Mr. Preston at the schoolhouse within a day or two from the time we received it.

Q. Did you receive any money at that time?

A. No, sir.

* * * * * * *

Q. What did you say about this policy having been delivered at the schoolhouse?

A. It was delivered within two or three days of the time received by me at the schoolhouse where Mr. Preston then worked.

Q. By whom?

A. By myself. Mr. Towne had the policy in his possession and handed it to Mr. Preston while I was with him.

Q. Left it with him?

A. No, sir.

Q. What was done with it?

A. I took it out of his hands.

Q. You took it from Mr. Preston?

A. Later.

Q. How much later?

A. Perhaps fifteen minutes.

Q. Mr. Towne had it in his possession and handed it to Mr. Preston, and then you took it back again from Mr. Preston?

A. After a time.

Q. Did you keep it in your possession after that?

A. I can't say how long; I gave it to Mr. Towne, either the same day, or very soon, to be delivered by him. The policy has not been in

my possession later than that day further than to be in that desk.

Q. Then what?

A. I think it was the same day that I gave it to Mr. Towne.

Q. The same day or about the same time after you had taken it back from Preston you gave it to Mr. Towne, did you ever see it again after that?

A. As it lay in our desk, the desk in Towne's and my office, in that vicinity.

Q. You did not have any more to do with it?

A. I did not.

Josiah Towne stated in his evidence that the policy was received at the office occupied by Caldwell and himself and within the next day or two they went to the schoolhouse in the city, where the applicant for insurance was employed as janitor, and there talked with him, and what the conversation was we will give as we find it recorded in the transcript of the testimony:

A. Went to the schoolhouse. Mr. Preston was not there; went out on the side, Twenty-third avenue I think it is; went in on the street side and went out on the avenue side. Just as we got on the sidewalk, Mr. Preston put in an appearance from his residence and met us about twenty feet from the schoolhouse. I passed the time of day and shook hands with him and says, "Tony" —always called him Tony—and took it out and delivered it to him. He says, "I can't pay for that to-day. I have just heard from the farm. I have lost a horse." He spoke something in regard to a note of $80 or $90 that he had got to meet; taking into consideration the fact of the note and the loss of the horse he could not take it then. He had it in his hand and during the con-

versation Mr. Caldwell took the policy from him. "Well," I says, "Tony, when could you take it?" This was some time during the middle of the week; the first or middle of the week. He says, "I will meet you at the lodge on Friday night." He says, "I will meet you at my lodge on Friday night, and I will pay you." I says, "All right, I will be there." Mr. Caldwell had the policy and we left with the understanding of the arrangement of Friday evening at his lodge. That was the conversation then and there.

Q. When did you next see Mr. Preston?

A. On Friday night by arrangement.

Q. What talk, if any, did you have with him then?

A. I went in to the lodge room and he was paying his dues and I thought it would be hardly courteous, I did not think it would, and without dunning him I went and stood right by him. He said, "Joe, I can't pay you to-night. I used more money than I expected. I am paying my dues to-night, but I will pay you at the office to-morrow morning at 10 o'clock," which would have been Saturday, the 7th. This was the 6th day of June. I said, "All right, Tony; I will be there at 10 o'clock."

Q. Where did you next see Mr. Preston?

A. At 9 o'clock the next morning at the office, or on the sidewalk first. He was waiting for me and was ahead of time.

* * * * * * *

Q. State what took place there.

A. Went into the office and I sat down and took the policy out of my pocket. He immediately commenced to talk that he did not, could not afford to take that policy and pay for it now.

He recited the fact of the loss of the horse and the note that was coming due and the expense he would be upon the farm; and I said to him,—you want all the conversation between him and myself,—I said to him, "Tony, you are getting to be too old a man to refuse to take any insurance. It is not a matter of accommodation; it's a privilege that any man would insure a man of your age. You are getting old. You have been accepted, the policy is here, you are getting at that time of life you need it; your expectancy is not a great many years." "Well," he says, "Joe, I would rather not take it, I can't pay for it; but," he says, "I will pay you for all your trouble." I says, "Tony, I want nothing if you don't take the policy. I get no commission, but I will not take anything from you if you don't take the policy." I says, "You want to take it even if you don't pay for it all now." I says, "You are perfectly good. I had just as lief take your word as take a bond and," I says, "you want to take it out. You need it," and I passed it over to him. He took it in his hand, unfolded it, not way open, but just merely the face of it in that shape. "Well," he says, "I will take it; and I will pay you $5, and when I come down from the farm, which will be next month, I will pay you the balance." I says, "Tony, that is all right." He paid me $5 and I made a memorandum of it in a book, opposite his name: "Received of Tony Preston, on June 7th, $5." He then handed the policy back to me. He says, "You just keep the policy for me, will you?" I says, "All right." He wanted me to keep the policy. It would be just as safe with me as it would with him. I took and put it in an envelope

and put it in my pocket. He got up and left the office.

The policy remained in the possession of Towne until July 29, 1890, on which date it was given by him to the son of the insured, who at that time paid the balance of the amount due of the premium. The whole sum of the membership fee and advance premium we will now state was testified to be $21.66. The policy was taken home by the son and handed to his father, who then gave it to his wife, the defendant in error. The insured had been ill for some days prior to this, and about two or three hours after turning the policy over to his wife, died. It appears that the following assessments, or calls, were sent from the main office of the association, addressed to Mr. Preston:

OMAHA, NEB., July 31, 1890.

"*Bro. Willet C. Preston, Minneapolis, Minn.:* You are hereby notified that we have charged to your insurance account the amounts this day falling due in accordance with the terms of your policy Nos. 2348, 2349, and that your account now stands as follows: * * * The amount shown above to be now due to balance, $11.62, must be received at the home office on or before August 29, 1890, in order to prevent forfeiture of your insurance. * * * Make remittances payable to the Pythian Life Association. Pay to D. H. Caldwell, R. 16, K. P. Block, Minneapolis, Minn."

"OMAHA, NEB., July 1, 1890.

"BROTHER: Satisfactory proof of death has been submitted to the association for the following claim: * * * in consequence whereof the managing board of directors, as provided in article 9, section 2, of the by-laws of the associa-

tion, as set forth in your policy of insurance, have ordered that a mortuary call be made upon all the members of the mortuary payment plan, of a two-thirds quarterly, mortuary premium and a 33 1-3 per cent dividend or deduction be made from the maximum quarterly premium of members insured on the national premium plan. This call is made upon all members insured prior to this date.

"Fraternally yours in F., C. & B.

"GEORGE ESMOND,

"*Acting Secretary Pythian Life Association.*"

It further appears that the defendant in error wrote to the association and requested that blank proofs of loss be sent to her; that this was done; that she procured them to be filled out and forwarded to the association; that they were received, and after they were examined a request was sent to Mrs. Preston to furnish some additional matters in the same connection, which she did.

The practical workings and benefits of insurance, both on life and property, are now universally acknowledged and adopted in countries where civilization and intelligence prevail, and people generally avail themselves of it under some of the different plans of issuance, either what is denominated the plan of the old line companies, or the mutual plan, or the lodge or association plan, etc. Whatever the plan, there is usually, if not always, issued some contract or agreement, most often styled a "policy" or "certificate of membership," as the case may be. In some jurisdictions the forms and conditions of these are provided and prescribed by law, but in the majority are left to be agreed upon by the

insurer and insured. The insurer usually making them as numerous and as stringent as seems best calculated, or, as experience has taught, will best subserve the end desired to be attained in the conduct of the business. If the public, the customers, could be induced to pay more attention to the matter and examine the conditions and stipulations of the policies issued to them, and, where they are arbitrary or unreasonable beyond justice between the parties to the contract, demand that they be made less complicated and made consonant with a spirit of equity, or be refused or not received, no doubt the framers would soon discover a way by which they could be made safe and fair and also bear and pass the scrutiny of the public, the customers. But where it is, as it has heretofore been, the task of the legislator to pass laws to effect the purpose above sketched, or the judiciary or courts of the land to annul an unreasonable and unfair stipulation and condition when a case involving the validity is presented for adjudication, it was, and is, naught but a mere trial of the skill and ingenuity of the draughtsmen of the policies to frame new conditions to evade the laws enacted by the legislatures, or to fill the place of such as are declared void or robbed of their effect by the courts. Contracts of insurance occupy no different position in the eyes of the law than do any other agreements, and when not unconscionable and unfair, should be enforced as made between the parties. The stipulation in the contract sued upon in the case at bar, that it should not be binding unless the membership fee and what was styled "the advance premium" were paid and the policy actually delivered to the person whose life was to be

insured thereby during life and good health, and the condition that no agent had authority to extend credit, were neither of them unjust or unfair or incapable of enforcement, nor such as should not be enforced in exact conformity with the letter and spirit. The association, it appears, had appointed a general agent, and the agreement which gave his appointment effect, assigned or in effect made his, as his compensation for what business he might do for it, all membership fees and advance premiums, and apparently without any further regard for how he received them or when, or what arrangements he might make as to their payment, whether he exacted it as contemplated by the terms of the policy or extended credit, as it is claimed he did in this particular instance. Our belief that the arrangement with the general agent should be thus construed is much strengthened by the facts that Preston had been considered by the association as one of its members, and it had recognized him in that relationship, by notifying him to contribute dues and premiums and mailed him a notice of a mortuary call. Clearly it would be violative of the principles of justice and right to hold that an arrangement might exist between the association and its agent by which the membership fees and advance premiums to be paid by an applicant for insurance became the property of the agent, and the association was no further interested in them, or their payment, had no further control over them, and whether payment was exacted on delivery of the policy, credit was extended, or payment was entirely waived, could in no manner affect the association or its rights or funds, and say that if the agent extended credit or made the applicant a

present of the membership fees and advance premiums, and the party to whom a policy had been delivered under such circumstances, died, that the policy was not in force. While it is very evident that, under the terms of the application and policy, no credit could be extended for the association, or rather it was the intention that none should be, it is equally clear that by their agreement it had no further power or control over the membership fees or advance premiums, and could make no objections to credit being extended by the general agent. The contract which the association entered into with him, by which he became entitled to the whole amount of such fees and premiums, was inconsistent with the stipulations contained in the application and policy, in regard to the payment of the fees and advance premiums, or their enforcement as against a party to whom their general agent had granted time for their payment. The policy was prepared and forwarded to the general agent by the association to be delivered and he to receive payment of fees and premiums of which no part belonged to the association, but to the general agent. If delivered, it was in full force, without regard to any arrangement made between the agent and the party insured respecting the time of payment of the advance premium. (*Smith v. Provident Savings Life Assurance Society of New York*, 65 Fed. Rep., 765, and cases cited.) The facts of the case referred to were somewhat different from the facts in the case at bar, but the principle of law applicable and decisive the same, and equally applicable and controlling in the present case.

In regard to the contention that Towne was not an agent of the association, in no manner

connected with it or its business and could not bind it by delivering a policy to the applicant, or by any agreement to extend credit, the general agent testified that Towne was a special agent for the association, appointed by him (the general agent) by virtue of the authority conferred upon him by his contract with the association, by which it will be remembered he was empowered to appoint special agents, but however this may have been, there was ample evidence to show that Towne was soliciting business for the association, working with and under the orders and directions of the general agent, and whether he was recognized by the association as an agent, or in its service, or its officers had any knowledge of his work, or his existence, is immaterial. The policy in question was forwarded to the general agent for the delivery. He turned it over to Towne, who had solicited and received the application, and directed him to deliver it to the party for whom by its terms, it was intended, and Towne followed the directions, and as appears from the testimony, gave it to Willet C. Preston, who left it with Towne for safe-keeping, and if the arrangement in respect to extension of credit for the payment of a portion of the amount due as fees and advance premiums, effected at the time of such delivery, was satisfactory to Caldwell, the general agent to whom the moneys to be paid belonged, and it is a fair inference that it was, no one could complain and certainly not the association, for, as we have seen, it had no interest in the fees or premiums to be paid at that time, or how they were paid, or when. We must conclude from a full investigation of the testimony that it sustains a finding of the delivery of

the policy sued upon in this action and in such a manner and at such a time as constitute it a valid, subsisting, and binding contract between the party applicant, and thereby insured, and the association. What occurred between Towne and Preston at the time the policy was given by Towne to Preston, considered with all the other facts and circumstances shown by the evidence and which were necessarily incident to and had a direct bearing upon this part of the transaction, constituted in legal effect a delivery of the policy.

There is an assignment of error which reads as follows: "The court erred in giving the second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, and sixteenth instructions given by the court on its own motion, to which the plaintiff excepted." Instruction numbered 11, given by the court on its own motion, was without fault, also some of the others enumerated in this assignment. The assignment was as to all the instructions, and having determined that it is not well taken in respect to one or more, in accordance with a well established rule of this court, it must be overruled as to all.

It is further assigned as error: "The court erred in refusing to give the first and second instructions asked by the plaintiff in error, to which refusal plaintiff in error duly excepted." No. 2 of the instructions referred to in this assignment, in some of the statements contained therein, would have incorrectly informed the jury, and the refusal to give was therefore proper. The error assigned was of the refusal to give the two instructions, and it being determined that the action of the court as to either of them was without error, it disposes of the entire assignment.

This disposes of all the errors which were urged in the argument, and it follows from the views herein expressed and the conclusions reached that the judgment of the district court must be

AFFIRMED.

UNION PACIFIC RAILROAD COMPANY V. J. J. KINNEY ET AL.

FILED MARCH 4, 1896. No. 6335.

