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REPORTS OF CASES

IN THE

SUPREME COURT

OF

NEBRASKA.

SEPTEMBER TERM, 1896—JANUARY TERM, 1897.

VOLUME L.

D. A. CAMPBELL,
OFFICIAL REPORTER.

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In behalf of the people of Nebraska.

THE SUPREME COURT

OF

NEBRASKA.

1897.

CHIEF JUSTICE,

A. M. POST.

JUDGES,

T. O. C. HARRISON,
T. L. NORVAL.

COMMISSIONERS,

ROBERT RYAN,
JOHN M. RAGAN,
FRANK IRVINE.

OFFICERS.

ATTORNEY GENERAL,

C. J. SMYTH.

CLERK AND REPORTER,

D. A. CAMPBELL.

DEPUTY CLERK,

W. B. ROSE.

DISTRICT COURTS OF NEBRASKA.

JUDGES.

First District—

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

Second District—

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

Third District—

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

Fourth District—

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

Fifth District—

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

Sixth District—

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

Seventh District—

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

Eighth District—

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

Ninth District—

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

Tenth District—

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

Eleventh District—

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

Twelfth District—
H. M. SULLIVAN.....Broken Bow.

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

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

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

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ADMITTED SINCE THE PUBLICATION OF VOL. XLIX.

ABBOTT, CHARLES E.
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BROWN, CYRUS O.
BROWN, FRANK.
CARR, JOHN.
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COHN, HARVEY L.
COLEMAN, BEACH.
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HAYWARD, WILLIAM H.
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KELLER, CALVIN.
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WARING, JOHN K.
WARNER, E. F.
WERTZ, GEORGE W.
WHITE, ALBERT SIDNEY.
WILSON, CLEMENT L.
WILSON, D. L.

SUPREME COURT COMMISSIONERS.

(Laws, 1893, chapter 16, page 150.)

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

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

SEC. 3. The said commissioners shall hold office for the period of three years from and after their appointment, during which time they shall not engage in the practice of the law. They shall each receive a salary equal to the salary of a judge of the supreme court, payable at the same time and in the same manner as salaries of the judges of the supreme court are paid. Before entering upon the discharge of their duties they shall each take the oath provided for in section one (1) of article fourteen (14) of the constitution of this state. All vacancies in this commission shall be filled in like manner as the original appointment. *Provided*, That upon the expiration of the terms of said commissioners as hereinbefore provided, the said supreme court shall appoint three persons having the same qualifications as required of those first appointed as commissioners of the supreme court for a further period of three years from and after the expiration of the term first herein provided, whose duties and salaries shall be the same as those of the commissioners originally appointed. (Amended, Laws, 1895, chapter 30, page 155.)

See page xlvii for table of Nebraska cases overruled.

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

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NEBRASKA.

SEPTEMBER 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, }

SARAH C. WEBSTER, APPELLANT, V. CITY OF LINCOLN ET AL., APPELLEES.

FILED DECEMBER 16, 1896. No. 6444.

1. **Appeal from Board of Equalization.** No appeal will lie from the determination of a board of equalization on a hearing of a matter of equalization of an assessment of taxes, unless an appeal is provided by law.
2. ———: JUDGMENT. The decision of a board in the equalization of an assessment of taxes is final and the consequent order a final one; hence it may be reviewed by an error proceeding.
3. ———. As a general rule, a proceeding in error to review the order of a board of equalization, in a matter within its jurisdiction, will afford an adequate remedy.
4. **Taxation: INJUNCTION: PLEADING AND PROOF.** In an action to enjoin the collection of taxes resulting from an order of a board of equalization, where it is claimed a remedy by an error proceeding would be inadequate, the facts upon which such claim is based must be pleaded and proved.

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

The opinion contains a statement of the case.

J. R. Webster, *G. M. Lambertson*, and *Samuel J. Tuttle*, for appellant:

There is no provision by law for review of the proceedings of the board of equalization by appeal, and the remedy by proceeding in error is not available in such cases, because the board is so constituted that error will not appear ordinarily on the face of the record of its proceedings, and there is no provision for making a bill of exceptions. (*Sioux City & P. R. Co. v. Washington County*, 3 Neb., 40; *Nance v. Falls City*, 16 Neb., 86; *Bradley v. City of Eau Claire*, 14 N. W. Rep. [Wis.], 10; *Ruggles v. City of Fond du Lac*, 53 Wis., 436; *Kelley v. City of Madison*, 43 Wis., 638; *McGee v. State*, 32 Neb., 149.)

Injunction is the proper remedy. (*Hanscom v. City of Omaha*, 11 Neb., 42; *Hurford v. City of Omaha*, 4 Neb., 336; *South Platte Land Co. v. Buffalo County*, 7 Neb., 257; *Touzalin v. City of Omaha*, 25 Neb., 824; *Darst v. Griffin*, 31 Neb., 672; *Lansing v. City of Lincoln*, 32 Neb., 470; *Reddick v. City of Omaha*, 35 Neb., 128.)

The arbitrary assessment made is contrary to the constitution of the state and beyond the power of the council, because it exempts some benefited property from contributing to cost of the improvement and imposes the entire cost on appellant's property. (*Hanscom v. City of Omaha*, 11 Neb., 41; *Kittle v. Sherwin*, 11 Neb., 81; *City of Ottawa v. Barney*, 10 Kan., 278.)

Abbott, Selleck & Lane, *Walter J. Lamb*, *H. J. Whitmore*, and *Atkinson & Doty*, *contra:*

Exclusive jurisdiction is given to the mayor and council to determine what property within the paving district is benefited by the improvement, and the amount of benefit to be assessed to each piece of property (*Kansas*

City v. Baird, 11 S. W. Rep. [Mo.], 562); and such jurisdiction, when so exercised by the mayor and council, is exclusive, and its determination, where it has obtained jurisdiction, is conclusive, when attacked collaterally. (*Hagar v. Reclamation District*, 111 U. S., 709.)

Where a party seeks to enjoin the collection of a tax upon real estate, he must set forth such facts in his petition as will show the tax to be either void or its enforcement inequitable. (*Dundy v. Richardson County*, 8 Neb., 508; *South Platte Land Co. v. City of Crete*, 11 Neb., 344; *Spargur v. Romine*, 38 Neb., 736.)

The action of the mayor and city council determining the amount of special benefit is conclusive. (*Fagan v. City of Chicago*, 84 Ill., 231; *Bigelow v. City of Chicago*, 90 Ill., 49; *Davies v. City of Saginaw*, 87 Mich., 439; *Litchfield v. Vernon*, 41 N. Y., 123; *Town of Macon v. Patty*, 57 Miss., 378; *City of St. Louis v. Œters*, 36 Mo., 456; *City of Philadelphia v. Field*, 58 Pa. St., 320; *Mayor of Baltimore v. Johns Hopkins Hospital*, 56 Md., 1; *Teegarden v. City of Racine*, 56 Wis., 545; *Chamberlain v. City of Cleveland*, 34 O. St., 552; *Grand Rapids School Furniture Co. v. City of Grand Rapids*, 52 N. W. Rep. [Mich.], 1028.)

A court of equity has no jurisdiction to re-examine the proceedings and judgments of the city court in reference to assessments. (*Methodist Church v. City of Baltimore*, 6 Gill [Md.], 391; *McGee v. State*, 32 Neb., 149; Welty, Assessments, sec. 312.)

HARRISON, J.

The plaintiff commenced this action against the city of Lincoln to restrain the collection of what was alleged to be an inequitable tax assessed upon her property to pay the cost of paving on the street which the property adjoins. The Lambertsons, of defendants, were brought into the case, or impleaded, at the instance of the city and filed a cross-petition, by which it was sought to have the collection of special taxes against their property restrained, the reasons for the relief, as to them, being in

substance the same as those alleged to exist as to the property of plaintiff. The situations, relatively, of the streets and the properties affected by the taxes assessed to pay for the improvement of one street (Fourteenth), being that toward which our attention must be particularly directed at this time, will be quite readily understood from a perusal of the findings of the district court at the time it determined the issues presented in the case and which we will hereinafter quote. It appears that during the pendency of the suit the properties were sold at delinquent tax sale and that further pursuance of such proceedings has been enjoined. Tender of the amount conceded to be due was in each instance made to the proper officer. Trial of the cause in the district court resulted in a judgment favorable to the city, of the dismissal of the action of the petitioner and cross-petitioner. The findings of the trial court were as follows:

"1. The defendant, the city of Lincoln, is a municipal corporation organized under the laws of the state of Nebraska, as a city of the first class with over twenty-five thousand inhabitants.

"2. That the plaintiff is the owner of lot No. 36, described in her petition, with Q street on the south and Fourteenth street on the west; and that the defendant Lambertson is the owner of lot No. 35, described in said Lambertson's cross-petition, with R street on the north and Fourteenth street on the west; that each of said lots is 150 feet square, and together constitute a strip of land 300 feet long, north and south, and 150 feet wide, east and west; that the block of which said lots form a part is a rectangular tract extending 300 feet north and south and 720 feet east and west, and is bounded by Q street on the south, Fourteenth street on the west, R street on the north, and Sixteenth street on the east.