1. **Bill of Exceptions:** AUTHENTICATION. If a bill of exceptions has not been authenticated by the certificate of the clerk of the trial court as required by law, matters contained therein will not be considered or examined by this court.
2. **Review.** Errors must be affirmatively shown by the record; if not, it will be presumed that the proceedings of the trial court were correct.

ERROR from the district court of Kimball county. Tried below before NEVILLE, J.

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

H. D. Rhea, contra.

HARRISON, J.

In this action, in the district court of Kimball county, the plaintiffs (defendants in error) sought to recover of the Union Pacific Railway Company, as damages, the value of a gray stallion, alleged to have been struck and killed by a locomotive, on a portion of the company's line of road in Kimball county, Nebraska, it being further alleged

that the striking and killing of the horse were due to the negligent and careless manner in which an engine and train of cars were operated and handled by the employes of the company at the time of the occurrence. Issues were joined by the pleadings filed by the parties, and a trial resulted in a judgment in favor of the plaintiffs in the action. The company presents the case here for review by error proceedings. In view of the disposition which we have, after examination, determined must be made of the case, a further or more extended statement is deemed unnecessary. In the argument in the brief filed by counsel for the railway company it is urged:

"1. The court should have granted defendant's request to direct a verdict for defendant (record, p. 12), or its motion for new trial (record, p. 16).

"2. The fifth paragraph of the petition declares 'where the killing of said stallion occurred was in the county of Kimball and in the state of Nebraska, and at a point about one and one-half miles west of Kimball in the said county and state; and at said point there is a public highway running along said railroad track, and said defendant has carelessly, negligently, and knowingly, utterly failed to construct a fence along said railroad, or in any manner protect stock from straying upon said track.' (Record, p. 3.) The evidence, as will be seen by referring to the preceding abstract and bill of exceptions, conclusively establishes that a fence had been erected by the plaintiff Kinney on the south side of defendant's right of way and the public highway running along said railroad track upon the south, said highway partially on defendant's right of way, leaving it between the fence and the road.

"3. The court erred in that by the third instruction it charged the jury that: 'The building of a fence on one side of a railway company's right of way by the owner and occupier of the lands on that side, does not release the company from its duty to build a fence on the other side of said railway company's right of way. (Record, p. 9.)

"4. The uncontroverted evidence shows that the plaintiff Kinney, in permitting his stallion to run at large, was guilty of a breach of section 91 of the Revised Statutes (Cobbey's edition).

"5. The court erred in overruling the objection of the defendant below to the several questions put by the plaintiff on rebuttal to L. C. Kinney, Charles E. Cronn, and J. J. Kinney, as follows."

To properly determine the force of each of these questions raised by the assignments of error a reference to and examination of the testimony introduced during the trial of the case, or portions of it, are necessary. Attached to the transcript is what purports to be a bill of exceptions and to contain the evidence, but it is not authenticated by the certificate of the clerk of the trial court as required by law, and cannot be used for any purpose. Such a certificate is indispensably necessary. (*Wax v. State*, 43 Neb., 18, and cases cited.) In the opinion of the case of *Romberg v. Fokken*, 47 Neb., 198, written by NORVAL, J., it was said: "That which purports to be a bill of exceptions, and which is attached to the transcript, does not appear to have been filed in the district court, nor has the clerk of that court certified that it is either the original bill of exceptions settled and allowed in the cause, or a copy thereof, as required by law. The pretended bill, therefore, must be ignored, and cannot be considered for any,

purpose. (*Aultman v. Patterson*, 14 Neb., 57; *Hogan v. O'Niel*, 17 Neb., 641; *Flynn v. Jordan*, 17 Neb., 518.) But it may be said the omission of the clerk's certificate authenticating the bill must be deemed to have been waived by the parties, inasmuch as they have conceded the validity of the bill of exceptions, by raising no objections thereto in this court. *Yates v. Kinney*, 23 Neb., 648, recognizes such rule, but we do not hesitate to say that it is unsound. In the exercise of its appellate jurisdiction this court reviews the proceedings of the district court, and our only means of ascertaining what proceedings were had and taken in the trial court in any case, or what pleadings were filed therein, is the transcript of the record of that court, duly authenticated by the proper officer. If the parties may waive the certificate of the clerk of the district court to the original bill of exceptions, then there is no reason why they may not likewise waive the authentication of the transcript of the final judgment, or order sought to be reviewed, and the pleadings in the case. The statute requires both the transcript and the bill of exceptions to be authenticated by the certificate of the clerk of the district court, and we have no right to ignore or disregard its mandatory provisions. (*Moore v. Waterman*, 40 Neb., 498; *Otis v. Butters*, 46 Neb., 492; *Martin v. Fillmore County*, 44 Neb., 719; *Yenney v. Central City Bank*, 44 Neb., 402.)" (See, also, *First National Bank of Greenwood v. Cass County*, 47 Neb., 172.)

As the decisions of the questions raised by the assignments of error and discussed in the brief or argument of counsel for plaintiff in error necessitate an inspection of the evidence adduced and we have just decided the testimony in this case is not

before us, and as alleged errors must be shown by the record or be presumed not to have occurred (*Willis v. State*, 27 Neb., 98; *Romberg v. Hediger*, 47 Neb., 201), it follows that the assignments of error must be overruled and the judgment of the trial court

AFFIRMED.

WALTER A. WOOD MOWING AND REAPING MACHINE COMPANY V. WILLIAM GERHOLD.

FILED MARCH 4, 1896. NO. 6149.

1. **Bill of Exceptions**: AUTHENTICATION. A bill of exceptions in a cause tried in the district court must be filed with the clerk of that court, and if the original bill is to be used in the supreme court, it must be authenticated by the certificate of the clerk of the trial court.
2. **Review**: ASSIGNMENTS OF ERROR. Assignments of a petition in error which can be reviewed only in connection with a bill of exceptions will be disregarded where no authentic bill is contained in the record.
3. ———: AFFIRMANCE. The petition in error presenting no question of law or fact for review, the judgment is affirmed.

ERROR from the district court of Platte county. Tried below before SULLIVAN, J.

McAllister & Cornelius, for plaintiff in error.

C. J. Garlow, contra.

NORVAL, J.

This suit was upon a promissory note executed by the defendant in error as part consideration for one of plaintiff's harvesting machines.

The defense interposed was breach of warranty of the machine. From a verdict and judgment thereon in favor of the defendant the plaintiff prosecutes error.

There is attached to the transcript a document purporting to be the bill of exceptions in the case, but it does not appear to have ever been filed with, nor is it in any manner authenticated by, the clerk of the district court; hence it must be disregarded by us. (*Aultman v. Patterson*, 14 Neb., 57; *Hogan v. O'Niel*, 17 Neb., 641; *Flynn v. Jordan*, 17 Neb., 518; *Wax v. State*, 43 Neb., 18; *Romberg v. Fokken*, 47 Neb., 198; *Union P. R. Co. v. Kinney*, 47 Neb., 393.)

The petition in error contained six assignments, but two of which—the verdict is contrary to the evidence, errors in the admission of testimony—are argued in the brief. The other assignments are deemed waived. (*Glaze v. Parcel*, 40 Neb., 732; *Erck v. Omaha Nat. Bank*, 43 Neb., 613; *City of Kearney v. Smith*, 47 Neb., 408.) Neither of the assignments discussed in the brief can be reviewed, except in connection with a bill of exceptions preserving the evidence adduced, and the rulings of the court below during the trial. As there is no authentic bill of exceptions in this record, the assignment of errors must be overruled and the judgment affirmed. (*State Ins. Co. v. Buckstaff*, 47 Neb., 1; *Sweeney v. Ramge*, 46 Neb., 919.)

AFFIRMED.

RUTHIE BROWN ET AL., APPELLEES, V. SAM WESTERFIELD ET AL., APPELLANTS.

FILED MARCH 4, 1896. No. 6136.

1. **Quieting Title**: DELIVERY OF DEED: PLEADING. An allegation in a pleading that the grantor "made and executed" a deed, includes all acts essential to the completion of the muniment of title,—the delivery of the instrument to the grantee as well as the signature of the grantor.
2. **Lost Deeds**: TITLE. The loss or destruction of a deed, after delivery thereof, does not divest the title of the grantee.
3. **Deeds**: DELIVERY. The delivery of a deed is essential to render the conveyance operative.
4. ———: ———: EVIDENCE. Delivery is purely a question of intent to be determined by the facts and circumstances of each particular case.
5. ———: ———. It is not essential to the validity of a deed that it should be delivered to the grantee personally. It is sufficient, if the grantor delivers it to a third person unconditionally for the use of the grantee, the grantor reserving no control over the instrument.
6. ———: ———. A mother signed and acknowledged a deed before a justice of the peace, conveying to her minor daughter certain real estate, and delivered the deed to the justice for the use and benefit of the grantee, without any reservation of control, with the intention and understanding that the justice should retain the custody of the instrument until the grantor's death, when he was to file it for record. The mother subsequently told the daughter that the property belonged to the latter, and that it had been fixed so she would have a home. *Held*, That the delivery to the justice was sufficient to pass the title to the property to the grantee at the date of such delivery.

APPEAL from the district court of Lancaster county. Heard below before TUTTLE, J.

See opinion for statement of the case.

Pound & Burr, for appellants:

The petition merely alleges that the deed was made and executed, without any allegation of delivery. The proof also fails to show delivery of the deed. The plaintiff has no title to the lot except as one of the heirs of Hannah Brown. (*Patrick v. McCormick*, 10 Neb., 1; *Wier v. Batdorf*, 24 Neb., 83; *Jones v. Loveless*, 99 Ind., 317; *Miller v. Physick*, 24 Ark., 244; *Miller v. Lullman*, 81 Mo., 311; *Byars v. Spencer*, 101 Ill., 429.)

A deed intended to operate as a testamentary disposition is in effect a will and is ambulatory and revokable during the life of the grantor. (*Turner v. Scott*, 51 Pa. St., 126; *Hall v. Bragg*, 28 Ga., 330; *Carey v. Dennis*, 13 Md., 1; *Frederick's Appeal*, 52 Pa. St., 338.)

Where a will once known to exist and to have been in the custody of the testator cannot be found after his decease, the legal presumption is that it was destroyed by the testator with the intention of revoking it. (*Behrens v. Behrens*, 47 O. St., 323; *Minor v. Guthrie*, 4 S. W. Rep. [Ky.], 179.)

Roscoe Pound and *Burr & Burr*, also for appellants:

To constitute delivery the grantor must unequivocally indicate it to be his intention that the instrument shall take effect as a conveyance of the property. It must be shown to have been intended as a present, operative conveyance. (*Fisher v. Hall*, 41 N. Y., 416; *Barrows v. Barrows*, 138 Ill., 649; *Davis v. Ellis*, 39 W. Va., 226; *Cline v. Jones*, 111 Ill., 563; *Schuffert v. Grote*, 88 Mich., 650; *Taft v. Taft*, 59 Mich., 185.)

Possession of the deed by the person employed to draw it is no delivery. (*Healy v. Seward*, 5 Wash., 319.)

B. F. Johnson and *T. F. Barnes, contra.*

References to the question of intention as to delivery and how determined: *Jordan v. Davis*, 108 Ill., 336; *Warren v. Swett*, 31 N. H., 332; *Burkholder v. Casad*, 47 Ind., 418; *Stevens v. Hatch*, 6 Minn., 19; *Black v. Kuhlman*, 33 O. St., 203; *Mitchell v. Ryan*, 3 O. St., 377; *Jamison v. Craven*, 4 Del. Ch., 311; *Adams v. Ryan*, 61 Ia., 733.

References as to delivery to another to hold for grantee's use: *Eckman v. Eckman*, 55 Pa. St., 269; *Jones v. Swayze*, 42 N. J. Law, 279; *Fewell v. Keisler*, 30 Ind., 195.

Absolute delivery to a third person to hold until grantee's death is a good delivery and passes title presently. (*Hinson v. Bailey*, 73 Ia., 544; *Albright v. Albright*, 70 Wis., 528.)

Acceptation is presumed in favor of infants. (*Byington v. Moore*, 62 Ia., 470; *Palmer v. Palmer*, 62 Ia., 204.)

A deed once delivered cannot be revoked by redelivery. (*Bunz v. Cornelius*, 19 Neb., 107; *Rogers v. Rogers*, 53 Wis., 36.)

NORVAL, J.

This was a suit by Ruthie Brown against Sam Westerfield and Ida Westerfield, his wife, and Louis and Jimmie Brown, to quiet the title in plaintiff to the south half of lot C, a subdivision of lots 4, 5, and 6, in block 28, of Kinney's O Street Addition to the city of Lincoln. The petition alleges that plaintiff is the only living child of Hannah and James Brown; that on the 20th day of June, 1883, the said Hannah Brown, now deceased, being the owner in fee-simple of the real estate above described, together with her hus-

band, said James Brown, made and executed a warranty deed to the plaintiff of said property, reserving a life estate therein to said James Brown; that said deed has become lost or stolen,—plaintiff is unable to state which,—but is informed that the same was placed in the hands of Sam Westerfield, one of the defendants; that though demand for the same has been made upon him, he has refused to comply therewith, and disclaims all knowledge of the deed; and that the defendants Sam Westerfield, Jimmie and Louis Brown are not the issue of the said James and Hannah Brown, but are children of said Hannah Brown by a former husband. James Brown, plaintiff's father, was subsequent to the institution of the suit joined as party plaintiff, and no service of summons having been had upon Louis and Jimmie Brown, the action was dismissed as to them. Sam Westerfield answered, admitting that plaintiff is the child and one of the heirs at law of said Hannah Brown, and denying all other averments of the petition. By way of cross-petition, Westerfield sets up that Hannah Brown and her husband, James Brown, executed and delivered a mortgage upon said lot C to one Mary Jane Carman to secure the payment of $27 and interest; that the defendant is the owner of said mortgage, and that the debt for which the same was given to secure has not been paid, nor any part thereof. The answer prays for the dismissal of plaintiff's suit, and for foreclosure of said mortgage. Upon the hearing, a decree was entered quieting the title to the premises in controversy in Ruthie Brown, subject to the life interest therein of her father, and foreclosing said mortgage. From the decree quieting the title the Westerfields appeal.