"3. That by ordinance duly passed and approved February 2, 1888, the defendant city created paving districts Nos. 4, 5, 6, 7, 8 of said city; that said ordinance was amended by ordinance approved February 23, 1888, the

material part of said ordinance being annexed to said city's cross-petition, marked 'Exhibit A,' and was subsequently amended by ordinance approved May 27, 1890, the material part of which is annexed to said city's cross-petition, marked 'Exhibit B.'

"4. That said district No. 5, as so created by said ordinances, included the streets and intersections surrounding the block described in finding 2, and including 150 feet upon each side of the said streets.

"5. That by ordinance approved April 23, 1891, the said defendant city further amended the said ordinance creating the said paving districts, and in said amended ordinance it was provided that the fifth paving district should include all estate on both sides of the streets in said district to the depth of 150, except that estate on the west side of Sixteenth street between Q and R streets, and that estate on the east side of Fourteenth street between Q street and R street, which shall be the depth of 360 feet.

"6. That by ordinance approved February 20, 1888, the defendant city ordered said paving districts Nos. 3, 4, 5, 6, 7, and 8 paved.

"7. That in pursuance of said order, that portion of Q, R, and Fourteenth streets surrounding the block above described was paved in 1890, and that portion of Sixteenth street adjoining said block was paved in 1891.

"8. The cost of paving Q and R streets adjoining said block was duly assessed by said defendant city upon all the property in said block fronts proportionate to the front feet of the respective lots in the block and to the depth of 150 feet.

"9. That on the 26th day of May, 1890, the defendant city made an assessment upon the block in question for the paving of Fourteenth street adjoining said block, and in making such assessment the said defendant city assessed the first 25 feet with 33 1-3 per cent of the cost of said paving, the second twenty-five feet with 20 per cent of the cost of such paving, the third 25 feet with 16 2-3

per cent of the cost of such, the fourth, fifth, and sixth 25 feet each 10 per cent; the total assessment being made to the depth of 150 feet from said Fourteenth street, and no more.

"10. That on the —— day of ———, 1891, the defendant city made an assessment upon the block in question for the paving of that portion of Sixteenth street adjoining the said block, and in making such assessment the defendant city assessed the property in said block to the middle thereof, a distance of 360 feet, dividing said distance into six equal parts, and assessing these parts in accordance with the rule laid down in finding 9, assessing the first 60 feet west of Sixteenth street at 33 1-3 per cent of the entire amount of such assessment, the second 60 feet 20 per cent thereof, the third 60 feet 16 2-3 per cent thereof, the fourth, fifth, and sixth 60 feet each 10 per cent of such assessment.

"11. The original plat of the city of Lincoln divides the original city into blocks 300 feet square, and in paving said original city the defendant has adopted and followed the plan of assessing the lots in such blocks in accordance with the foot frontage as to the paving in front of the lots, and assessing the said lots in accordance with the rule laid down in finding 9, as to the side streets of said lots or blocks, and assessing to the center of the said blocks.

"12. The assessment as set forth in finding 9 leaves 210 feet in the rear of the property assessed for the paving of Fourteenth street, extending to the middle of the block, that would bear no burden and no assessment for the paving of the side streets east and west of said block.

"13. None of the owners of this 210 feet above referred to have any access from their property to said Fourteenth street through any alley or over any property fronting or abutting said Fourteenth street owned either by the plaintiff or Lambertson, and the property of the plaintiff and Lambertson occupies all the frontage of Fourteenth street between Q and R streets to the depth of 150 feet.

"14. Fourteenth street is a cross-street of great length, upon a section line connecting the county roads north and south from the city, and is beneficial to the interior of the block in question to not less extent than the paving of Sixteenth street; and the paving of said Fourteenth street, or that portion of it adjacent to the said block, is of special benefit to all the property extending east to the middle of the block, but the extent of such special benefits and its particular distribution as to such property is not shown by the evidence.

"15. The plaintiff and defendant Lambertson each tendered, respectively, the sum of $464.75 within the fifty days allowed by law for the payment of special assessments and for the benefit of paving Fourteenth street adjacent to their said property; and if apportioned in one-sixth part back to the middle of the block, in accordance with the plan laid down in finding 9, the said sum was the proper sum to be tendered and paid. The said sum was tendered to defendant city and by defendant city refused.

"16. Complainants Webster and Lambertson each appeared before the city council of the defendant city, sitting as a board of equalization upon the said Fourteenth street assessments, and objected to the assessments proposed to be made upon their property as set forth in finding 9, for all the cost of such improvement, and demanded that the assessment be extended to include the property to the middle of the block, a distance of 360 feet from said Fourteenth street; but such demand was by the said board refused, and the assessment was made by the said board of equalization against the protests of the said complainants.

"17. The action of the city council and the board of equalization of the defendant city in making such assessment and levy upon the property of the complainants Webster and Lambertson has never been appealed from, reversed, vacated, or in anywise canceled or set aside.

"18. Since the bringing of this suit the Farmers Loan

& Trust Company, of Sioux City, Iowa, defendant herein, purchased the property of the plaintiff and defendant Lambertson for non-payment of special paving assessments for the paving of Fourteenth street, and now holds the certificate of purchase."

There were further findings, as follows:

"1. That the city council of the defendant, the city of Lincoln, sitting as a board of equalization, in acting upon the special assessments complained of in plaintiff's petition, and complained of in defendant's, Lambertson's, and Samuel J. Tuttle's, guardian *ad litem*, cross-petitions, acted within its authority, and at the time of so acting had jurisdiction of the persons and the subject-matter concerning which it purported to act.

"2. That the action of such board of equalization, unappealed from, was final.

"3. That the plaintiff and defendant Lambertson had an adequate remedy at law, by writ of error from the action of such board of equalization.

"4. That the action of such board of equalization is a bar to this action."

The record of the proceedings of the city council at the time of the assessment of the taxes in question, as introduced in evidence, was as follows:

"*Resolved*, By the mayor and city council of the city of Lincoln, Nebraska, that the cost of paving the streets and alleys in paving district No. 5, in said city, as the said improvement was completed up to the 1st day of April, 1890, and being the following streets and alleys, to-wit: Q street from Eleventh to Sixteenth, R street from Ninth to Seventeenth, Fourteenth street from O to R, be, and the same is hereby, levied and assessed upon the respective property in said district, subject to assessment for the cost thereof, in accordance with the special benefits accruing to said property by reason of said completed improvement; * * * that the real estate in each quarter block is benefited by said improvement to an amount equal to the whole cost of the improving the one-

half of the streets and alleys in its front; * * * that the first one-sixth of each quarter block next to the street or alley paved is specially benefited to an amount equal to thirty-three and one-third per cent of the cost of such improvement along its front; the second one-sixth is specially benefited to an amount equal to twenty per cent of such cost; that the third one-sixth is specially benefited to an amount equal to sixteen and two-thirds per cent, and the fourth, fifth, and sixth one-sixths are each specially benefited to an amount equal to ten per cent; * * * that the special benefits to each of the respective pieces and parcels of real estate in said paving district, by reason of the completion of said improvement, is as shown by the tabulated statement hereto attached, and the cost of said improvement is hereby apportioned and levied and assessed upon the several parcels of real estate in accordance with benefits and as shown by said statement aforesaid," etc.

The tabulated statement referred to in the record we have just quoted showed the plaintiff's property and the Lambertsons' property as charged with the whole of the taxes by divisions of one-sixths, or twenty feet, instead of being, as contended it should have been, by one-sixth divisions, or sixty feet of the 360 feet from the street to the center of the block. According to the provisions of the statutory law governing cities of the class to which Lincoln belongs, the mayor and council were empowered to make the assessments and levy the special assessments, and there was also a board of equalization composed of the members of the city council before which any parties who desired to complain of assessments might appear and present their grievances for hearing and adjustment. The matters of assessments of plaintiff's and the Lambertsons' property were brought before the board of equalization and a hearing had and the following record made of the action then taken:

"*Resolved*, That the remonstrances against the assessment of paving in the fifth district as made by Mr. Lam-

bertson, Mr. Hargreaves, and others be placed on file, and that the board of equalization refuse to make the change, for the reason that a change would necessitate a change in the ordinance, and the present rate does not work an injustice compared with paving (page 433) and assessments elsewhere in the city."

The mayor and council were authorized by statute to establish paving districts and to assess the cost of paving streets upon the lots and lands especially benefited by the improvements in such district, in proportion to benefits derived therefrom, to be determined by the mayor and council under the provisions of the act.

One question presented for determination is, the complaining parties having appeared before the regularly convened board of equalization and been accorded a hearing, did an appeal lie from the action of such board in respect to the matters adjudicated, or could such action have been reviewed through the medium of error proceedings to the district court, and if, by either appeal or error, review might be had, was the remedy adequate and the only one available to the parties? The law gave no right of appeal from the determination of the board of equalization, and where no right of appeal is provided by law, none exists; hence there was no right of appeal here. The hearing before the board of equalization was one having the semblance of a trial, and the tribunal, the board of equalization, was called upon to consider and adjudicate the questions presented and the determination made was a final disposition, the order made a final one, and hence reviewable in error proceedings to the district court. (Code of Civil Procedure, sec. 580; *Sioux City & P. R. Co. v. Washington County*, 3 Neb., 30.) As a general rule, this would furnish an adequate remedy, and no relief could be sought or afforded by means of proceedings to enjoin any action resulting from and enforcing the adjudication or order of the board of equalization. But it is urged here that there exists no provision of law for perfecting a bill of exceptions of any

matters entering into a hearing before a board of equalization which would necessarily require presentation in such form in order to their proper presentment to the appellate court in error proceedings thereto to secure a review of the action of the board; that where the alleged errors would appear on the face of the record, the remedy by petition in error would be adequate, and an application for an injunction would not lie or be entertained; but where evidence was introduced before the board of subjects otherwise extrinsic to the record, then a bill of exceptions would become indispensable and could not be obtained, from the very nature of the tribunal, its formation, and the cause of the hearing before it. Whether or not a bill of exceptions of any portions of the presentation of the equalization of an assessment before the board could be obtained, and if not, in such case the remedy by error proceedings be inadequate, and an action to procure an injunction, therefore, proper and allowable, need not now be discussed or decided. The question does not arise herein. It is not pleaded, nor does it otherwise appear that in the presentation to the board of equalization of the complaint in regard to the assessments of taxes involved in this action, and against the collection of which a restraining order was demanded, that any evidence was introduced, or any matters presented which required presentation by a bill of exceptions to make them a part of the record in error proceedings to the reviewing court. If it was sought to found the right to an action to enjoin on the inadequacy of the remedy by error proceedings, the facts upon which such claim was based should have been pleaded and proved.

The conclusions reached on the questions considered dispose of the case without a discussion and determination of any of the other matters argued. The judgment of the district court is

AFFIRMED.

GEORGE E. GIBSON ET AL. V. WILLIAM SIDNEY.

FILED DECEMBER 16, 1896. No. 6930.

1. **Action:** DEFINITION. "The term 'action' is a comprehensive one, and is applicable to almost any proceeding in a court of justice, by which an individual pursues that remedy which the law affords him." (1 Ency. Pl. & Pr., 110.)
2. **Cause:** DEFINITION. A cause is "a suit, litigation, or action. Any question, civil or criminal, contested before a court of justice." (Black, Law Dictionary.)
3. **Attachment:** MOTION TO DISSOLVE: TRIAL: COSTS. The hearing of a motion to dissolve an attachment is a "trial" of the issues of law or fact, or both, in an action or cause within the meaning of the term employed in our Code, and the provisions of the fee bill fixing the fees of justices of the peace, and a charge of one dollar taxed and collected with the costs of a case for a second day's attendance upon such hearing by a justice of the peace was not the charging or taking of illegal fees.

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

Foster & Boucher and *C. P. Halligan*, for plaintiffs in error.

Lee Helsley, contra.

HARRISON, J.

It appears herein that an action was commenced before a justice of the peace in Douglas county, in which a writ of attachment was procured to issue and was by an officer levied on property of the defendant. Prior to the day assigned in the summons for hearing of the main cause a motion, supported by affidavits, to discharge the attachment was filed and a day was set for the hearing of said motion, on which the parties appeared by counsel, and after a partial presentation of the matter its further hearing was adjourned to the following day, when it was again taken up, the hearing

completed, and the questions involved decided. In taxing the costs in the case, afterward paid by defendant, the justice of the peace included $1 as a fee for one day's attendance on the hearing of the motion to discharge the attachment. This, it is claimed, was an illegal charge, unauthorized by law, and the defendant instituted this suit against the justice of the peace and his bondsmen, and in it recovered a judgment in the sum of $50, the amount allowed by statute to be recovered by the person aggrieved from an officer who charges and takes illegal fees. From the judgment, error proceedings have been prosecuted to this court.

The only question of those argued in the briefs which we deem it necessary to consider is whether the justice of the peace was entitled to charge the $1 for one of the two days of his attendance on the hearing of the motion to discharge the attachment, and the determination of this hinges in part upon the answer to the query, was the hearing of a motion to dissolve a trial within the meaning of the word "trial" as it appears in the fee bill embodied in our statutes, and also in section 279 of the Code of Civil Procedure? The section last mentioned reads as follows: "A trial is a judicial examination of the issues, whether of law or of fact, in an action." In section 11 of chapter 28 of the Compiled Statutes, in which section the fees of justices of the peace are fixed, appears the following sentence: "Each day's attendance upon trial of a cause, after the first day, one dollar." Section 235 of the Code, by which the right is conferred to file a motion to discharge an attachment, is as follows: "The defendant may, at any time before judgment, upon reasonable notice to the plaintiff, move to discharge an attachment as to the whole or a part of the property attached;" and the next section (236) reads: "If the motion be made upon affidavits on the part of the defendant, or papers and evidence in the case, but not otherwise, the plaintiff may oppose the same by affidavits or other evidence, in addition to that on which the order of attach-

ment was made." It is clear that the foregoing contemplates a hearing and settlement of issues of either or both law and fact, or, a trial. If so, was it a trial in an "action" or "cause"? "Action" is defined in Black's Law Dictionary as "The legal and formal demand of one's right from another person or party, made and insisted on in a court of justice;" and in Winfield, Adjudged Words & Phrases, "A remedial instrument of justice, whereby redress is obtained for any wrong committed or right withheld." (*Durant v. Supervisors*, 26 Wend. [N. Y.], 86, quoting 3 Bl. Com., 3.) "Any judicial proceeding which, conducted to a determination, will result in a judgment, is an action." "The term 'action' is a comprehensive one, and is applicable to almost any proceeding in a court of justice by which an individual pursues that remedy which the law affords him." (1 Ency. Pl. & Pr., 110.) In Winfield's Adjudged Words & Phrases appears the following: "The primary meaning of the word 'case,' according to lexicographers, is 'cause.' When applied to legal proceedings it imports a state of facts which furnishes occasion for the exercise of the jurisdiction of a court of justice;" citing *Kundolf v. Thalheimer*, 12 N. Y., 596; 11 Wis., 516; 48 Tex., 433. In Black's Law Dictionary "Cause" is thus defined: "A suit, litigation, or action. Any question, civil or criminal, contested before a court of justice." But all these are general definitions.

We will turn now to what has been said by this court in particular reference to attachment. In the syllabus to the opinion in *Reed v. Maben*, 21 Neb., 696, it is said: "Attachment, although an ancillary remedy, and applicable to a limited class of cases, yet within its limits rests upon its own facts, and not upon the facts of the action;" and in the body of the opinion appears the following on the same subject: "Attachment is a proceeding ancillary to the main action in which it is allowed. If the main action is attacked and overthrown, the attachment goes with it. On the other hand, it often hap-

pens that while the cause of action is lawful and just, the ground of attachment is mistaken or false; hence, judgment must be rendered for the plaintiff on the merits, but the attachment must be dissolved. As a matter of practice, however, if no ground of attachment exists, or the order has been issued without the proper affidavit or bond, as required by statute, the attention of the court must be called thereto in some appropriate manner, and the question of sufficiency settled before the final judgment in the case." In the case of *Jordan v. Dewey*, 40 Neb., 639, it was stated: "Attachment, though sometimes called an ancillary or auxiliary proceeding, is, nevertheless, in all essential respects a suit. The affidavit of a plaintiff, made to obtain a writ of attachment, and the affidavit of a defendant, when made, denying the truth of the averments of the plaintiff, constitute the pleadings in the proceeding." We are satisfied that an attachment, while it is not an independent action, while it is auxiliary and ancillary to the main action in which it may be obtained, is, nevertheless, an "action" or "cause" within the true meaning of such words as used in the section of our statutes now under consideration; and we are further satisfied that the hearing on a motion to discharge an attachment is such a "trial" of issues of fact or law as fulfills the meaning of the word as it appears in the aforementioned sections of our statutes. It follows that the justice of the peace was entitled to charge and receive $1 as a fee for the second day's attendance at the hearing of the motion; that his taking such fee was not illegal, consequently the judgment assessing a penalty against him for receiving the fee was wrong and must be reversed and the cause remanded.

REVERSED AND REMANDED.

EDWARD ROYSE ET AL. V. STATE NATIONAL BANK OF ST. JOSEPH, MISSOURI.

FILED DECEMBER 16, 1896. No. 6870.

1. **Alteration of Instruments: NOTE: ADDITION OF SURETY'S NAME.** The addition of the name of a surety to a promissory note after its delivery to the payee, without the maker's knowledge, is not such an alteration as will release such maker. (*Barnes v. Van Keuren*, 31 Neb., 165.)

2. **Unauthenticated Bill of Exceptions.** A bill of exceptions not authenticated according to statute will be disregarded upon review.

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

J. S. Kirkpatrick, L. E. Kirkpatrick, E. P. Campbell, and *M. McSherry*, for plaintiffs in error.

Sullivan & Gutterson, contra.

NORVAL, J.