The appellants contend, in argument, that the petition is defective and fails to state a cause of action, in that it contains no specific allegation that the deed in question was ever delivered. The delivery of a deed is indispensable to its validity. While it is true there is no direct averment in the pleading that the deed had been delivered, yet this is not fatal. It is averred that the grantors "made and executed a warranty deed to the plaintiff" to the property. "Execute" is defined by Webster thus: "To complete, as a legal instrument; to perform what is required to give validity to, as by signing and perhaps sealing and delivering; as, to execute a deed, lease, mortgage, will," etc.; and the same authority gives the following as one of the definitions of the word "execution:" "The act of signing, sealing, and delivering a legal instrument, or giving it the forms required to render it valid; as the execution of a deed." In 1 Warvelle, Vendors, p. 482, it is said: "The term 'execution' primarily means the accomplishment of a thing—the completion of an act or instrument; and in this sense it is used in conveyancing to denote the final consummation of a contract of sale. The term properly includes only those acts which are necessary to the full completion of an instrument, which are: the signature of the disposing party, the affixing of his seal to give character to the instrument, and its delivery to the grantee." In this state the seal of the grantor is unnecessary, and an acknowledgment is no part of the deed conveying land other than the grantor's homestead, but an unacknowledged deed to such real estate, otherwise perfect, as between the parties, passes the title. The averment in the petition that the grantors "made and executed"

the deed, under the definitions already given, includes the delivery of the instrument as a conveyance of the property.

The uncontradicted testimony shows that James and Hannah Brown signed and acknowledged a deed of conveyance to their daughter, Ruthie Brown, one of the plaintiffs herein, for the premises in controversy, reserving a life estate therein to James Brown, one of the grantors. It was never actually delivered to the grantee in person, nor was it ever placed upon record. The instrument is not now to be found. A deed is merely the evidence of the grantee's title. The loss or destruction of the deed did not divest plaintiffs of their title, if they ever acquired one. And whether the title ever passed from Mrs. Brown, the owner of the fee to this property, depends upon whether the facts disclosed by this record amount, in law, to a delivery of the deed in question. It appears from the evidence adduced that Hannah Brown, being the owner of the property in dispute and another tract of the same size adjoining it on the north, on the 20th day of June, 1883, caused two deeds to be prepared by J. H. Brown, a justice of the peace of the city of Lincoln, one covering the north portion to Sam Westerfield, one of the defendants, and the other covering the south tract to Ruthie Brown, subject to a life interest in her father, James Brown. These deeds, properly witnessed, were signed and acknowledged by both Hannah and James Brown before said justice of the peace. The magistrate is the only person who testified as to what transpired at the time, and the disposition made of the deeds. He states, in substance, that he had acted as Mrs. Brown's legal adviser, having at various

times transacted considerable business for her; that on the date already mentioned, at her request, he went to see her, when she informed him it was her desire that the property be divided between her two children, Ruthie and Sam, the former being then some nine or ten years old, reserving a life interest in her husband in the home property; that her two sons, Jimmie and Louis, had abandoned her, and it was her wish to make a division of the property then for fear they would come in for a share at her death. In pursuance of this request, the two deeds were prepared by the witness, and then signed and acknowledged. The magistrate was requested to keep them and place them upon record after her death. He carried them for two or three days thereafter, when he went to Mrs. Brown's place of abode, put them in a tin box in which she kept her tax receipts and other papers, and at the time the witness, at Mrs. Brown's request, promised to see to the recording of the deed in question upon her death; that four or five times thereafter, the last one being about a week or ten days before Mrs. Brown died, she talked the matter over, expressing herself satisfied with the disposition she had made of the property; that immediately after the death of Mrs. Brown, the justice, with James Brown, looked for the deed, and then discovered that it was gone. Sam Westerfield testified that he had never seen the deed, but had heard it spoken of by several; and that the deed to himself he had recorded August 28, 1883, prior to his mother's death. Ruthie Brown testified that about a week before her mother died, the latter told her, as she had frequently stated before, that the place was Ruthie's and it had been fixed so that she would

have a home; that about two weeks before the trial witness asked Sam Westerfield about the deed, and he replied that he had it, or knew where it was. This conversation Westerfield denies having ever occurred.

The matter of contest is whether there was in law a delivery of the deed, for a delivery is indispensable to its binding effect. But, as was said by Chief Justice LAKE in *Brittain v. Work*, 13 Neb., 347: "No particular act or form of words is necessary to constitute a delivery of a deed. Anything done by the grantor from which it is apparent that a delivery was intended, either by words or acts, or both combined, is sufficient." Delivery of a written instrument like a deed is largely a question of intent to be determined by the facts and circumstances of the case. In the case at bar it depends on whether the intention of the grantor at the time was that the deed should operate as a muniment of title to take effect presently. In other words, did Mrs. Brown part with control over the instrument and place the title in her daughter? If such was the purpose, the delivery was complete, and the title to the property passed. (1 Devlin, Deeds, secs. 260-262; *Warren v. Swett*, 31 N. H., 332; *Jordan v. Davis*, 108 Ill., 336; *Burkholder v. Casad*, 47 Ind., 418; *Masterson v. Cheek*, 23 Ill., 73.) From an examination of the evidence we are satisfied that it establishes a delivery of the deed. It was placed in the hands of the magistrate who took the acknowledgment to hold for the grantee. This was sufficient to carry the title to the land. (*Byington v. Moore*, 62 Ia., 470; *Hinson v. Bailey*, 73 Ia., 544; *Black v. Hoyt*, 33 O. St., 203; *Lessee of Mitchell v. Ryan*, 3 O. St., 377; *Albright v. Albright*, 70 Wis., 528; *Ball v. Foreman*, 37 O. St., 132.)

In the case last cited the grantor delivered the deed to a third party with the understanding that he should retain the custody of the same until the grantor's death, when he was to deliver to the grantee. It was held to be the grantee's deed *in præsenti*, and that the subsequent destruction of the instrument by the grantor did not have the effect to divest the title of the grantee. Cassody, J., in delivering the opinion of the court in that case cites numerous authorities which sustain the proposition enunciated in the case. In *Hinson v. Bailey*, 73 Ia., 544, Eva Hinson went to a justice of the peace and signed and acknowledged a deed before him conveying certain lands to her children. She left the deed in the possession of the magistrate, with directions to retain it until her death, and then have it recorded. The justice told her that she could have the deed whenever she desired it, but she replied: "I don't want it. You must keep it until I die." It was held to be a good delivery and that the deed took effect immediately upon the delivery to the justice. (See, also, *Wittenbrock v. Cass*, 42 Pac. Rep. [Cal.], 300; *Bury v. Young*, 1 Am. L. Reg. & Rev., n. s. [Cal.], 140.) It is true in the case before us that, after the delivery of the deed to Justice Brown, he took it to the grantor and put it in a box where she kept her papers; but if was not with the intention of surrendering the deed, nor did that fact have the effect to divest the title of the grantee. Having once passed, it could not be divested in that way. (*Bunz v. Cornelius*, 19 Neb., 107; *Connell v. Galligher*, 39 Neb., 793.)

It is argued by appellants that the conveyance was intended to operate in the nature of a testamentary disposition of the property, not to take

effect until the death of Mrs. Brown, and authorities are cited in the brief to the effect that such a deed is invalid. The facts do not warrant such conclusion. The intention clearly was that the deed should take effect at once. The recording alone was to be deferred until Mrs. Brown's death. This is not a case where a grantor has placed a deed in a depository to be delivered to the grantee upon the death of the grantor, reserving the right to recall the deed at any time. The authorities cited by counsel for appellants are, therefore, not applicable here. We are constrained to hold that the trial court was, under the circumstances, justified in finding a sufficient delivery of the deed. The decree is

AFFIRMED.

CITY OF KEARNEY V. LOUISA SMITH.

FILED MARCH 4, 1896. No. 6342.

1. **Review:** ASSIGNMENTS OF ERROR. Assignments of error relating to the giving and refusal of instructions cannot be considered unless the record discloses that exceptions were taken at the trial.
2. ———: ———: WAIVER. Assignments of error not presented by the briefs or oral argument, will be treated as waived.

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

W. D. Oldham, for plaintiff in error.

F. G. Hamer and *J. S. Murphy*, *contra*.

IRVINE, C.

The defendant in error recovered a judgment of $450 against the plaintiff in error, for injuries sustained by reason of a fall alleged to have been caused by a defective sidewalk. The city seeks to reverse this judgment.

The first, second, third, and fourth assignments of error relate to the giving and refusal of instructions; but as the record does not disclose that any exceptions were taken to either the giving or refusal of instructions, these assignments are not open to examination. The only other assignment is that the damages were excessive. Neither by oral argument nor by brief was this assignment called to the attention of the court, and it is therefore treated as waived. Even were it not waived, we could not consider it, because there is no certificate of the clerk of the court authenticating what is filed here as either the original or a copy of the bill of exceptions filed in the case.

JUDGMENT AFFIRMED.

CARTER WHITE LEAD COMPANY V. PETER KINLIN.

FILED MARCH 4, 1896. No. 6287.

1. **Instructions: FAILURE TO REQUEST: REVIEW.** In order to present for review the failure of the trial court to instruct the jury upon particular issues or evidence in a case, the party complaining must have requested instructions on the omitted topics.

2. **Contract of Employment: DAMAGES: STATUTE OF FRAUDS.** A contract whereby one, in consideration of the release of a claim for damages against him, agrees to employ

the claimant at certain wages so long as the works of the first are kept running, or until the other shall see fit to quit, is not void either for uncertainty, for want of mutuality, or as within the statute of frauds.

3. **Statute of Frauds:** TIME TO PERFORM CONTRACT. A contract not to be performed within one year, as meant by the statute of frauds, is one which by its terms cannot be performed within one year. A contract is not within the statute merely because it may or probably will not be performed within a year.

4. **Contract of Employment:** TIME: OPTION TO TERMINATE. One party to a contract may obligate himself for a definite or an indefinite period, not depending on his own acts, and the other party may at the same time have the option of terminating it at his will. A contract upon sufficient consideration is not void for that reason.

5. ———: CONSIDERATION: DAMAGES. In order to sustain a contract which has for its consideration the release of a claim for damages against the promisor it is not necessary that the claim should be one which on litigation would have proved valid.

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

The facts are stated by the commissioner.

E. J. Cornish and *W. T. Nelson*, for plaintiff in error:

In instructing the jury the court erred in omitting essential elements of the case. (*Hale v. Sheehan*, 36 Neb., 439; *City of Plattsmouth v. Boeck*, 32 Neb., 297; *City of York v. Spellman*, 19 Neb., 385; *Nelson v. Johansen*, 18 Neb., 183; *Gilbert v. Merriam & Roberson Saddlery Co.*, 26 Neb., 194; *Bowie v. Spaids*, 26 Neb., 635; *Runge v. Brown*, 23 Neb., 817.)

The contract is void for want of mutuality. (*Stiles v. McClellan*, 6 Colo., 89; *Townsend v. Fisher*, 2 Hilton [N. Y.], 47; *Ewins v. Gordon*, 49 N. H., 444; *Boyce v. Berger*, 11 Neb., 399; *Pennsylvania Co. v. Dolan*, 32 N. E. Rep. [Ind.], 802.)

Smith & Sheean, contra:

If any instruction is vague or indefinite, plaintiff in error waived the right to object thereto by failing to request a more specific charge. (*Klosterman v. Olcott*, 25 Neb., 383; *Sioux City & P. R. Co. v. Finlayson*, 16 Neb., 578; *Burlington & M. R. R. Co. v. Schluntz*, 14 Neb., 425; *Dunbar v. Briggs*, 13 Neb., 332.)

The contract relied on is a legal one and binding on both parties. (*Hobbs v. Brush Electric Light Co.*, 75 Mich., 550; *Pennsylvania Co. v. Dolan*, 6 Ind. App., 109.)

IRVINE, C.

The assignments of error relied on by the plaintiff in error relate to the giving of instructions and to the sufficiency of the evidence. It is not contended that any of the instructions misstated the law, but the complaint is that they omitted certain features of the case upon which the jury should have been instructed, both in stating the issues and the law applicable thereto. For the most part these assignments clearly fall within the rule that a failure to fully instruct the jury upon the issues and law of the case is not open to review, unless the party complaining requested instructions on the omitted topics. (*Barr v. City of Omaha*, 42 Neb., 341; *Carleton v. State*, 43 Neb., 373; *Post v. Garrow*, 18 Neb., 682.) It is, however, claimed that by two instructions the court endeavored to cover all the facts essential to a recovery; and that omissions of essential facts in these instructions rendered them erroneous, without such request. We do not think that the instructions referred to severally or jointly were of the char-

acter which renders that rule applicable. The action was by Kinlin against the Carter White Lead Company, which we shall hereafter term the "company," the petition alleging that on the 23d of November, 1891, a contract had been made between the parties whereby the company agreed to employ plaintiff, and pay him $2.50 per day while working in the smelting department, and $2 per day while elsewhere employed, and to so give him employment as long as the works were kept running, or until the plaintiff saw fit to quit, in consideration whereof Kinlin agreed to so work for the company, and to release a claim for damages against the company, which was then in litigation between them. Kinlin, in the first count of his petition, alleged that he had been wrongfully discharged, in violation of such contract, and prayed damages therefor. In another count he alleged that the company had not paid him as much as it had agreed during the time he was employed, and judgment was sought for the deficiency. The answer, among other things, denied the material allegations of the petition, alleging that Kinlin's employment had been a hiring at will at the wages paid other men for similar work. The instructions particularly complained of were as follows:

"5. Before the plaintiff can recover he must prove by a preponderance or greater weight of the testimony that the contract alleged was made, that he and the defendant by its president, Carter, did agree that defendant would give plaintiff employment as long as defendant's works were kept running, at the rate of $2.50 per day for work in the smelting department and $2 per day while otherwise employed."