The State National Bank of St. Joseph, Missouri, brought an action in the court below against S. J. Lonergan and Edward Royse upon the following promissory note:

"$2,000. BROKEN BOW, NEBRASKA, February 7, 1891.

"Two months after date, and for value received, we jointly and severally promise to pay to the order of the Central Nebraska National Bank of Broken Bow, Nebraska, two thousand dollars, with interest at the rate of ten per cent per annum from maturity until paid.

"S. J. LONERGAN.
"E. ROYSE."

The petition alleges the execution and delivery of the note to the payee therein named; the transfer and indorsement thereof to plaintiff for value before maturity; that no part of the same has been paid; and that there

is due plaintiff thereon from the defendants the sum of $2,000 and interest. The defendants filed separate answers, that of Lonergan alleging, in substance:

1. That since the execution and delivery of the note by him to the original payee the same has been altered, without his knowledge or consent, by one Ed Royse signing his name thereto as surety.

2. That Lonergan received no consideration for signing the note; that he executed and delivered it to the Central Nebraska National Bank as an accommodation merely, and that said bank turned over and assigned the note to plaintiff as collateral security to a pre-existing debt due it from the payee.

The defendant Royse sets up in his answer, as a defense, that he signed the note "long after its execution by the defendant S. J. Lonergan, and as an accommodation only, that he never received any consideration for the same, and that plaintiff knew when it received the same that it was wholly without consideration." The reply put in issue every averment in the answers contained, and upon the trial the jury returned a verdict for the plaintiff for the principal sum and interest. A separate motion for a new trial was presented by each defendant, and from an order overruling the same the defendants prosecute separate petitions in error.

Complaint is made of the second instruction given by the court on its own motion, which told the jury, in effect, that there was not such a material alteration of the note as to avoid it as to the defendant Lonergan. The alteration pleaded consisted of the addition of the name of Royse as surety after the delivery of the note to the payee, without Lonergan's knowledge. Such fact, if established by the evidence, would not have the effect to discharge the maker. This principle was distinctly held and applied in *Barnes v. Van Keuren*, 31 Neb., 165, and is adhered to.

We cannot review the evidence in this case, inasmuch as the doctrine attached to the transcript which

purports to be the bill of exceptions is not authenticated by the clerk of the district court. (*Andres v. Kridler*, 47 Neb., 585, and cases there cited.) For the same reason, we cannot determine whether the court erred in directing the jury that the question of innocent purchaser did not arise in the case. No error appearing upon the face of the record, the judgment is

AFFIRMED.

HERMAN BAACKE ET AL. V. LIZZIE BAACKE ET AL.

FILED DECEMBER 16, 1896. No. 6856.

1. **Wills: REVOCATION: IMPLICATION.** The common-law doctrine that the revocation of a will may be implied from subsequent changes in the condition or circumstances of the testator obtains in this state in so far as it has not been modified by statute.

2. ———: ———: ———. An absolute revocation of a will cannot be implied by law from the obtaining of a divorce from the testator by his wife after the making of the will, the death of one of his children for whom provision was made in the will, and the birth of three children to such deceased child, prior to the testator's death.

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

Abbott & Abbott, for plaintiffs in error.

References: *Boudinot v. Bradford*, 2 Yeates [Pa.], 170; *Eyster v. Young*, 3 Yeates [Pa.], 511; *Sneed v. Ewing*, 22 Am. Dec. [Ky.], 52; *Wilson v. Fosket*, 39 Am. Dec. [Mass.], 726; *Negus v. Negus*, 26 Am. Rep. [Ia.], 157; *Graves v. Sheldon*, 15 Am. Dec. [Vt.], 660; *Young's Appeal*, 80 Am. Dec. [Pa.], 518; *Vanorsdall v. Van Deventer*, 51 Barb. [N. Y.], 147; *Heard v. Horton*, 1 Den. [N. Y.], 165.

F. I. Foss and *W. R. Matson, contra.*

NORVAL, J.

Carl Baacke, of Lancaster county, on the 16th day of December, 1887, executed a will which disposes of his property in the language following:

"1. After my decease, and after all my debts and funeral expenses have been paid out of my estate, the following heirs shall divide my estate as prescribed in paragraph 2:

"2. My present wife, Dorothea E. Baacke, shall receive as her share, first, such part as may be allowed her by court and law as my wife; secondly, she, Dorothea E. Baacke, shall receive out of my estate twenty-five dollars in cash, in addition. To my son, Fritz Baacke, I bequeath ten ($10) dollars. To my daughter, Elizabeth, now Mrs. Klepper, I bequeath ten ($10) dollars. To my son, Herman Baacke, I bequeath ten ($10) dollars; and the balance of my property I bequeath to the children of my son, Fritz Baacke, viz.: Elizabeth Sophia Margaretha Baacke, born October 24, 1880; Juliana Margaretha Baacke, born January 30, 1882; Maria Dorothea Baacke, born July 4, 1885; but on the condition that they pay off the sums by me specified, and divide the remainder equally between themselves.

"3. In case any one of my heirs shall oppose these conditions, or shall even appeal to law, then his legacy (share) shall consist of five ($5) dollars; no more."

On February 11, 1893, the testator died, and a few days later T. H. Miller filed in the county court said will, and asked that the same be admitted to probate. Herman Baacke, son of said Carl, on March 3, 1893, presented to the county court a petition, alleging therein that the instrument purporting to be the last will and testament of Carl Baacke had been revoked and annulled, and praying that letters of administration be granted on the estate to one Henry Cramer. Subsequently, Herman Baacke and Elizabeth Klepper, son and daughter of the deceased, pleaded in the county court certain matters

which they claimed amounted to a revocation of the will, and protested against the probate thereof. Upon the hearing the county court found that there had been a revocation of the will, refused to admit the instrument to probate, and appointed Henry Cramer administrator of the estate. An appeal was taken to the district court by the proponent, where the will was ordered to be probated. The contestants prosecute error to this court.

The record shows that Carl Baacke, at the time of the making of his will, had a wife, with whom he was then living; that subsequently she obtained a divorce from him, and her property rights were settled; that after the execution of the will, and prior to the death of the testator, three other children were born to his son Fritz, who survived their grandfather; and that said Fritz died about a year before the death of his father.

The statutory provisions in respect to the revocation of wills are contained in section 132, chapter 23, Compiled Statutes, and are as follows: "No will, nor any part thereof, shall be revoked unless by burning, tearing, canceling, or obliterating the same, with the intention of revoking it, by the testator, or by some person in his presence and by his direction; or by some other will or codicil, in writing, executed as prescribed in this chapter; or by some other wording, signed, attested, and subscribed in the manner provided in this chapter for the execution of a will; excepting only that nothing contained in this section shall prevent the revocation implied by law from subsequent changes in the condition or circumstances of the testator." It is not claimed in this case that there has been any express revocation of the will by the testator in any of the modes pointed out in the statute. The sole question is whether the facts already mentioned, namely, the divorce of the wife, the death of the son, Fritz, and the birth to the latter of three children, operated as an implied revocation of the will. It cannot escape notice that the statute quoted provides that no will, or any part of the same, shall be revoked or

annulled by the testator unless he has performed some one of the acts which the legislature has declared shall constitute an express revocation, with the intent to revoke, with a clause saving revocations "implied by law from subsequent changes in the condition or circumstances of the testator." By the language just quoted the common law rule of revocation of wills by implication is retained in this state, except as modified by statute. Undoubtedly certain changes in the condition and circumstances of the testator will operate as a revocation. Thus, a sale of the entire estate devised will have that effect, since the will cannot thereafter take effect on it. (29 Am. & Eng. Ency. of Law, 308, and cases there cited; *Collup v. Smith*, 15 S. E. Rep. [Va.], 584; *Epps v. Dean*, 28 Ga., 533; *Bowen v. Johnson*, 6 Ind., 110.) So, too, a sale of a part of the estate devised will work a revocation *pro tanto*. (*Forney's Estate*, 161 Pa. St., 209; *Borden v. Borden*, 2 R. I., 94; *Graham v. Burch*, 47 Minn., 171.) At common law the will of a woman was revoked by her subsequent marriage, upon the theory that coverture destroyed her testamentary capacity to modify the will, and hence the instrument could not be relied upon as representing her wishes. (1 Jarmin, Wills [5th ed.], 167.) And in some of the states, by express statutory provisions, the same rule obtains. (*Blodgett v. Moore*, 141 Mass., 75; *In re Kaufman's Will*, 131 N. Y., 620; *Stewart v. Powell*, 14 S. W. Rep. [Ky.], 496; *Corker v. Corker*, 87 Cal., 643; *Ellis v. Darden*, 86 Ga., 368.) Under statutes like ours, which have removed most of the disabilities of married women and conferred express power upon them to dispose of their property by will, it has been held that the common law doctrine of the revocation of a will of a woman by her subsequent marriage is abrogated. (*In re Tuller's Will*, 79 Ill., 99; *In re Hunt's Will*, 81 Me., 275; *In re Ward*, 70 Wis., 251; *Noyes v. Southworth*, 55 Mich., 172.) In this state, by section 123, chapter 23, Compiled Statutes, a married woman may devise and dispose of her real and personal estate by a will,