"9. If you believe from a preponderance of the evidence that the contract alleged by plaintiff was made, and that defendant was discharged without adequate and reasonable cause, then he would be entitled to recover for the time he was unable to procure work as shown by the evidence. If he could procure work it would be his duty to accept work, and for the time he was able to get work, with reasonable diligence, he could not recover. For such time as he could not, with reasonable diligence, get work, and was obliged to be idle, he would be entitled to recover at the agreed rate. The amount of plaintiff's claim under this cause of action is $180."

As we said, the complaint is that these instructions were not complete. The fifth instruction related solely to the promise on which Kinlin founded his claim, impressing upon the jury that, in order to recover, Kinlin must establish the contract as alleged. The object of the ninth instruction was to state the measure of damages, and especially the law of avoidable consequences. Standing alone, we do not see that either or both could be taken as summarizing all the particular elements essential to a recovery; and taken in connection with the other instructions, each one of which related to a particular issue, it is quite clear that the jury could not have understood them in that sense; so that the first rule stated is applicable to these instructions as well as to the others.

The assignment that the verdict is not sustained by the evidence suggests questions both of law and of fact. So far as the question of fact is concerned, the case is one of those in which counsel very reasonably believe that they have suffered

an adverse verdict while the evidence preponderated in their favor, and therefore seek in this court a modification of the rule generally observed in ascertaining the sufficiency of the evidence, in order to correct a verdict which they feel to be wrong. The wisdom of the rule here established by which this court declines to weigh conflicting evidence in cases within its appellate jurisdiction is daily justified by experience. On the written transcript, it seems to the writer that the verdict was against the weight of the evidence; but the opportunities of the jury on the trial and the district judge on the motion for a new trial, for correctly estimating the effect of the evidence, were much better than ours. There is sufficient conflict to prevent our disturbing the verdict, unless as a matter of law the contract, which the evidence, taken most favorably for the plaintiff, tends to establish, is invalid or incapable of enforcement. It is quite evident from the testimony and the instructions that the verdict rendered for $120.07 was based entirely on the first count in the petition—that for the wrongful discharge of plaintiff. The defendant claims that the contract sued on was invalid, and that, therefore, the judgment cannot stand. A similar contention was urged in regard to a somewhat similar contract in *Chicago, B. & Q. R. Co. v. Cochran*, 42 Neb., 531; but the case was disposed of on grounds which did not call for a decision of the questions here presented. In *Hobbs v. Brush Electric Light Co.*, 75 Mich., 550, the plaintiff released a claim for damages against the defendant in consideration of defendant's promise to give the plaintiff "steady employment as trimmer." The court held this to be a valid and binding contract,

although it will be observed that it was less definite in its terms than that alleged by Kinlin. In *Pennsylvania Co. v. Dolan*, 6 Ind., App., 109, the contract was to give Dolan "steady and permanent employment," at the amount he was earning at the time of his injury, in consideration whereof Dolan released the company from liability on account of such injuries. The court pronounced this contract valid because of the consideration, saying that the words "steady and permanent" were equivalent in meaning to the promise of employment so long as the employe was able, ready, and willing to perform such services as the company might have for him to perform. The construction given these terms was not very different from the actual terms of the contract relied on in this case. Here the duration of the contract was limited either by Kinlin's volition or by the company's continuing to operate its works. We think these cases show that the contract was not void for uncertainty. In the Indiana case it is intimated that it might be within the statute of frauds and therefore only enforceable for one year. A contract, within the meaning of the statute, which is not to be performed within one year from its date, means a contract which by its terms discloses that the parties do not contemplate that it can be performed within that period; as, for instance, a contract to employ a party for one year beginning at a future day. (*Kansas City, W. & N. W. R. Co. v. Conlee*, 43 Neb., 121.) Where a contract is of such a character that it may be performed within a year, it is not within the statute merely because it may not be performed within that time. (*Connolly v. Giddings*, 24 Neb., 131; *Kiene v. Shaeffing*, 33 Neb., 21; *Powder River Live*

Stock Co. v. Lamb, 38 Neb., 339.) In this case the company might close its works for an indefinite period within a year; or within that time Kinlin might see fit to quit. In either event the contract would be performed.

Finally, it is claimed that the contract was void for want of mutuality. This argument is based on the contention that in order to be mutual the plaintiff must have been bound to continue work as well as the defendant to employ him; and secondly, upon the ground that it was not shown that plaintiff had a valid claim for damages and that it was not shown that the contract was in consideration of the release of such claim. On the first point, we do not think that a contract lacks mutuality merely because every obligation of the one party is not met by an equivalent counter-obligation of the other. If the consideration existed the company might well bind itself to furnish the plaintiff employment for a definite period or an indefinite period, not depending on its own acts, and at the same time give the plaintiff the option of releasing it from that obligation by an earlier determination, if he so desired. On the second point we think there was some evidence, and sufficient to justify the finding, that the release of the claim for damages was the moving consideration of the contract. It was not necessary that plaintiff should establish a valid claim. Indeed, if his claim had been absolutely unquestioned for an amount certain, his release for a less amount might not bind him. (*Fitzgerald v. Fitzgerald & Mallory Construction Co.*, 44 Neb., 463.) But a party may buy his peace, and when an action is brought against one who compromises it by the payment of money, he cannot recover the money back on

the ground that had the litigation been pursued the plaintiff would have failed in his case. This is elementary; and if it is true, then it follows that a contract for the compromise of such litigation may be enforced.

JUDGMENT AFFIRMED.

STATE OF NEBRASKA, EX REL. GEORGE HOCKNELL, v. GEORGE W. ROPER ET AL.

FILED MARCH 5, 1896. No. 7387.

1. **Counties: RELOCATION OF COUNTY SEAT: ELECTIONS: BALLOTS.** Under the provisions of the act for the relocation of county seats, there being no requirement that abortive ballots shall be certified to the county canvassing board, such ballots cannot be counted for the purpose of making up the grand total, of which a place other than the existing county seat must receive three-fifths to be entitled to the relocation of the county seat, merely because in the certified return of the county election board such ballots were referred to as "ballots not reported or accounted for," or as "rejected" or "blank ballots."

2. ———: ———: ———: ———. Where there were cast upon the question of relocation of the county seat of Red Willow county 867 votes for Indianola, and for McCook 1,339 votes, and the return of county canvassers showed ballots to have been rejected or not to have been voted or accounted for, *held*, that McCook, having received more than three-fifths of the numbers above given, became the county seat of said county. *State v. Roper*, 46 Neb., 724, is overruled.

REHEARING of case reported in 46 Neb., 724, on application for *mandamus* to compel the officers of Red Willow county to remove their offices from Indianola to McCook. *Writ allowed.*

The issues appear in the opinion and in the former report of the case.

A. J. Rittenhouse, *J. W. Deweese*, and *W. S. Morlan*, for relator:

Blank ballots, and ballots from which it is impossible to determine the elector's choice, are not votes, are void, and should not be counted. (*Oldknow v. Wainwright*, 1 Wm. Bl. [Eng.], 229; *Rex v. Foxcroft*, 2 Burr. [Eng.], 1017; *State v. Green*, 37 O. St., 230; *St. Joseph Township v. Rogers*, 16 Wall. [U. S.], 644; *Cass County v. Johnson*, 5 Otto [U. S.], 360; *People v. Loomis*, 8 Wend. [N. Y.], 396; *Brown v. McCollum*, 76 Ia., 479.)

The intention of the voter must be ascertained from his ballot. (*Hawes v. Miller*, 56 Ia., 395; *State v. Foster*, 38 O. St., 604; *People v. Pease*, 27 N. Y., 84; *State v. Metzger*, 26 Kan., 395; *Clark v. Board of Commissions*, 33 Kan., 202.)

In the absence of any express regulation as to what shall constitute a majority or three-fifths of the voters or electors, when a majority or three-fifths of the voters or electors are required in favor of a proposition, the proposition is carried by a majority or three-fifths of the voters who vote on that proposition. (*Oldknow v. Wainwright*, 1 Wm. Bl. [Eng.], 229; *Rex v. Foxcroft*, 2 Burr. [Eng.], 1017; *State v. Green*, 37 O. St., 230; *St. Joseph Township v. Rogers*, 16 Wall. [U. S.], 644; *Cass County v. Johnson*, 5 Otto [U. S.], 360; *Everett v. Smith*, 22 Minn., 53; *State v. Mayor of St. Joseph*, 37 Mo., 270; *Sanford v. Prentice*, 28 Wis., 358; *Holcomb v. Davis*, 56 Ill., 414; *Heiskell v. Mayor of Baltimore*, 65 Md., 125; *Attorney General v. Shepard*, 62 N. H., 383; *Rushville Gas Co. v. City of Rushville*, 121 Ind., 208; *People v. Wiant*, 48 Ill., 266; *Walker v. Oswald*, 68 Md., 146; *Taylor v. Taylor*, 10 Minn., 81; *Gillespie v. Palmer*, 20 Wis., 554; *Bayard v. Klinge*, 16 Minn., 221.)

As to the mode of ascertaining what constitutes three-fifths of the voters, reference was made to the following authorities: *People v. Warfield*, 20 Ill., 163; *Louisville & N. R. Co. v. County Court*, 1 Sneed [Tenn.], 691; *State v. Winkelmeier*, 35 Mo., 103; *People v. Wiant*, 48 Ill., 266; *Chester & L. N. G. R. Co. v. Commissioners of Caldwell County*, 72 N. Car., 486; *Hawkins v. Supervisors of Carroll County*, 50 Miss., 735.

S. R. Smith, *W. R. Starr*, *H. W. Keyes*, and *Reese & Gilkeson*, *contra*.

References: *People v. Brown*, 11 Ill., 479; *State v. Crabtree*, 35 Neb., 108; *State v. Lancaster County*, 6 Neb., 474; *State v. Brassfield*, 67 Mo., 331; *State v. Sutterfield*, 54 Mo., 391; *State v. Mayor of St. Louis*, 73 Mo., 435; *State v. Walsh*, 25 Atl. Rep. [Conn.], 1; *Slingerland v. Norton*, 61 N. W. Rep. [Minn.], 322; *State v. Hill*, 20 Neb., 122; *State v. Wilson*, 24 Neb., 139; *Brower v. O'Brien*, 2 Ind., 423; *Lewis v. Commissioners of Marshall County*, 16 Kan., 102; *State v. Stevens*, 23 Kan., 456; *State v. Commissioners of Hodgeman County*, 23 Kan., 268; *Hagerty v. Arnold*, 13 Kan., 367; *Strong, Petitioner*, 20 Pick. [Mass.], 492; *Dalton v. State*, 11 Am. & Eng. Corp. Cases [O.], 78; *Patten v. Florence*, 38 Kan., 501; *Kreitz v. Behrensmeyer*, 125 Ill., 182.

RYAN, C.

This case has twice received the attention of this court, *vide State v. Roper*, 46 Neb., 724, and under same title, 46 Neb., 730. By the action of this court above last referred to there were left to contest the questions presented only such defendants as it is claimed were bound by reason of being county officers, to remove their respective

offices to McCook, the place where, as the relator insists, the county seat of Red Willow county was relocated by a special election held to determine that proposition. By the opinion first above referred to, the *mandamus* applied for was denied. Afterwards a rehearing of the matters considered in said opinion was granted, and we are now required to pass upon the question therein discussed. Practically the averments of the petition may be taken as true, for, in support of such as were controverted, and they were of minor importance, there was submitted such evidence as left no room for doubt. If, therefore, a fuller statement of the facts of this case than is herein given shall be deemed desirable, this can be found in the description of the averments of the petition in the opinion first filed. For our present purpose it is sufficient to say that as to the relocation of the county seat of Red Willow county the canvassing board's return of the votes cast at said election was, as shown by the totals, as follows:

At Indianola	867
At McCook	1,339
Ballots not reported or accounted for	25
Ballots rejected	1
Blank ballots	3
Ballots written for McCook and not counted	2
Total vote of precinct	2,237

In the former opinion (46 Neb., 724) it was said that the question presented was whether or not the petition, or application, which disclosed the above condition of the return, no other ground of criticism of the petition existing, stated a cause

of action, and it was held that the contention in favor of McCook could not be sustained. This contention was that, as Indianola and McCook together received 2,206 votes, and that as 1,339 for McCook were more than three-fifths required to locate the county seat at that place, it must thenceforward be held to be the county seat. The case of *State v. Lancaster County*, 6 Neb., 474, was in said opinion cited to support the holding thereof adverse to McCook, and as the case cited was correctly epitomized in said former opinion, such part of the language as was therein used for the purpose of making such epitome is quoted as follows: "Section 5, article 10, of the constitution provides: '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.' A proposition to adopt township organization was submitted to the voters of Lancaster county at the November, 1877, election. At the election held at that time there were cast 2,451 votes; 952 were cast in favor of, and 601 votes were cast against the proposition. The county commissioners refused to complete township organization as provided by law, and application was made to this court for a peremptory writ of *mandamus* to compel the county commissioners of Lancaster county to complete township organization in said county by dividing the county into towns and appointing town officers, etc., and this court, construing the constitutional provision quoted above, held that, in order to adopt township organization, a majority of all the legal voters of the county voting at the election must be recorded

in favor of township organization." It is unnecessary to consider other authorities cited in the aforesaid opinion in this case, for they clearly support the same general principle, and that is, that when a proposition of the nature of that under consideration is submitted at a general election, the highest number of votes cast on any proposition or for any candidate is assumed to be the total number of which the requisite majority must be obtained. Our present difficulty is not so much with the correctness of this abstract rule as with its application to the return of the canvassing board. If the votes cast for Indianola, 867, and for McCook, 1,339, should alone be considered, clearly McCook has more than three-fifths of the total 2,206 thereby made up. In the former opinion, however, the requirement of three-fifths of all votes cast was held to assume that in the votes cast should be included twenty-five ballots "not reported or accounted for," one "ballot rejected," three "blank ballots," and two "ballots written for McCook and not counted." A re-examination of this question has satisfied us that we were mistaken in construing the requirement of three-fifths of all the votes cast as indicating the necessary proportion of all the above items aggregating 2,237 ballots. With respect to the principles which should govern in determining questions of the nature of those now presented, a review of the most nearly analogous cases cited by counsel for the parties litigant herein, it is believed, will not be wholly useless.

In *Gillespie v. Palmer*, 20 Wis., 544, there was under consideration a section of the constitution which contained a proviso which made its adoption dependent upon an approval by a majority

of all the votes cast at such election. In the opinion of the court there was the following language: "What is the meaning of the word 'vote'? It is the expression of the choice of the voter for or against any measure, any law, or the election of any person to office."

In *State v. Green*, 37 O. St., 227, the following definition of the word "vote," given by Davies, J., in *People v. Pease*, 27 N. Y., 45, was approved: "A vote is but the expression of the will of a voter; and whether the formula to give expression to such will be a ballot or *viva voce*, the result is the same; either is a vote." Both parties to this litigation cite the decisions of the supreme court of Missouri, and upon behalf of the plaintiff there is relied upon the *County of Cass v. Johnston*, 95 U. S., 360, based on a Missouri case. These are of little practical value in this state, for the rule of construction therein is radically different from that adopted by this court, as is illustrated by the following quotation from *State v. Francis*, 95 Mo., 44: "When by law a vote is required or permitted to be taken, and a majority of the legal voters is mentioned in such law as being necessary to carry the proposed measure, such majority must be a majority of all the legal voters entitled to vote at such election and not a mere majority of those voting thereat."

In *Everett v. Smith*, 22 Minn., 53, the requirement of a "majority of such electors" was held to refer to those who voted, and in *Sanford v. Prentice*, 28 Wis., 358, the same construction was given the words "a majority of the legal voters of the said district."

In *Holcomb v. Davis*, 56 Ill., 413, there was under consideration a herd law which, by its own terms,

was declared not to be in force "until it shall be ratified by a majority of the legal voters of the county," etc., and this was held to require only a majority of the votes cast on the proposition submitted.

In *People v. Wiant*, 48 Ill., 263, it was said that if the return of the various poll books of the county showed a larger number of votes cast for circuit judge, or other officer, than were cast for and against the removal of the county seat, then that should be taken as the number of voters of the county.

In *County Seat of Linn County*, 15 Kan., 500, it was said: "It is a general rule, in respect to elections, that where the number of the electoral body is fixed, as in case of the directors or members of a corporation, or a legislature, there a majority means a majority of the whole body; but where the electoral body is indefinite in numbers, as in ordinary popular elections, there a majority means a majority of the votes actually cast."

With the exception of the case last above cited, those of other states, except Missouri, simply adhere to the rule adopted in this state. In the *County Seat of Linn County* there is, however, stated the distinction between corporate or political bodies having a fixed membership and those wherein the membership is indeterminate with respect to the data from which a majority must be estimated. Where there occurs at the same time a general and a special election, there is given an exact basis from which to ascertain the number of electors, and that is the greatest number of votes cast for any candidate or proposition. Where the election is special and confined to a single proposition, there is no occasion

for a resort to this method of finding the total number of electors, and this is especially true when the requisite majority is of the "votes cast."

As to the effect to be given to the disclosed fact that others than those counted were present, *Oldknow v. Wainwright*, 1 Wm. Bl. [Eng.], 229, is somewhat instructive, as will be seen by the following copy of that case as reported: "On a special verdict, the question was, whether Segrave, the town clerk of Nottingham, was legally elected. There were twenty-one electors present; nine of whom voted for Segrave; eleven protested against him, without voting for any one else, and one other said that 'he suspended doing anything.' It was argued by Mr. Caldecot, that this was such a negative upon Segrave, that his election was invalid. Serjeant Hewit, *contra*, in Easter Term last; and now *per tot. Cur.* The election is clearly good. The eleven protestant dissenters, having voted for nobody, could not put a negative upon the only man put in nomination, and Wilmot, J., cited K. and Withers, H., 8 Geo., 2; K. and Boscawen, P., 13 Anne; and Taylor and the Mayor of Bath, *temp.* Lee, C. J., to shew that, where a majority do nothing but merely dissent, they lose their votes." The proposition in support of which the citations were made by Wilmot, J., was stated and enforced in *State v. Green*, *supra*, in *Attorney General v. Shepard*, 62 N. H., 383, and in *Rushville Gas Co. v. City of Rushville*, 121 Ind., 206.

In *Walker v. Oswald*, 68 Md., 146, it was held that when an election is held at which a subject-matter is to be determined by a majority of the voters entitled to cast ballots thereat, those absenting themselves, and those who, being present, abstain from voting, are considered as acquies-

cing in the result declared by a majority of those actually voting, even though, in point of fact, but a minority of those entitled to vote really do vote.

In *People v. Town of Sausalito*, 39 Pac. Rep. [Cal.], 937, the question was whether or not there was, in fact, a majority of the votes cast "for incorporation." There were seven official ballots without a mark placed on either of them by any one to indicate his wish in any particular. These were held to be no votes, and discussing the effect to be given them, the court said they were not to be counted or considered for any purpose.

The respondents specially rely upon *State v. Walsh*, 62 Conn., 260. In this opinion were quoted the following provisions of the statute applicable to the election under consideration: "The presiding officer shall, with the certificate upon the result of the electors' meeting, which he is required to send by mail to the secretary of the state, send to the secretary his certificate of the whole number of names on the registry lists, the whole number checked as having voted at such elections, the whole number of names not checked, the number of ballots found in each box, namely, 'general and representative,' and the number of ballots in each box not counted as in the wrong box,. and the number not counted for being double, and the number rejected for other causes, which other causes shall be stated specifically in the certificate." It appears from the statutory returns that eleven ballots in one town and one ballot in each of two other towns had been rejected, but the reason of such rejection neither appeared in returns of the presiding officers nor by the evidence offered in court. In respect to the contention that the rejected votes should not be con-

sidered in determining the whole number of votes cast, a majority of the supreme court of errors of Connecticut said: "Under a plurality rule, it is material only to count the votes of the two highest candidates. All scattering votes are practically disregarded. Under the majority rule, all scattering votes are important, and must be counted. * * * If it appears upon the face of the returns that the ballots were legally rejected, it would have presented a different case. There is a presumption in favor of the legality of a transaction when it appears to have been done in compliance with the law; but there is no such presumption when it appears that the law was not complied with and the courts can make no intendment in favor of its legality. The law requires that the cause for rejecting a ballot shall be stated specifically in the certificate. That duty was wholly omitted. The act of rejection is illegal on its face. There can be no presumption to sustain an illegal act." It was in accordance with the views of a majority of the above court held that in ascertaining what candidates had received a majority, as distinguished from a plurality of all the votes cast, those rejected without a reason being given for such rejection must be reckoned in making up the grand total. If our statute required that the causes for rejecting ballots in county seat elections should be stated specifically in the certificate of the returns, the case just considered would have tended strongly to sustain the contention of the defendants. In connection with this particular statute, however, no such requirement exists. The rejection of ballots upon the face of the return seems not to have been in violation of the provisions of the statute or of

any law to which our attention has been called. The principle that "there is a presumption in favor of the legality of a transaction when it appears to have been done in compliance with law," therefore, is applicable to the action of the various precinct officers with respect to the rejection of the twenty-five ballots not reported, or accounted for, the one ballot rejected, and the three blank ballots. Whether or not the same presumption extends to the two ballots written for McCook and not counted we need not determine, for these should either have been counted for McCook or, if in that respect rejected, they should have been rejected for all purposes. From the foregoing considerations it results that McCook, having received three-fifths of all the votes cast, should in this proceeding be held to be the county seat of Red Willow county. A writ will therefore issue as prayed.

WRIT ALLOWED.

HARRISON, J., and RAGAN, C., dissenting.

STATE OF NEBRASKA, EX REL. DAVID C. PATTERSON, V. BOARD OF COUNTY COMMISSIONERS OF DOUGLAS COUNTY ET AL.

FILED MARCH 5, 1896. No. 7814.

1. **County Canals:** CONSTITUTIONALITY OF STATUTE: AMENDMENTS: CORPORATIONS. By an act of the legislature there was provided to be appointed a board of trustees, which, when organized, should in law and equity be construed as a body corporate and politic, and which might in its corporate name sue and be sued, contract and be contracted with, acquire and hold real and per-

sonal property necessary for its corporate purposes, adopt and change its corporate seal, construct and operate a canal for the purposes of commerce and supplying power, heat, and light. *Held*, That this was not a municipal corporation, and that the attempt to make it a corporation was nugatory, because in effect the general corporation law in existence was thereby sought to be amended without its provisions being referred to in any way in the amendatory act.

2. **Statutes:** TITLES OF BILLS: CONSTITUTIONAL LAW: CORPORATIONS: CANALS. In the title of an act its scope was defined as authorizing counties of a prescribed description, among other powers conferred, to construct, own, and operate canals in certain defined ways, also to acquire right of way and land for such purposes, and also to provide for the appointment of a board of trustees to carry such purposes into effect. In the act itself provision was made for the appointment of a board of trustees, which, when organized, should in law and equity be construed a body corporate and politic, and in this board the act provided there should be vested the power to construct and operate such canal, and that, for those purposes, such board of trustees might in its own name acquire right of way and other required land even by condemnation proceedings if necessary. *Held*, That the subject of the act was not clearly expressed in its title, as required in section 11, article 3, of the constitution of Nebraska, and that, since this defect rendered inoperative its other provisions, the entire act is null and void.

ERROR from the district court of Douglas county. Tried below before AMBROSE, DUFFIE, and KEYSOR, JJ.

The opinion contains a statement of the case.

B. S. Baker, *C. J. Greene*, *J. L. Kennedy*, *Charles Ogden*, and *George W. Covell*, for plaintiff in error:

The act in question does not violate the following provisions of section 11, article 3, of the constitution: "No bill shall contain more than one subject, and the same shall be clearly expressed in its

title. And no law shall be amended unless the new act contains the section or sections so amended, and the section or sections so amended shall be repealed." (*People v. Nelson*, 133 Ill., 574; *People v. Mahaney*, 13 Mich., 481; *Wellington, Petitioner*, 16 Pick. [Mass.], 87; *Erie & N. E. R. Co. v. Casey*, 26 Pa. St., 287; *Powell v. Commonwealth*, 114 Pa. St., 265; *Hawthorne v. People*, 109 Ill., 302; *People v. Hazelwood*, 116 Ill., 319; *Wulff v. Aldrich*, 124 Ill., 591; *Field v. People*, 2 Scam. [Ill.], 79; *Lane v. Dorman*, 3 Scam. [Ill.], 238; *People v. Marshall*, 1 Gil. [Ill.], 672; *Newland v. Marsh*, 19 Ill., 376; *Bigelow v. West Wisconsin R. Co.*, 27 Wis., 478; *Attorney General v. City of Eau Claire*, 37 Wis., 400; *Dow v. Norris*, 4 N. H., 16; *People v. Supervisors of Orange County*, 17 N. Y., 235; *Bitters v. Commissioners of Fulton County*, 81 Ind., 125; *Clare v. People*, 9 Colo., 122; *White v. City of Lincoln*, 5 Neb., 505; *Hamlin v. Meadville*, 6 Neb., 234; *Kansas City & O. R. Co. v. Frey*, 30 Neb., 790; *Dogge v. State*, 17 Neb., 143; *State v. Babcock*, 23 Neb., 128.)