and revoke the will in the same manner as a man may do. At common law the will of an unmarried man was not revoked by his subsequent marriage or the subsequent birth of a child to him, but such marriage and birth conjointly worked a revocation of his will where no provision, in or out of the will, was made for the wife and child. (*Hoitt v. Hoitt*, 63 N. H., 475; *Bowers v. Bowers*, 53 Ind., 430; 4 Kent, Commentaries [13th ed.], 527; *Marston v. Roe*, 8 Ad. & L. [Eng.], 457; *Brady v. Cubitt*, 1 Doug. [Eng.], 31; *Christopher v. Christopher*, 4 Burr. [Eng.], 2182; *Havens v. Van Den Burgh*, 1 Den. [N. Y.], 27; *Baldwin v. Spriggs*, 5 Atl. Rep. [Md.], 295; *Roane v. Hollingshead*, 25 Atl. Rep. [Md.], 307; *Brush v. Wilkins*, 4 Johns. Ch. [N. Y.], 506; *Webb v. Jones*, 36 N. J. Eq., 163; *Belton v. Summer*, 12 So. Rep. [Fla.], 371; *Morton v. Onion*, 45 Vt., 145; *Nutt v. Norton*, 142 Mass., 242.) In some of the states the doctrine of the common law has been changed by legislation. (*Stewart v. Powell*, 14 S. W. Rep. [Ky.], 496; *Gay v. Gay*, 84 Ala., 38; *Rhodes v. Weldy*, 46 O. St., 234; *Holloman v. Copeland*, 10 Ga., 79; *Ware v. Wisner*, 50 Fed. Rep., 310.) Manifestly, decisions based on statutes which expressly provide that a will shall be revoked by either marriage or the birth of a child are not applicable under the legislation of this state. It has been held that the revocation of a will cannot be implied by law from the subsequent acquisition of property by the testator, which is not affected by the will. (*Baldwin v. Spriggs*, 65 Md., 373.) "The more generally accepted view seems to be that a change in the testator's condition and circumstances, as the death of his wife or children, or the objects of his bounty, the increase or decrease of his fortune, or the alienation of his property, will not work a total revocation of the will." (29 Am. & Eng. Ency. of Law, 313, and cases in note 3.)

While our statute recognizes revocations of wills by implication of law, it has not undertaken to designate or specify what subsequent changes in the condition and circumstances of the testator will produce such

revocation, but it is for the court to determine from the facts of each particular case, under the rules and forms of law, whether the testator intended the will to stand notwithstanding the changes in his condition and circumstances. To show that the present case does not fall within the exception of the statute respecting the revocation of wills by implication of law, we have already mentioned certain facts which courts have held to constitute such revocation, and also have instanced some of the changes in the condition of a testator from which a revocation of a will cannot be implied. The doctrine of revocation by implication of law is based upon a presumed alteration of intention arising from the changed condition and circumstances of the testator, or on the presumption that the will would have been different had it been executed under the altered circumstances. An entire revocation by implication of law does not extend to a large number of cases. Change of circumstances may work a partial revocation, and the will in other respects stands as it is written.

No case has been cited, nor has the writer been able to find a single authority, which holds that a subsequent granting of a divorce to the wife of a testator, and a settlement of her property rights, work a revocation. It could no more than revoke the will as to her legacy, and whether it would have that effect in this case it is not necessary now to determine, as the question is not before us.

The death of the testator's son could have no effect, since it was a contingency that must have been contemplated by the testator. Especially is this true in view of our statute (Compiled Statutes, ch. 23, sec. 151), which declares that "when a devise or legacy shall be made to any child or other relation of the testator, and the devisee or legatee shall die before the testator, having issue who shall survive the testator, such issue shall take the estate so given by the will in the same manner as the devisee or legatee would have done if he had survived the testa-

tor, unless a different disposition shall be made or directed by the will." The legacy provided by the will for the testator's son Fritz did not lapse by the death of the latter, as he left several surviving children, who, by virtue of the above statute, would take the same.

But one other ground relied upon for a revocation remains to be considered, and that is the birth of the three children to Fritz Baacke after the making of the will. We have already observed that at common law a revocation will not be implied from the birth of a posthumous child, and clearly, from analogy, the subsequent birth of the grandchildren did not revoke the will. This view is emphasized by the legislation in this state upon the subject. Section 148 of said chapter 23 declares: "When any child shall be born after the making of his parent's will, and no provision shall be made therein for him, such child shall have the same share in the estate of the testator as if he had died intestate, and the share of such child shall be assigned to him as provided by law in case of intestate estate, unless it shall be apparent from the will that it was the intention of the testator that no provision should be made for such child." The next succeeding section provides: "When any testator shall omit to provide in his will for any of his children, or for the issue of any deceased child, and it shall appear that such omission was not intentional, but was made by mistake or accident, such child, or the issue of such child, shall have the same share in the estate of the testator as if he had died intestate, to be assigned as provided in the preceding section." The succeeding section in the same chapter provides the manner for assigning of the estate in the cases mentioned in the section quoted above. It is obvious from these statutory requirements it was not the intention of the legislature that the omission of a testator to make any provision in his will for a posthumous child, or for the issue of a deceased child, should work an entire revocation of the will, else the legislature would not have provided for the assignment of the estate

in such cases so as to allow such child or issue of a deceased child omitted from the will, as the case may be, to take the share he would have received had the testator died intestate. The statute having expressly declared what effect the subsequent birth of an heir prior to the testator's death would have on a will, none other can be implied. We are aware of no case where the birth of a grandchild after the making of a will is held to operate as a total revocation of the will. We are constrained to hold that there has not been an entire revocation of the will of Carl Baacke by implication of law, and the decree of the lower court allowing and admitting it to be probated should be affirmed.

DECREE AFFIRMED.

STATE OF NEBRASKA, EX REL. JAMES C. DAHLMAN, V. JOEL A. PIPER, SECRETARY OF STATE.

FILED DECEMBER 16, 1896. No. 8790.

1. **Supreme Court:** JURISDICTION. The original jurisdiction of the supreme court, conferred upon it by the constitution, is confined to "cases relating to the revenue, civil cases in which the state shall be a party, *mandamus*, *quo warranto*, and *habeas corpus*."

2. **Mandamus:** PURPOSE OF WRIT. The writ of *mandamus* can only be invoked to compel the performance of some particular act which the law especially enjoins as a duty resulting from an office, trust, or station. As a preventative remedy it cannot take the place of injunction.

3. ———: ———. *Mandamus* can be resorted to alone for the purpose of compelling action. It is not a proceeding to correct errors.

4. **Elections:** SECRETARY OF STATE: APPEAL. An appeal or proceeding in error will not lie directly to this court to review the decisions of the secretary of state under the Australian ballot law.

5. ———: ———: ———: NOMINATIONS. The findings of facts made by the secretary of state in passing upon objections filed against certificates of nomination, if not conclusive, are at least, *prima facie*, right.

6. ———: CERTIFICATES OF NOMINATION: OBJECTIONS: HEARING: SECRETARY OF STATE. Under our Australian ballot law the secretary of state, in passing upon objections to nomination certificates, is not confined to mere formal matters relating to such certificates, but may determine from extrinsic evidence whether the candidates therein named were in fact nominated by a convention called and held according to party usages and claiming in good faith to represent a political party which cast the requisite number of votes at the last election. *State v. Allen*, 43 Neb., 651, and *Phelps v. Piper*, 48 Neb., 724, followed.

7. **Regularity of Nominating Conventions: SECRETARY OF STATE.** It is neither the province of the secretary of state nor the courts to determine which of two rival state conventions of the same party so called and held is entitled to recognition as the regular convention. (*State v. Allen* and *Phelps v. Piper, supra.*)

8. ———: ———. Where rival factions of a political party in good faith nominate candidates at conventions called and held in accordance with the usages of the party and certify such nominations to the secretary of state, he will certify to the several county clerks the names of the candidates nominated by each. (*State v. Allen* and *Phelps v. Piper, supra.*)

ORIGINAL application for *mandamus* to compel the secretary of state to certify to the county clerks the names of certain persons only as nominees of the democratic party for electors for president and vice president and for other offices. *Writ denied.*

Robert Wheeler, *Frederick Shepherd*, and *Bane & Altschuler*, for relator.

W. D. McHugh, *Robert W. Patrick*, and *John H. Ames*, *contra.*

NORVAL, J.

This was a proceeding to determine the validity of certain nominations for electors for president and vice president and the several state offices, and to require the secretary of state to certify to the several county clerks the names of certain persons, and none others, as nominees of the democratic party for such offices. The cause was submitted upon the pleadings and oral admissions of the parties, without any testimony being adduced,

and a decision announced, denying the relief demanded, just preceding the last general election. To the writer is assigned the duty of preparing an opinion incorporating the views of the court upon the questions involved.