The power conferred upon the judges of the district court by the act in question, to appoint canal trustees, is one which the judges may exercise under the provisions of the constitution, and the act is not unconstitutional in conferring such power upon them. (*People v. Nelson*, 133 Ill., 600; *People v. Williams*, 51 Ill., 63; *People v. Morgan*, 90 Ill., 558; *Moore v. People*, 109 Ill., 499; *Kilgour v. Drainage Commissioners*, 111 Ill., 342; *Huston v. Clark*, 112 Ill., 344; *Owners of Lands v. People*, 113 Ill., 296; *People v. Hoffman*, 116 Ill., 587; *Field v. People*, 2 Scam. [Ill.], 79; *McArthur v. Nelson*, 81 Ky., 67; *David v. Portland Water Committee*, 14 Ore., 98; *Sheboygan v. Parker*, 3 Wall. [U. S.], 93; *Mississippi v. Johnson*, 4 Wall. [U. S.], 475; *Flour-*

noy v. City of Jefferson, 17 Ind., 169; *Tennessee & C. R. Co. v. Moore*, 36 Ala., 371; *Commissioner of the General Land Office v. Smith*, 5 Tex., 471; *Life & Fire Ins. Co. of New York v. Wilson*, 8 Pet. [U. S.], 291; *Morton v. Comptroller General*, 4 Rich. [S. Car.], 430; *Grider v. Tally*, 77 Ala., 422; *Rains v. Simpson*, 50 Tex., 495; *Kendall v. Stokes*, 3 How. [U. S.], 87; *South v. Maryland*, 18 How. [U. S.], 396; *Ex parte Virginia*, 100 U. S., 339; *Conner v. Long*, 104 U. S., 228; *People v. Supervisors*, 35 Barb. [N. Y.], 408; *Pennington v. Streight*, 54 Ind., 376; *Ex parte Batesville*, 39 Ark., 82; *Evans v. Etheridge*, 96 N. Car., 42; *Crane v. Camp*, 12 Conn., 464; *State v. Doyle*, 40 Wis., 174; *Washington County v. Boyd*, 64 Mo., 179; *Platter v. County Commissioners*, 103 Ind., 360; *People v. Bush*, 40 Cal., 344; *Tillotson v. Cheetham*, 2 Johns. [N. Y.], 63; *Jackson v. Buchanan*, 89 N. Car., 74; *Baldwin v. Hewitt*, 88 Ky., 673; *State v. Sneed*, 84 N. Car., 816; *Nash v. People*, 36 N. Y., 607; *Mathews v. Houghton*, 11 Me., 377; *Wilson v. Mayor of New York*, 1 Den. [N. Y.], 595; *Marion County v. Moffett*, 15 Mo., 406; *Ray County v. Bentley*, 19 Mo., 236; *Cedar County v. Johnson*, 50 Mo., 227; *Town Board v. Boyd*, 58 Mo., 279.)

The act does not violate section 15, article 3, of the constitution, prohibiting special legislation. (*State v. Robinson*, 35 Neb., 401; *State v. Spaude*, 37 Minn., 322; *Hingle v. State*, 24 Ind., 28; *Hymes v. Aydelott*, 26 Ind., 421; *Toledo, L. & B. R. Co. v. Nordyke*, 27 Ind., 95; *Conner v. City of New York*, 2 Sand. [N. Y.], 355; *Wheeler v. City of Philadelphia*, 77 Pa. St., 338; *Kilgore v. Magee*, 85 Pa. St., 401; *Commonwealth v. Patton*, 88 Pa. St., 258; *McAunich v. Mississippi & M. R. Co.*, 20 Ia., 338; *Haskel v. City of Burlington*, 30 Ia., 232; *State v. Tolle*, 71

Mo., 645; *Marmett v. City of Cincinnati*, 45 O. St., 63; *Hunzinger v. State*, 39 Neb., 653; *McClay v. City of Lincoln*, 32 Neb., 412.)

The act is not void on the ground that it provides for taking private property under the guise of taxes for other than a public purpose. (*People v. Mayor of Brooklyn*, 4 N. Y., 419; *Williams v. Mayor of Detroit*, 2 Mich., 560; *Scovill v. City of Cleveland*, 1 O. St., 126; *Northern Ind. R. Co. v. Connelly*, 10 O. St., 159; *Washington Avenue*, 69 Pa. St., 352; *White v. People*, 94 Ill., 604; *Varick v. Smith*, 5 Paige Ch. [N. Y.], 160; *Napa Valley R. Co. v. Napa County*, 30 Cal., 487; *Stockton & V. R. Co. v. City of Stockton*, 41 Cal., 147; *Parham v. Justices*, 9 Ga., 341; *Water-Works Co. v. Burkhart*, 41 Ind., 364; *Challis v. Atchison, T. & S. F. R. Co.*, 16 Kan., 117; *New Central Coal Co. v. George's Creek Coal Co.*, 37 Md., 537; *Haverhill Bridge Proprietors v. County Commissioners*, 103 Mass., 120; *Dietrich v. Murdock*, 42 Mo., 379; *County Court v. Griswold*, 58 Mo., 175; *Concord R. Co. v. Greely*, 17 N. H., 47; *Brooklyn Park Commissioners v. Armstrong*, 45 N. Y., 234; *In re Townsend*, 39 N. Y., 171; *Rogers v. Bradshaw*, 20 Johns. [N. Y.], 735; *Willyard v. Hamilton*, 7 O. [Part 2], 111; *Chesapeake & Ohio Canal Co. v. Key*, 3 Cranch [U. S. C. C.], 599; *Darlington v. City of New York*, 31 N. Y., 164; *Bell v. Mayor of New York*, 105 N. Y., 142; *Spalding v. Andover*, 54 N. H., 55; *Skinkle v. Essex Road Board*, 47 N. J. Law, 93; *Hubbell v. City of Viroqua*, 67 Wis., 348; *City of San Francisco v. Canavan*, 42 Cal., 542; *Payne v. Treadwell*, 16 Cal., 233; *Hart v. Burnett*, 15 Cal., 568; *People v. Mayor of Chicago*, 51 Ill., 31; *Richland County v. Lawrence County*, 12 Ill., 8; *Trustees of Schools v. Tatman*, 13 Ill., 30; *Palmer v. Fitts*, 51 Ala., 492.)

References as to taking of private property for public use and delegation of powers to private individuals or corporations: *President & Commissioners v. State*, 45 Ala., 399; *Weymouth & Braintree Fire District v. County Commissioners*, 108 Mass., 144; *Montpelier v. East Montpelier*, 29 Vt., 12.

Canal trustees are not county officers within the meaning of the provision of the constitution providing for the election of county and township officers. (*United States v. Hatch*, 1 Pinney [Wis.], 182; *Horton v. Town of Thompson*, 71 N. Y., 521; *Liebman v. City of San Francisco*, 24 Fed. Rep., 719; *Hoagland v. City of Sacramento*, 52 Cal., 149; *Tone v. Mayor of New York*, 70 N. Y., 165; *Shepherd v. Commonwealth*, 1 S. & R. [Pa.], 1; *Bryant v. Robbins*, 35 N. W. Rep. [Wis.], 545; *Martin v. Tyler*, 60 N. W. Rep. [N. Dak.], 392; *Walker v. City of Cincinnati*, 21 O. St., 14; *Sheboygan County v. Parker*, 3 Wall. [U. S.], 93; *People v. Bennett*, 54 Barb. [N. Y.], 480.)

References to the question of corporate or county purposes for which a county may issue bonds: *Beals v. Amador*, 35 Cal., 634; *Harcourt v. Good*, 39 Tex., 456; *City of Louisville v. Hyatt*, 2 B. Mon. [Ky.], 178; *Justices of Clarke County v. Paris Turnpike Co.*, 11 B. Mon. [Ky.], 178; *Cheaney v. Hooser*, 9 B. Mon. [Ky.], 329; *City of Lexington v. McQuillan*, 9 Dana [Ky.], 513; *Slack v. Marysville & L. R. Co.*, 13 B. Mon. [Ky.], 1; *Cincinnati, W. & Z. R. Co. v. Clinton County*, 1 O. St., 77; *Goddin v. Crump*, 8 Leigh [Va.], 120; *Sharpless v. Mayor of Philadelphia*, 21 Pa. St., 147; *Walker v. City of Cincinnati*, 21 O. St., 15; *Quincy, M. & P. R. Co. v. Morris*, 84 Ill., 411; *Taylor v. Thompson*, 42 Ill., 9; *Chicago, D. & V. R. Co. v. Smith*, 62 Ill., 268; *Nichol v. City of Nashville*, 9 Humph. [Tenn.], 252; *Cotton v. Leon County*, 6 Fla., 621; *Stockton v. Powell*, 29 Fla., 1.

Public corporations: *Trustees of Dartmouth College v. Woodward*, 4 Wheat. [U. S.], 518; *Trustees of Schools v. Tatman*, 13 Ill., 30; *Philips v. Bury*, 2 Term Rep. [Eng.], 346; *Allen v. McKean*, 1 Sumn. [U. S.], 276; *People v. Morris*, 13 Wend. [N. Y.], 325; *Penobscot Broom Corporation v. Lamson*, 16 Me., 224; *State v. Dodge County*, 8 Neb., 124; *State v. Lancaster County*, 4 Neb., 540; *Darst v. Griffin*, 31 Neb., 668.

The power to construct drains is no part of the usual powers belonging to town and county governments, nor is the power to construct canals any part of the usual powers belonging to such governments, but is a special authority given for a particular purpose and may be conferred by legislative power on any person or body. (*Bryant v. Robbins*, 70 Wis., 258; *State v. Riordan*, 24 Wis., 484; *State v. Supervisors*, 25 Wis., 339; *State v. Dousman*, 28 Wis., 541; *McRae v. Hogan*, 39 Wis., 529; *State v. Supervisors*, 62 Wis., 376; *Soens v. City of Racine*, 10 Wis., 271*; *Bond v. Kenosha*, 17 Wis., 292; *Johnson v. City of Milwaukee*, 40 Wis., 315; *Hagar v. Reclamation District*, 111 U. S., 701; *Wurts v. Hoagland*, 114 U. S., 606; *Martin v. Tyler*, 60 N. W. Rep. [N. Dak.], 392; *People v. Salomon*, 51 Ill., 37; *People v. Walsh*, 96 Ill., 232; *Walker v. City of Cincinnati*, 21 O. St., 15.)

The canal act is not unconstitutional on the ground that it makes party affiliation a qualification for office. (*In re Supreme Court Commissioners*, 37 Neb., 655; *State v. Bemis*, 45 Neb., 724.)

The scope of the act was fairly reflected in its title. (*People v. McCallum*, 1 Neb., 194; *White v. City of Lincoln*, 5 Neb., 505; *State v. Ream*, 16 Neb., 683; *In re White*, 33 Neb., 812; *Perry v. Gross*, 25 Neb., 830; *Poffenbarger v. Smith*, 27 Neb., 788;

Kansas City & O. R. Co. v. Frey, 30 Neb., 792; *Western Union Telegraph Co. v. Lowrey*, 32 Neb., 737; *Singer Mfg. Co. v. Fleming*, 39 Neb., 679; *Kleckner v. Turk*, 45 Neb., 176; *Van Horn v. State*, 46 Neb., 62; *People v. State Ins. Co.*, 19 Mich., 392; *People v. Nelson*, 133 Ill., 565; *McCaslin v. State*, 44 Ind., 151; *State v. Town of Union*, 33 N. J. Law, 350; *Simpson v. Bailey*, 3 Ore., 516; *David v. Portland Water Co.*, 14 Ore., 98; *People v. Commissioners*, 47 N. Y., 501; *McArthur v. Nelson*, 81 Ky., 67; *In re Application Mayor City of New York*, 99 N. Y., 570.)

The act did not authorize the formation of a private corporation in a manner in effect amendatory of the general corporation law. (1 Dillon, Municipal Corporations, secs. 29, 30; *Ten Eyck v. Delaware & Raritan Canal Co.*, 19 N. J. Law., 5; *Tinsman v. Belvidere D. R. Co.*, 26 N. J. Law, 148; *Miners Bank of Dubuque v. United States*, 1 Greene [Ia.], 553; *Trustees of University v. Winston*, 5 Stewart & P. [Ala.], 17; *People v. Morris*, 13 Wend. [N. Y.], 324; *Dean v. Davis*, 51 Cal., 406; *Hoke v. Perdue*, 62 Cal., 545; *People v. Reclamation District*, 53 Cal., 346; *People v. Williams*, 56 Cal., 647; *People v. La Rue*, 67 Cal., 526; *People v. Salomon*, 51 Ill., 37.)

Charles Offutt, *William S. Poppleton*, and *Charles S. Lobingier*, *contra:*

The constitutionality of the act may be determined in this proceeding. (*State v. Stevenson*, 18 Neb., 416; *State v. Douglas County*, 18 Neb., 506; *State v. Bartley*, 40 Neb., 298; *State v. Cobb*, 44 Neb., 434; *Van Horn v. State*, 46 Neb., 62; *State v. Tappan*, 29 Wis., 664; *State v. Nelson*, 21 Neb., 572; *State v. Wallichs*, 13 Neb., 278.)

The canal trustees are county officers, and the

provision for their appointment contravenes article 10, section 4, of the constitution. (*Speed v. Crawford*, 3 Met. [Ky.], 207; *People v. Hurlburt*, 24 Mich., 98; *State v. Lancaster County*, 6 Neb., 474; *State v. Brennan*, 29 N. E. Rep. [O.], 593; *Davies v. Supervisors*, 50 N. W. Rep. [Mich.], 862; *Varney v. Justice*, 6 S. W. Rep. [Ky.], 457; *Ice v. Marion County*, 20 S. E. Rep. [W. Va.], 809; *United States v. Hatch*, 1 Pinney [Wis.], 182; *Bryant v. Bobbins*, 35 N. W. Rep. [Wis.], 545; *Martin v. Tyler*, 60 N. W. Rep. [N. Dak.], 392-401; *People v. Nostrand*, 46 N. Y., 375; *People v. Rathbone*, 40 N. E. Rep. [N. Y.], 395; *United States v. Hartwell*, 6 Wall. [U. S.], 385; *United States v. Maurice*, 2 Brock. [U. S.], 103; *Smith v. Lynch*, 29 O. St., 261; *State v. Kennon*, 7 O. St., 547; *In re Attorneys and Counselors*, 20 Johns. [N. Y.], 492; *State v. Wilson*, 29 O. St., 347; *Commonwealth v. Evans*, 74 Pa. St., 124.)

In imposing upon the district judges the duty of appointing canal trustees, the act requires the exercise by such judges of other than judicial power, and thus contravenes article 2, section 1, of the constitution. This appears from the purpose of the provision as reflected in its history. (Thayer, Cases on Constitutional Law; Aristotle, Politics, book 6, ch. 14; Works of John Adams, vol. 4, p. 216; Montesquieu, Spirit of Laws.) This is clear also from the meaning of the phrase "judicial power" (*State v. Denny*, 118 Ind., 449), and of the term "jurisdiction." (*United States v. Arredondo*, 6 Pet. [U. S.], 691-709; *Rhode Island v. Massachusetts*, 12 Pet. [U. S.], 657; *Sinking Fund Cases*, 99 U. S., 761; 6 Bracton, Laws of England [Master of Rolls' ed.], p. 159.)

Appointment to office is the exercise neither of judicial power nor of jurisdiction. (*Miller v.*

Wheeler, and *Crawford v. Norris*, 33 Neb., 765; *Supervisors of Election*, 114 Mass., 247; *Houseman v. Montgomery*, 58 Mich., 364; *State v. Hyde*, 121 Ind., 20; *State v. Denny*, 118 Ind., 449; *Ex parte Griffiths*, 118 Ind., 83; *Heinlen v. Sullivan*, 64 Cal., 378; *Burgoyne v. Supervisors*, 5 Cal., 9; *Dickey v. Hurlburt*, 5 Cal., 343; *People v. Nevada*, 6 Cal., 143; *Houston v. Williams*, 13 Cal., 24; *People v. Sanderson*, 30 Cal., 160; *Smith v. Strother*, 68 Cal., 194; *People v. Bennett*, 29 Mich., 451; *Shephard v. City of Wheeling*, 30 W. Va., 479; *Minnesota v. Young*, 29 Minn., 474; *State v. Kennon*, 7 O. St., 561; *State v. Barbour*, 53 Conn., 76; *Taylor v. Commonwealth*, 3 J. J. Marsh. [Ky.], 401; *Hayburn's Case*, 2 Dall. [U. S.], 409; *United States v. Ferreira*, 13 How. [U. S.], 43; *Gordon's Case*, 117 U. S., 697; *In re Sanborn*, 148 U. S., 222; *In re Pacific Railway Commission*, 32 Fed. Rep., 241; *In re McLean*, 37 Fed. Rep., 648.) The Illinois cases relied on by plaintiff in error are unsound and not well considered, and the cases from other jurisdictions are not in point.

The act is special legislation, in affecting the powers of judges of the district courts of certain counties only, and contravenes article 6, section 19, of the constitution. (*State v. Shropshire*, 4 Neb., 411; *People v. Nelson*, 133 Ill., 600; *People v. Rumsey*, 64 Ill., 44.)

Both the title and the body of the act contain more than one subject. (*Trumble v. Trumble*, 37 Neb., 340; *State v. Lancaster County*, 6 Neb., 474; *Smails v. White*, 4 Neb., 357; *State v. Lancaster County*, 17 Neb., 85; *Van Horn v. State*, 46 Neb., 62; *State v. Bemis*, 45 Neb., 724; *People v. Fleming*, 7 Colo., 230.)

The subject of the act is not clearly expressed in the title. (*Burlington & M. R. R. Co. v. Saunders*

County, 9 Neb., 507; *City of Tecumseh v. Phillips*, 5 Neb., 305; *Ives v. Norris*, 13 Neb., 252; *Holmberg v. Hauck*, 16 Neb., 337; *Touzalin v. City of Omaha*, 25 Neb., 817; *Kleckner v. Turk*, 45 Neb., 176.)

The body of the act provides a new mode of creating corporations of which the title gives no hint; contains provisions relating to irrigation and water rights not indicated in the title; provides for condemnation of land, for leasing the same to private individuals for manufacturing purposes, with no hint of this in the title; confers important and far-reaching powers upon the district judges, which nothing in the title suggests, and vitally affects counties of less than 125,000 inhabitants, without purporting to do so in the title. (*Blair v. State*, 17 S. E. Rep. [Ga.], 96; *Snell v. City of Chicago*, 24 N. E. Rep. [Ill.], 532; *Wilcox v. Paddock*, 31 N. W. Rep. [Mich.], 609; *Niles v. Schoolcraft*, 60 N. W. Rep. [Mich.], 771; *Burlington & M. R. R. Co. v. Saunders County*, 9 Neb., 507; *City of Tecumseh v. Phillips*, 5 Neb., 305; *Ives v. Norris*, 13 Neb., 252; *Adams v. San Angelo Water-Works Co.*, 25 S. W. Rep. [Tex.], 605; *Clark v. Board of Commissioners of Wallace County*, 39 Pac. Rep. [Kan.], 225.)

The act is void, because, while amendatory in character, it fails to refer to existing acts with whose provisions it is clearly in conflict. (*Trumble v. Trumble*, 37 Neb., 347; *City of South Omaha v. Taxpayers' League*, 42 Neb., 671; *In re House Roll 284*, 31 Neb., 505; *Lancaster County v. Hoagland*, 8 Neb., 38; *Ryan v. State*, 5 Neb., 276; *White v. City of Lincoln*, 5 Neb., 505; *Hamlin v. Meadville*, 6 Neb., 234; *People v. McCallum*, 1 Neb., 182; *People v. Nelson*, 133 Ill., 574.)

Special and exclusive privileges are granted by the act to certain counties, thus infringing article

3, section 16, of the constitution. (*McCarthy v. Commonwealth*, 5 Atl. Rep. [Pa.], 215; *State v. Justices*, 1 S. W. Rep. [Mo.], 307.)

The act is invalid, because it delegates to the electors of but one county the power to determine when its provisions shall be operative. (*In re Municipal Suffrage*, 36 N. E. Rep. [Mass.], 488; *Barto v. Himrod*, 8 N. Y., 483; *Santo v. State*, 2 Ia., 165; *Ex parte Wall*, 48 Cal., 279; *Bradshaw v. Lankford*, 21 Atl. Rep. [Md.], 66.)

The act is invalid, because it makes party affiliation a test for office. (Constitution, art. 1, sec. 4; *People v. Hurlburt*, 24 Mich., 93; *State v. Seavey*, 22 Neb., 466.)

The act is unconstitutional, because it requires a tax levy for other than public purposes, the conduct by the county of other than public business, and the taking of private property "without due process of law." (Cooley, Taxation [2d ed.], p. 55; *Coats v. Campbell*, 37 Minn., 498; *Sharpless v. Mayor*, 21 Pa. St., 168, 169; *Loan Association v. Topeka*, 20 Wall. [U. S.], 664; *Attorney General v. City of Eau Claire*, 37 Wis., 400; *Nalle v. City of Austin*, 21 S. W. Rep. [Tex.], 375; *People v. Parks*, 58 Cal., 624; *People v. Salem*, 20 Mich., 452; *Hanson v. Vernon*, 27 Ia., 28; *Commonwealth v. Maxwell*, 27 Pa. St., 444; *Mott v. Pennsylvania C. R. Co.*, 30 Pa. St., 9; Sedgwick, Constitutional Law, pp. 174, 175, 515; *Taylor v. Porter*, 4 Hill [N. Y.], 140; *Lowell v. City of Boston*, 111 Mass., 454; *Kingman v. City of Brockton*, 26 N. E. Rep. [Mass.], 998; *Parkersburg v. Brown*, 106 U. S., 487; *Ottawa v. Carey*, 108 U. S., 110; *Cole v. La Grange*, 113 U. S., 1; *Allen v. Jay*, 60 Me., 124; *Mather v. City of Ottawa*, 114 Ill., 659; *State v. Osawkee Township*, 14 Kan., 419; *Curtis v. Whipple*, 24 Wis., 350; *Weismer v. Douglas*, 21 Am. Rep. [N. Y.],

586; *People v. Batchellor*, 53 N. Y., 128; *State v. Adams County*, 15 Neb., 568; *Getchell v. Benton*, 30 Neb., 870; *Philadelphia Association v. Wood*, 39 Pa. St., 73; *Mead v. Acton*, 139 Mass., 341; *People v. Mayor*, 4 N. Y., 419.)

The act is invalid, because it attempts to create a corporation by a special law, and particularly because it authorizes the formation of a private corporation in a manner which, in effect, amends the general corporation law. (*State v. Atchison & N. R. Co.*, 24 Neb., 143; *Abbott v. Omaha Smelting & Refining Co.*, 4 Neb., 416; *Trumble v. Trumble*, 37 Neb., 347; *City of South Omaha v. Taxpayers' League*, 42 Neb., 671; *State v. Cobb*, 44 Neb., 434; *In re House Roll 284*, 31 Neb., 505; *Lancaster County v. Hoagland*, 8 Neb., 38; *Ryan v. State*, 5 Neb., 276.)

H. H. Baldrige, also for defendants in error:

The legislature of the state cannot delegate to the judges of the district court the power to appoint trustees to construct a canal as provided by the act. (*Achley's Case*, 4 Abb. Pr. [N. Y.], 35; *Taylor v. Commonwealth*, 3 J. J. Marsh. [Ky.], 401; *Heinlen v. Sullivan*, 64 Cal., 378; *Houseman v. Kent*, 58 Mich., 365; *Gordon v. United States*, 117 U. S., 697; *Walker v. City of Cincinnati*, 21 O. St., 15; *Case of Supervisors of Election*, 114 Mass., 247.)

The powers of the district court are not broad enough to make appointments to office. (*Osborn v. Bank of United States*, 9 Wheat. [U. S.], 738; *Johnson v. Jones*, 2 Neb., 135.)

The act is void. Canal trustees are county officers, and the constitution provides that county officers shall be elected. (*United States v. Maurice*, 2 Brock. [U. S.], 96; *United States v. Hartwell*, 6 Wall. [U. S.], 393; *In re Hathaway*, 71 N. Y., 238;

Bradford v. Justices, 33 Ga., 332; *Commonwealth v. Evans*, 74 Pa. St., 139; *People v. Langdon*, 40 Mich., 673; *Rowland v. Mayor*, 83 N. Y., 376; *State v. Stanley*, 66 N. Car., 59; *Hall v. State*, 39 Wis., 79; *Shelby v. Alcorn*, 36 Miss., 273; *State v. Valle*, 41 Mo., 31; *People v. Nostrand*, 46 N. Y., 375.)

Wharton & Baird and *Frank T. Ransom*, also for defendants in error.

RYAN, C.

At the last session of the legislature of this state there was passed and approved an act entitled "An act enabling counties in the state of Nebraska having a population of not less than 125,000 inhabitants to issue bonds to construct, own and operate canals in the state of Nebraska for navigation, water power and other purposes, and generating of electric and other power and transmitting of the same for light, heat, power, and other purposes; and to acquire right of way and land for such purposes, and to provide for the appointment of a board of trustees to carry into effect the purposes of this act, and to levy taxes to pay the same and interest thereon, and to repeal section 2032*a*, Consolidated Statutes, 1893." (Session Laws, 1895, ch. 71.) Douglas county alone in this state has a population adequate to render available the above provisions. In the body of the act in question it is provided that the bonds which may be issued shall not exceed in amount ten per cent of the assessed valuation of the county, and that, whether or not bonds shall be voted, must first be submitted to the voters of the county in compliance with the prayer of a petition signed by 2,500 legal voters

asking such submission, which petition must be presented to and acted upon by the county commissioners. A petition in conformity with the above requirements was presented to the board of county commissioners of Douglas county. This board refused to call an election, and by *mandamus* in the proper district court it was sought by one of the petitioners to compel the county board to order an election. The judgment of the district court was adverse to relator, and the correctness of this judgment is now challenged by this error proceeding.