On the 30th day of September, 1896, a certificate of nomination of candidates for electors of president and vice president, and the several state offices, was filed with the secretary of state, signed by Ed P. Smith as chairman and Lee Herdman as secretary, which purported to be a certificate of the nominations made by the democratic party of the state in a regularly called delegated convention, held in the city of Omaha on the 4th day of September, 1896; and on the 7th day of October, 1896, there was filed with the secretary of state an amended and supplemental certificate of said nominations, signed by the same persons who signed the first certificate. No objections to either of the said certificates were ever filed with the secretary of state. On October 8, 1896, one Charles G. Ryan as chairman and Henry Koehler as secretary filed in the office of the secretary of state another certificate of other candidates for the same offices, also purporting to be a certificate of nominations made by the democratic party in a regularly called delegated convention held in the city of Omaha, on the 1st day of October, 1896. Within the time provided by law, James C. Dahlman, an elector of the state, and claiming to be chairman of the democratic state central committee, filed with the secretary of state written objections to this certificate, in substance as follows:

1. That said Charles G. Ryan and Henry Koehler, as chairman and secretary, respectively, are not members of the democratic party of the state, and that no convention of the democratic party was held at the time and place designated in said certificate.

2. That said pretended convention did not represent the democratic party of this state, or any party casting one per cent of the votes in the state at the last general election.

3. That said pretended convention did not represent, and had no authority to act on behalf of the democratic party in this state; that it was wholly unauthorized by the democratic party or any one authorized to act for said party, and was only called and held for the purpose of disorganizing and, as far as possible, injuring and destroying the democratic organization in this state, and, if possible, defeating the election of the regular nominees of said party.

4. That said pretended convention was not recognized by the duly organized democratic national convention, but on the contrary the state convention held on the 4th day of September, 1896, was recognized by the national democratic convention which convened in Chicago on July 7, 1896.

5. That said pretended convention of October 1 did not act in good faith in making nominations and filing said certificate with the secretary of state, but made said nominations and filed said certificate for the purpose of confusing and deceiving the voters in casting their ballots.

6. That the printing of the names set forth in the certificate upon the official and sample ballots will entail upon the state a very heavy additional and unnecessary expense.

7. That the regularly held and duly authorized convention of the democratic party of the state was the one which convened on September 4, 1896.

The secretary of state, upon the hearing of this protest, made findings of facts and rendered a decision overruling said protest and ordering that the names of the nominees mentioned in said certificate of nomination filed on October 8 be certified to the several county clerks as nominees of the democratic party. It was disclosed that two state conventions of the democratic party were held in the year 1896 for the purpose of nominating electors for president and vice president, and a full state ticket to be voted for at the last election, one September 4 and the

other on the 1st day of October, each having assembled by virtue of a call regularly issued in accordance with the practices of the party in such cases from a body claiming to represent the democratic state central committee, and each convention claiming the right to act for and on behalf of the democratic party of the state; that each convention made nominations, and the same were certified in due form to the secretary of state within the time provided by law by the officers of each of said conventions; that the convention which assembled on October 1 met and made nominations in good faith in pursuance of a regular call issued from the democratic state central committee elected by a convention held in 1895, claiming to be the democratic state convention of Nebraska, at which convention Hon. T. J. Mahoney was nominated as candidate for the office of judge of the supreme court, and Hons. John H. Ames and W. S. Ashby as candidates for regents of the State University, and whose names were placed upon the official ballots for the general election held in 1895, as democratic candidates for said respective offices, and at said election said several candidates received more than one per cent of the total vote cast at the said election, and nearly twice as many votes as were polled for other persons named upon said ballot, as democratic candidates.

The respondent in his answer objects to the jurisdiction of this court upon the following grounds:

1. That the proceeding herein is an equitable one for injunction, which this court has no original jurisdiction to entertain.

2. That the matters and things in controversy were passed upon and decided by the secretary of state, and this court has no power to review or modify his findings or decision.

3. That the questions involved are not judicial, but purely political in their character, and consequently subjects in respect of which courts have no jurisdiction.

By section 2 of the article of the constitution of this

state relating to the judicial department, the original jurisdiction of the supreme court is confined to "cases relating to the revenue, civil cases in which the state shall be a party, *mandamus*, *quo warranto*, and *habeas corpus*." There is no escaping the conclusion that this court has no original jurisdiction as a court of equity of causes involving relief solely obtainable by injunction unless it may be in revenue and state cases, of which this is not one, since no such power is conferred upon it by the fundamental law of the state. While it is true the petition prays for an order restraining the respondent from certifying to the several county clerks the names of the nominees of the convention of October 1, it is perfectly plain that merely a temporary injunctional order was asked to be made and enforced until such time as there should be a final hearing of the cause. The ultimate object of this proceeding was to compel the respondent to rescind his decision to certify the names of the nominees of the convention of October 1; in other words, to require the secretary of state to certify to the county clerks of the several counties of the state as nominees for the democratic party the names of the persons placed in nomination at the said convention held on September 4, and none others. In one sense it may be said that the relief demanded involves the perpetual enjoining of the certification to the various county clerks of the names of nominees of the said convention presided over by Charles G. Ryan as chairman and at which Henry Koehler acted as secretary, and if such was the sole nature or purpose of the suit, unquestionably this court would be without jurisdiction to hear or determine the same, for the writ of *mandamus* can only be invoked to compel an inferior tribunal, corporation, board, or person to perform some particular act which the law specially enjoins as a duty resulting from an office, trust, or station, and not merely to prevent it. On the other hand, injunction is wholly to restrain or prohibit the doing of a threatened act. As a preventative remedy simply, the writ of *man-*

damus cannot take the place of an injunction. Applying these principles to the case at bar, as made by the petition, it is believed that the ultimate relief sought is to compel the performance of a particular act by the respondent, which he had declined to do, namely, the certification to the county clerk of each county the names of the candidates mentioned in the certificate of nomination first filed as aforesaid with the secretary of state, as the sole nominees of the democratic party for electors of president and vice president and state offices, which act could not be enforced by injunction. The requiring of an officer by *mandamus* that he do some particular thing in a specified way necessarily implies it shall not be performed in any other mode, but that is not adopting proceedings by *mandamus* to effect the purpose of an injunction. Had the equitable powers of the proper forum been invoked to enjoin the certification to the county clerk of the names of the persons nominated at the convention held on October 1 it is evident that the right to the relief asked in this proceeding could not have been adjudicated therein. This action is not essentially one for injunction, and the first objection to the jurisdiction must be determined adversely to the respondent. It should be remarked before leaving the subject that two similar causes have been entertained by us (*State v. Allen*, 43 Neb., 651, and *Phelps v. Piper*, 48 Neb., 724), although the question of jurisdiction was not then urged upon the attention of the court in either of them.

We come now to the second objection interposed to the jurisdiction, namely, that this court is without authority to review or set aside the decision of the secretary of state in passing upon objections to nomination certificates. It was strenuously insisted in argument that the decision of the officer with whom certificates of nominations are filed, in determining objections thereto, is final and conclusive. Section 11 of our Australian Ballot Law (Compiled Statutes, ch. 26, sec. 136), provides: "All certificates of nomination which are in apparent con-

formity with the provisions of this act shall be deemed to be valid, unless objection thereto shall be duly made in writing within three (3) days after the filing of the same. In case such objection is made, notice thereof shall forthwith be mailed to all candidates who may be affected thereby, addressed to them at their respective places of residence, as given in the certificate of nomination. The officer with whom the original certificate was filed shall in the first instance pass upon the validity of such objection, and his decision shall be final, unless an order shall be made in the matter by a county court, or by a judge of the district court, or by a justice of the supreme court at chambers, on or before the Wednesday preceding the election. Such order may be made summarily upon application of any party interested, and upon such notice as the court or judge may require." A mere reading of the foregoing is sufficient to disclose that it was the purpose of the legislature to give to the secretary of state, or other officer with whom certificates of nomination are required to be filed, the power in the first instance to pass upon all objections to such certificates or nomination papers, and whose decision in the premises is at the furthest limit to be regarded as final, where no "order shall be made in the matter by the county court, or by a judge of the district court, or by a justice of the supreme court at chambers," within the time fixed by statute. If the determination of the secretary of state is absolutely final, it could not anywhere else be questioned. That his decision is not necessarily conclusive follows from the fact that the statute has made provision for reviewing the same, or rather for the determination of the questions by the county court, or by a judge of the district or supreme court. Whether that portion of the act is valid which attempts to confer power in such matters upon a judge of this court at chambers has been seriously doubted,—so much so that the present judges have not entertained such jurisdiction. The rulings of the secretary of state could be deemed final only when not

reviewed by the court or officer authorized by the statute so to do, and when he properly determines such questions alone as he is empowered by law to decide; that is, when he has proceeded legally and within his jurisdiction. If he has acted illegally, or without jurisdiction, his decision is without validity. Suppose a certificate of nomination should be filed after the statutory period, and he should determine to certify the names of the nominees therein mentioned; his action would not be conclusive or binding. Or should he refuse to certify the names of the candidates mentioned in a certificate in due form, who were properly nominated, and against such certificate no protest had been filed, his action would not be final, even though no order had been made in the premises by the court or judge mentioned in the law, and most assuredly *mandamus* would lie to compel him to certify the names of such nominees to the county clerks, because the duty is purely a ministerial one enjoined by law, involving no discretion. Again, should the secretary of state determine which of two rival conventions of the same political party was the regular convention, where both were called and held in accordance with the usages of the party, and each made nominations in good faith and certified the same in due form to him within the statutory time, and should certify the names of one set of candidates and decline to certify the other, *mandamus* could be invoked against him. His decision would not be final should he, without a hearing of objections properly made and filed to a certificate of nomination, determine that the names of the candidates therein mentioned should or should not appear upon the official ballot. There are many other instances which might be given where *mandamus* would be the appropriate proceeding to compel the secretary of state to act. Clearly it was not the purpose of the election law to take away the right theretofore conferred upon the courts to compel by *mandamus* the performance by an officer of a purely ministerial duty enjoined by law.