It is very difficult to summarize the provisions of the above act within a reasonably brief space, nevertheless this shall now be attempted. After the proposition to issue bonds has been carried it becomes the duty of the county commissioners to notify the judges of the district court of the result of the election, whereupon these judges are required to appoint five trustees. Each of the trustees must give an official bond in such amount as the board of county commissioners may fix. It is provided that the board of trustees shall, "when duly organized, be construed in law and equity a body corporate and politic, and shall be known by the name and style of 'The Board of Canal Trustees of ——— County, Nebraska,' and by such name and style may sue and be sued, contract and be contracted with, acquire and hold real estate and personal property necessary for its corporate purposes and adopt a common seal and alter the same at pleasure, and shall exercise all the powers necessary to carry into effect the object for which such board shall have been appointed, and shall control and manage all the affairs and property which shall come into the

hands or under the control of such board of trustees." (Session Laws, 1895, p. 307, ch. 71, sec. 1.) It further provides: "Such board of trustees shall have full power to pass all necessary rules and regulations for the proper management and conduct of the business of such board, and of such corporate body, and for carrying into effect the objects for which such board is created. Any board of canal trustees organized as provided in this act shall have power to make preliminary surveys, lay out, acquire right of way and other lands within such county or within twenty miles of the limits of such county, necessary for its purposes, establish, construct, and maintain and operate a canal through any county or counties in this state for navigation, water power, and all other purposes, except irrigation, for generating electric and other power and transmitting the same for light, heat, power, and all other purposes except irrigation, and may dispose of the water in such canal for domestic and for all other purposes except irrigation, and to control and dispose of water power, electric, pneumatic, hydraulic, or other power generated by such water power, also to operate a line of boats on such canal, or granting the right for such navigation to any party or parties upon payment of tolls, subject to such rules and regulations as shall be established and adopted by such board of trustees; Provided, That no exclusive right shall be granted to any person or persons or corporations, except that such board may lease to any party, ground for manufacturing or industrial purposes for a term or terms of years, which ground so leased shall be subject to reappraisal for rental purposes every twenty years. All revenues de-

rived by said board of trustees from every source shall be deposited with the county treasurer of such county and by him be placed in a fund to be designated as the canal fund, the general expense, maintenance, extension, or enlargement of such canal or other works connected therewith shall be paid out of said canal fund by the county treasurer of such county upon official orders issued by the board of canal trustees. All surplus moneys in said fund not needed for canal expenses, improvement, or enlargement shall be placed in the general fund of the county and may be used for all purposes for which the county general fund, as now designated, may be used. Such board of trustees for and on behalf of such county may acquire by purchase, condemnation, or otherwise, whether within or without the county limits, if within twenty miles of the limits of such county, any and all real property necessary to carry into effect the objects for which such board shall have been appointed and which may be required for its corporate purposes and right of way for the canal and right of way privileges and easements, sites for reservoirs and dams, power houses, and additional lands to be leased to persons, parties, or corporations purchasing or using such power; Provided, That all the moneys for the purchase of any real property shall be paid before possession is taken thereof, or any work done thereon, and all moneys for the condemnation of any property shall be paid into the county court of the county in which such property shall be condemned. Whenever the board of canal trustees of any county appointed under this act shall require any private property necessary for the purposes aforesaid, such prop-

erty shall be acquired or condemned as nearly as may be in the same manner as is provided by law for the condemnation of right of way for railroad corporations within this state; Provided, That proceedings to acquire possession by condemnation of property so taken shall in all cases be instituted in the county where the property sought to be taken or damaged is situated; Provided, That when it shall be necessary in making any improvement by such board of trustees to enter upon any property held for public use they shall have power to do so, and may acquire right of way upon and over such property held for public use in the same manner as is above provided for acquiring private property by condemnation of such board of trustees, and may enter upon, use, widen, deepen, and improve any stream, waterway, or lake that may be necessary to be used for such canal purposes, but in cases where public roads are crossed by such canal or tail-race or outlets thereof, such board of trustees shall cause to be constructed and maintained, bridges over such canal or tail-race or outlets thereof." (Session Laws, 1895, p. 308, ch. 71, sec. 1.)

It is scarcely necessary, perhaps, to note that in respect to the canal proposed to be constructed and operated the board of county commissioners of Douglas county, after they shall have ordered an election, have but little more to say or do. The duty is devolved upon the board to notify the district judges of the result of the election upon the proposition to issue bonds, whereupon the judges must appoint five trustees. These trustees, when organized so as to constitute a board, take charge of the construction and operation of the canal as property owned by itself

for the use and benefit of the county. There is a provision that the title shall be held for the county, but there is no method by which the county, *eo nomine*, can assert ownership or an independent right of possession. All revenues, it is true, must be deposited with the county treasurer, but these must be kept as a distinct fund and from this fund the board of trustees, upon its own orders, may require payments to be made, and only such surplus as the board of trustees does not require may be used by the county. The county commissioners have no voice in allowing or rejecting claims, and there is reserved no right of appeal in favor of either the county or a taxpayer. There is required no accounting by the trustees, either of moneys received or expended, and, without the consent of property owners thereby affected, the jurisdiction of these functionaries of Douglas county is extended over a circumjacent strip twenty miles in width, for certain purposes attached to and treated as a mere outlying province.

Counsel for plaintiff in error, in his reargument of this case, made in compliance with a request to that effect, contends that the provisions with respect to the creation of a body corporate and politic finds judicial sanction in *People v. Kelly*, 76 N. Y., 475, *Walker v. City of Cincinnati*, 21 O. St., 14, *People v. Salomon*, 51 Ill., 37, and in several California irrigation cases. Before attempting an expression of our own views, we shall indicate why these cases fail to establish the propositions in support of which they were cited.

In *People v. Kelly* an amendment of the constitution of the state of New York had prohibited cities

and other municipal corporations from becoming interested in any stocks or bonds of any corporation, and from incurring any indebtedness except for county, city, or village purposes. It became necessary for the construction of the bridge between the cities of New York and Brooklyn that those cities should own the aforesaid bridge, and, for its joint construction and control, a board of sixteen trustees, one-half of whom were to be appointed by the authorities of each city, was provided. This board was in no sense a body corporate or politic.

In *Walker v. City of Cincinnati*, Scott, C. J., in delivering the opinion of the court, said: "The general scope and purpose of the act is to authorize any such city to construct a line of railroad leading therefrom to any other terminus in the state or in any other state, through the agency of a board of trustees consisting of five persons, to be appointed by the superior court of such city, or if there be no superior court, then by the court of common pleas of the county in which such city is situated. The enterprise cannot, however, be undertaken until a majority of the city council shall, by resolution, have declared such line of railway to be essential to the interests of the city, nor until it shall have received the sanction of a majority vote of the electors of the city, at a special election, to be ordered by the city council, after twenty days' public notice. For the accomplishment of this purpose the board of trustees is authorized to borrow a sum not exceeding ten millions of dollars, and to issue bonds therefor in the name of the city, which shall be secured by a mortgage on the line of railway and its net income, and by the pledge of the faith of the city

and a tax to be annually levied by the council, sufficient with such net income to pay the interest and provide a sinking fund for the final redemption of the bonds." Speaking of the trustees above provided for it was said in the opinion above quoted from: "But it is clear that the trustees are a mere agency through which the city is authorized to operate for its own sole benefit. Neither as individuals, nor as a board, have they any beneficial interest in the fund which they are to manage, or in the road which they are to build. They are in fact, as well as in name, but trustees, and the sole beneficiary of the trust is the city of Cincinnati." These trustees, when organized as a board, certainly were not "a body corporate and politic."

In *People v. Salomon* the scope of the decision, in so far as it is applicable to this case, is thus expressed in the fourth paragraph of the syllabus: "Under the act of February 24, 1869, providing for the location and maintenance of a park for the towns of South Chicago, Hyde Park, and Lake, those towns were erected into a park district, and the people of the towns affected by the act having, by a vote, accepted its provisions, the board of park commissioners thereby created, to whom was committed the entire control of the park, became a municipal corporation, in whom it was competent for the legislature to vest the power to assess and collect taxes within the park district so created, for the special corporate purpose of its creation, and such is the effect of that portion of the act which requires the county clerk of the county in which the district is situated, on the estimate of the park commissioners, to place the amount required, within certain limits, in the tax

warrants for the towns embraced in the district." The nature and functions of a district of the kind above referred to are found to exist in irrigation districts, and, as the discussion of districts of this latter class applies equally to the park district above referred to, no further space will be devoted to a consideration of *People v. Salomon, supra.*

Counsel for plaintiff in error cites several California cases as being analogous in principle to the one at bar, but apparently have overlooked the case of *Board of Directors of Alfalfa Irrigation District v. Collins*, 46 Neb., 411, in which this court has already considered this class of adjudications. Referring to chapter 69, Laws, 1895, POST, J., in the case just cited said: "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 thereof 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 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." In respect to the nature of irrigation districts it was said in this opinion: "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." Having reviewed at some length the trend of judicial decisions in California, POST, J., quoted with approval the language of Harrison, J., in *Re Madera Irrigation District*, 92 Cal., 296, from which quotation the following is reproduced: "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 laws, 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 char-

acter and details are within the discretionary power of the legislature. We know no more appropriate mode of such indication than the affirmative vote of those who are affected by the acceptance of the terms of the act." From the very instructive case of *Board of Directors of Alfalfa Irrigation District v. Collins* there is clearly deducible the conclusions that irrigation districts organized as above indicated are public, rather than municipal corporations; that their officers are public agents, and that, having been created by vote of the people concerned, duly authorized thereto by a constitutional law, an irrigation district may properly perform the appropriate functions with which it is endowed. Neither the California cases nor the other cases cited on behalf of plaintiff in error furnish any analogies which can be of use with respect to the case under consideration. How, then, shall we classify this "body corporate and politic," which, differing in its genesis and functions from any known political organization, nevertheless assumes the performance of duties and the exercise of functions which in no way resemble those by law devolved upon the board of county commissioners?

The defendants in error contend that the individual trustees are public officers, and that, therefore, the very essential part of the act which provides for their appointment necessarily constitutes them county officers, and on this account it should be declared void. In opposition to this contention we are reminded that the individual trustees have no authority as such, and that it is only as a board that they have recognition. In a brief submitted on behalf of the plaintiff in error it is said: "We insist that this act creates a new

and independent municipal corporation. It is not a city or county corporation, but one wholly distinct from either, etc. * * * The act does not in any way abridge or curtail any of the rights of the counties heretofore existing, or the right of any of its officers, or does not amend or conflict with any of the provisions of the statute heretofore existing regarding counties." In another brief submitted on behalf of the plaintiff in error occurs the following language: "There is an important feature of the canal act which ought to be considered in this connection. The board of canal trustees when duly organized are to become, in law and equity, a corporation. No one of the trustees fills any office except as a member of the board. The board itself—the corporation—is the agency of the state to carry into effect the purposes of the act." From these definitions and limitations, if accepted as correct, it would necessarily result that by an act of the legislature a method had been provided whereby a corporation, consisting of five private citizens, may be created. It is idle to insist that this board of trustees, when organized, can be a municipal corporation in any sense. The following definition of the term "municipal corporation" is given by an eminent writer upon that subject: "We may therefore define a municipal corporation in its historical and strict sense to be the incorporation by the authority of the government of the inhabitants of a particular place or district, and authorizing them in their corporate capacity to exercise subordinate specified powers of legislation and regulation with respect to their local and internal concerns. This power of local government is the distinctive purpose and the distinguishing feature of a municipal

corporation proper." (1 Dillon, Municipal Corporations, sec. 20.) "A municipal corporation is a subordinate branch of the government of state." (*Mayor of Nashville v. Ray*, 19 Wall. [U. S.], 475.)

In argument no claim has been founded upon the use of the term "body politic," also used as a part of the description of the board of trustees contemplated in the act, and we apprehend that none properly could be. We must, therefore, deal with the board as a corporation having no municipal attributes, and of which no municipal duties can be required. It is provided in section 1, article 11, of the constitution of Nebraska, under the head of "Miscellaneous Corporations," as follows:

"Section 1. No corporation shall be created by special law, nor its charter extended, changed, or amended, except those for charitable, educational, penal, or reformatory purposes which are to be and remain under the patronage and control of the state, but the legislature shall provide by general laws for the organization of all corporations hereafter to be created."

Under this provision of the constitution there was in existence before this act was passed a general law which provided how corporations composed of and managed solely by private citizens must be created. Previous to the commencement of business, corporations within the class indicated were required to adopt and file for record articles of incorporation, and to publish notice of the name, the place, and the nature of their business, the amount of capital stock, the time of commencement and termination, to what amount they might become indebted, and by what officers their affairs should be managed. It can scarcely be claimed by the plaintiff in error that "The Board

of Canal Trustees" can be a "corporation designed for either charitable, educational, penal, or reformatory purposes," and yet its creation is provided for by an act which in no way refers to the general incorporation law which is to be found in chapter 16, Compiled Statutes. This method of amending statutes already in existence is unquestionably in violation of the provision in section 11, article 3, of said constitution 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." (*Smails v. White*, 4 Neb., 353; *Sovereign v. State*, 7 Neb., 409; *Stricklett v. State*, 31 Neb., 674; *Trumble v. Trumble*, 37 Neb., 340.) For the sake of the argument, if it should be conceded to the contention of the plaintiff, that the board of trustees duly organized becomes a municipal corporation, the above considerations would still have the same force, the difference being merely that the amendatory act invades the field of legislation governing municipal as distinguished from ordinary corporations.

The right of eminent domain, by the provisions of the act, was delegated directly to the board of trustees as such, and the title of the property acquired by its exercise, or in any other way, for the construction and operation of a canal, is to be held by the board of trustees in its corporate capacity. The title of this act is "An act enabling counties * * * to issue bonds to construct, own, and operate canals, * * * and to acquire right of way and land for such purposes, and to provide for the appointment of a board of trustees to carry into effect the purposes of this act, and to levy taxes to pay the same and the interest thereon," etc. Of these enumerated pur-

poses, the power to issue bonds and the power to levy taxes for the payment of the principal and interest thereof are contained in the body of the act without question. In a certain sense, perhaps, the provision in the title for the appointment of a board of trustees to carry into effect the provisions of this act finds response in the provisions of the bill which turn over to said board the whole property as it is acquired or constructed. But it is believed that no power of construction is adequate to the task of demonstrating that the powers of a county to own and operate canals, and to acquire and hold land for such purposes, as provided in the above title, are at all met by providing in the bill itself that such powers shall be vested in a specially created distinct corporation, even though municipal, independent of the county as well as of its officers and taxpayers. The title of the bill is therefore misleading as to a part of the act, without which its purpose could not be accomplished, and since this part of the subject is not clearly expressed in the title, as required by section 11, article 3, of the constitution of this state, no part of the act can be sustained. (*Ives v. Norris*, 13 Neb., 252; *State v. Ream*, 16 Neb., 681; *Trumble v. Trumble*, 37 Neb., 340.) The judgment of the district court is

AFFIRMED.

NORVAL, J., HARRISON, J., and RAGAN, C., concur in result.

IRVINE, C., not sitting.

POST, C. J., dissenting.