It is very evident an appeal or proceeding in error will

not lie directly to this court to review the decisions of the secretary of state under the Australian Ballot Act, for two reasons: First, no provision is made therefor by the law in question, or by any other statute; and in the next place, the appellate jurisdiction of this court is confined to a review of the judgments and orders made by the several district courts of the state. Neither error nor appeal can be prosecuted from the decision of any other court or tribunal directly to this court. (*Cleghorn v. Waterman*, 16 Neb., 225.)

While upon the argument the case was discussed by counsel for respondent partly as if this was a proceeding in error to review the action of the secretary of state, it is obvious that the petition is essentially an application for a writ of *mandamus*, and must be so regarded. The constitution has conferred original jurisdiction upon the supreme court in *mandamus*, hence the case is not one of the class without the jurisdiction of this court, but within it. Whether *mandamus* should issue in this particular case is another question,—one which will be determined later on. *Mandamus* can be resorted to alone for the purpose of compelling action; that is, the performance of a duty enjoined by law. It is not a proceeding to correct errors (*State v. Nemaha County*, 10 Neb., 32; *State v. Powell*, 10 Neb., 48; *State v. Kinkaid*, 23 Neb., 641; *McGee v. State*, 32 Neb., 149), so that errors, if any, committed by the respondent upon the hearing, or in his decisions, are not available here. Our inquiry is confined alone to the question whether the respondent has failed to discharge any ministerial act which the statute requires him to perform.

It appears from the findings of fact made by the secretary of state in passing upon the objections filed against the certificate of nomination that two rival factions of the democratic party in this state held conventions called in accordance with the usages of the party, and each in good faith nominated candidates for electors of president and vice president, as well as state offices, which nominations were duly certified to him; that each of said con-

ventions claimed to represent the democratic party of the state; "that the said convention of October 1, 1896, was held openly, and publicly announced in the public press, and that the fact that the said convention was to be held was a matter of public knowledge and notoriety, and that said convention assembled openly and publicly in pursuance of said call, and was comprised of delegates duly accredited to said convention from the various senatorial districts of the state, and that all its acts were open and public, and in good faith." The above findings were pleaded by the respondent in his answer, and, not having been controverted on the hearing, are at least *prima facie* correct, if not conclusive. When so regarded, what was the duty of the secretary of state? Was he required to decide between said rival factions of the party and certify to the several county clerks the names of the nominees of one of the conventions alone as the candidates of the democratic party? These precise questions have been already twice adjudicated by this court, and that, too, adversely to the contention of the relator herein, in a controversy involving the right of each faction of the democratic party in this state, now concerned in this litigation, to representation upon the official ballot. A reference to those cases will not be inappropriate.

State v. Allen, 43 Neb., 651, was an application for *mandamus* to compel the secretary of state to certify to the county clerks the names of the relators therein as nominees of the democratic party for the several state offices to be filled at the election to be held on the 6th day of November, 1894. Two certificates of nomination in due form had been filed with the secretary of state, each containing the names of different persons as nominees of the democratic party for state offices. A protest was filed against each certificate. That against the certificate containing relators' names was sustained by the secretary of state, and the other protest was overruled by him. The writ was denied because the claim of the relators rested alone upon the certificate of nomination, it not appearing from the

record that they were nominated by a convention claiming to represent the democratic party. Among others, the following legal propositions were determined by the court in that case: 1. The secretary of state in passing upon objections to nomination certificates is not confined to mere formal matters, but may determine from extrinsic evidence whether the candidates were in fact nominated by a convention claiming to represent a party which cast the requisite number of votes at the last preceding election. 2. That it was not the province of such officer to determine which of the two rival state conventions of the same party is entitled to recognition as the regular convention, but it is his duty to certify to the county clerks the names of all the candidates who were nominated by each convention according to the usage of such party. The same principles were held and applied in the opinion of RAGAN, C., in *Phelps v. Piper*, 48 Neb., 724; and further, that the question as to which one of the two factions of a political party has the right to act for the party, it is not the province of the courts to determine, since the question is a political, and not a judicial, one. To the same effect are *People v. District Court*, 18 Colo., 26, *Shields v. Jacob*, 88 Mich., 164.

Decisions of other states which hold that courts will determine which faction of a political organization is the regular one, and entitled to recognition, were, for the most part, based upon statutes materially different from ours, and therefore clearly distinguishable. Thus, where a statute authorizes a political party to select one or more of the election officers, and such party is divided into factions, of necessity the court, to prevent disorder and confusion, may decide which faction represents the regular organization. So, too, where the ballot law requires the names of candidates of political parties to be arranged and printed on the official ballot in a separate group, and it is made the duty of the election officer in arranging the ballot to place the ticket of the party having the greatest number of votes at the last preceding

election first on the ballot, and that the position of other tickets should be controlled relatively by the same rule, it is obvious that under such a law it is necessary to decide between rival factions of the same party, in order to determine the position of the tickets upon the ballot. But where, as under our ballot law, the reason for the rule does not exist, the rule itself does not obtain. The construction adopted by this court in its prior adjudications, and followed in this, is in consonance with the spirit and object of our election laws, since it affords the voter the greater liberty in casting his ballot.

The views expressed dispose of all the grounds set forth in the protest filed by the relator with the secretary of state excepting the fourth and sixth, which we will now briefly notice in their order. By the fourth objection it was sought to raise the question whether the decision of the national convention of a political party recognizing one faction of its party in a state is conclusive, and not reviewable by the court. Unfortunately for the relator such question is not before us, since the averment in the petition for the writ and in the protest relating thereto were put in issue by the answer and return of the respondent, and no evidence was introduced upon that subject. The sixth ground of objection is without merit for two reasons: First, the printing of the names of the nominees upon the official and sample ballot will entail no additional expense on the state, because it is not required to pay the cost of printing the ballots; second, the additional expense entailed by the printing of a candidate's name upon the ballot is no valid reason for excluding his name therefrom.

It having been disclosed by the record in this case that nominations for the same offices were in fact made by each of the two rival conventions of the democratic party of the state, called and held in accordance with the usages of the party, and each claiming in good faith to represent a political organization which cast one per cent of the total vote at the general election of 1895, it was

not the province of the secretary of state, nor is it of this court, to determine which convention was the regular one; but it was the duty of the secretary of state to certify the names of the nominees of both conventions to the county clerks.

WRIT DENIED.

IRVINE and RYAN, CC., not sitting.

RAGAN, C., dissenting.

I agree to the conclusion reached in this case, viz., that the writ asked for should be denied; but I do not agree to the reasons given for that conclusion. No statute of this state has conferred any authority on this court to review a decision made by the secretary of state, as to what nominations certified to him shall be placed on the official ballot; nor does the fact that the constitution invests this court with original jurisdiction in *mandamus* cases confer any authority on the court to control the discretion of the secretary of state, in this or any other case. The legislature has seen fit to provide that the secretary of state shall hear and decide all objections to nominations certified to him; and that "his decision shall be final unless an order shall be made in the matter by a county court or by a judge of the district court, or by a justice of the supreme court at chambers." (Compiled Statutes, ch. 26, sec. 136.) In the matter involved here no order has been made by a county court, a judge of the district court, or a justice of the supreme court, and if the statute is to be followed, the decision of the secretary of state is final; and "final," in judicial parlance, means that question is ended; decided; set at rest forever. It was quite as competent for the legislature to leave the decision of such matters as those involved here to the secretary of state as to any other person, officer, board, or tribunal, or to the supreme court. The matters in litigation here are not judicial. They are purely administrative or political in their nature, and neither the constitution nor the statute makes it the duty of this court to

pass upon them; nor has the court either original or appellate jurisdiction to say that the decision made by the secretary of state is either right or wrong. In my opinion the writ should be denied on the ground that this court has no jurisdiction in the premises.

STATE OF NEBRASKA, EX REL. JAMES C. DAHLMAN ET AL., v. JOEL A. PIPER, SECRETARY OF STATE.

FILED DECEMBER 16, 1896. No. 8791.

Regularity of Nominating Conventions: DUTIES OF SECRETARY OF STATE: MANDAMUS. The decision in this case is ruled by *State v. Piper*, 50 Neb., 25.

ORIGINAL application for *mandamus*. *Writ denied.*

Robert Wheeler, *Frederick Shepherd*, and *Bane & Altschuler*, for relators.

John H. Ames, *contra.*

NORVAL, J.

This was an application for *mandamus* against the secretary of state to determine the validity of the nomination of R. S. Proudfit, and the right to have his name printed upon the official ballot as the nominee of the democratic party for congress in the fifth congressional district in this state. Two certificates of nomination of candidates for said office were filed with the secretary of state, both upon their face in apparent conformity with the requirements of the election law, and each purporting to be a certificate of nomination by the democratic party of that congressional district, in one of which R. D. Sutherland was named as the candidate, and the other certificate R. S. Proudfit was stated to be the nominee.

The respondent overruled the objections filed to the last named certificate. The facts and the questions involved are identical with those in *State v. Piper*, 50 Neb., 25, and following the decision therein, the writ must be denied.

WRIT DENIED.

IRVINE and RYAN, CC., not sitting.

STATE OF NEBRASKA, EX REL. C. D. CASPER, V. JOEL A. PIPER, SECRETARY OF STATE.

FILED DECEMBER 16, 1896. No. 8792.

Elections: CERTIFICATES OF NOMINATION: OBJECTIONS: TIME. The provisions of the statute (Compiled Statutes, ch. 26, sec. 136) known as the "Australian Ballot Law," requiring objections to a certificate of nomination of candidates for office to be filed within three days after the filing of such certificate, are mandatory, and must be strictly followed, else said certificate, if in conformity with law, will be deemed valid.

ORIGINAL application for *mandamus*. *Writ denied.*

Robert Wheeler, *Frederick Shepherd*, and *Bane & Altschuler*, for relator.

John H. Ames, *contra.*

NORVAL, J.

This was an application by C. D. Casper, as chairman of the democratic congressional committee for the fourth congressional district, for a writ of *mandamus* to determine the right of the secretary of state to certify to the several county clerks of said district the name of R. E. Dunphy as the democratic nominee for congress from such district. Like the two other cases decided herewith, the controversy grows out of the fact that two rival

factions of the democratic party have made and filed separate certificates of nomination for said office. The validity of the nomination of Mr. Dunphy alone is assailed in this proceeding. All the questions involved, except one, were decided in *State v. Piper*, 50 Neb., 25. One subject presented by the application for the writ requires notice, and that is whether the relator is in any position to question the nomination of Mr. Dunphy, or the right to have his name appear upon the official ballot as the democratic nominee from the fourth congressional district. The application alleges that on the 1st day of October, 1896, the certificate of nomination of R. E. Dunphy as the democratic nominee for congressman for that district was filed in the office of secretary of state; that on the 12th day of the same month the relator filed his protest and objections to said certificate of nomination; and that the respondent overruled said objections and decided that the name of Mr. Dunphy was entitled to have place upon the official and sample ballots. Section 11 of the Australian Ballot Law (Compiled Statutes, ch. 26, sec. 136) declares: "All certificates of nomination which are in apparent conformity with the provisions of this act shall be deemed to be valid, unless objection thereto shall be duly made in writing within three (3) days after the filing of the same," etc. The statute requires that objections to certificates of nominations shall be filed within three days after such certificates are filed. This provision is mandatory and must be strictly followed, else the certificate of nomination, if in due and legal form, shall be regarded as valid. (*State v. Norris*, 37 Neb., 299; *In re Cuddeback*, 39 N. Y. Supp., 388; *Price v. Lush*, 10 Mont., 61; *Griffin v. Dingley*, 46 Pac. Rep. [Cal.], 457; *Nomination of Van Storch*, 2 Pa. Dist., 7.) The application or petition in this case shows that the objections of the relator to Mr. Dunphy's nomination were not filed until the eleventh day after the filing of his nomination certificate, and it was not alleged that either the relator or any one else, at any

other time, filed another protest against such certificate, or that the same was defective in form or substance. It was, therefore, the duty of the respondent to certify the name of Mr. Dunphy to the several county clerks within the fourth congressional district as the nominee of the democratic party.

WRIT DENIED.

IRVINE and RYAN, CC., not sitting.

RAGAN, C.

I concur in the conclusion reached only.

STATE OF NEBRASKA, EX REL. FRANK L. ROSE, V. JOEL A. PIPER, SECRETARY OF STATE.

FILED DECEMBER 16, 1896. No. 8794.

1. **Elections:** CERTIFICATES OF NOMINATION: OBJECTIONS: DUTY OF SECRETARY OF STATE. The secretary of state in passing upon objections to a certificate of nomination for a public office is not confined alone to the consideration of objections as to matters of form, but has the power to decide from extrinsic evidence whether the candidate named in such certificate was in fact nominated by a convention called and held in accordance with the precedents and usages of a political party which cast one per centum of the votes of the state at the last general election, or by a faction in good faith claiming to represent a party casting such a per centum of the vote of the state.
2. ———: ———: ———: ———. Upon the facts in this case it was *held* that the secretary of state properly refused to certify to the county clerks the names of certain candidates for office.

ORIGINAL application for *mandamus* to compel the secretary of state to certify to the county clerks the names of certain persons as republican nominees for certain offices. *Writ denied.*

E. H. Wooley, *W. M. Morning*, and *C. S. Rainbolt*, for relator.

John H. Ames, contra.

NORVAL, J.

This was an application by the state, on the relation of Frank L. Rose, for a peremptory writ of *mandamus* to compel the certification by respondent, as secretary of state, to the county clerks of the names of certain persons as republican nominees for electors of president and vice president and the several state offices. A submission was taken upon the pleadings alone, consisting of the application and the answer thereto of the respondent, shortly prior to the last general election, and an oral decision was then announced, the preparation of a written opinion having been delayed until now. For a proper understanding of the questions involved it is not deemed necessary to set out the pleadings; moreover, to do so would extend this opinion beyond reasonable limits. It should be stated here that after the submission a reply to the answer was filed without leave or consent of the court being first had and obtained, and it was accordingly eliminated from the record. The answer, *inter alia*, raised the same objections to the jurisdiction of the court which were presented and determined in *State v. Piper*, 50 Neb., 25, and which must be overruled for the reasons stated in the opinion therein filed.

It clearly appears that at a state convention of the republican party of this state, duly and regularly held in accordance with the practices of the party in such cases, and pursuant to a call executed and published by the chairman and secretary of its state central committee in obedience to an order by said committee, which convention was composed of more than 900 delegates and representing all the organized counties in the state, a full ticket of candidates for all the state offices and presidential electors to be voted at the general election in 1896 was nominated; that a certificate of said nominations, made out in conformity with law, was executed by

George W. Collins and H. M. Wells, respectively the chairman and secretary of said convention, and in due time filed in the office of the respondent, as secretary of state, and that no protest or objection to said certificate or to said nominations was ever presented or filed with him. Subsequently, and on the 7th day of October, 1896, there was filed with the respondent a certificate of nomination of other persons as candidates for the same offices, signed by F. L. Rose as chairman and R. A. Williams as secretary, purporting to be a certificate of nominations made by a convention of the republican party of the state, hereafter called the "Rose convention," held in the city of Lincoln on the 6th day of October, 1896, reciting and stating that said convention was held "pursuant to a call regularly issued for a Nebraska state republican mass convention, which state convention was composed of delegates and legal representatives duly qualified and chosen as such, and the legal representatives of the qualified electors and residents of the state of Nebraska representing the republican party in said state, which said political party, at the holding of the last election before the holding of such convention, polled more than one per cent of the entire vote cast in the state." On October 9, 1896, John P. Maule, a resident and elector of the state, filed with the respondent written objections to said last mentioned certificate of nomination and to the nominees therein named, and thereafter, upon due notice having been given to all persons interested therein, a hearing was had upon said protest before the respondent, who, upon the consideration of the evidence adduced by the respective parties, sustained said objections and declined to certify to the various county clerks of the state to be printed upon the official ballots the names of the persons mentioned in the Rose certificate. Relator being dissatisfied with this ruling and decision commenced this proceeding.

The secretary of state, at the time of his decision, made findings of fact and conclusions of law, which are set

forth in full in his answer herein, and which said findings he alleges are in all respects true. The findings are as follows:

"First—There was not held in said city of Lincoln on the 6th day of October, 1896, or at any time in said year after the first day of July, any convention composed of delegates and legal representatives duly qualified and chosen as such and the legal representatives of the qualified electors and residents of the state of Nebraska representing the republican party in said state.

"Second—I find that on the 3d day of October, 1896, one F. L. Rose, a private individual residing at Lincoln, Nebraska, but not having, or claiming to have, any official relation as committeeman or otherwise with the republican party in said state, caused to be published in the Omaha *World-Herald*, a newspaper published at Omaha, Nebraska, and in the *Evening Post*, a newspaper published at Lincoln, Nebraska, a notice, of which the following is a copy:

" 'LINCOLN, NEB., Oct. 3, 1896.

" 'We, the republicans of the state of Nebraska, reaffirm our allegiance to the time-honored principles of our party as enunciated by John C. Fremont, Abraham Lincoln, and its illustrious framers, and exemplified by the public life and utterances of James A. Garfield, John A. Logan, James G. Blaine, and other great leaders. To the end that the great principles which called for the grand old party of freedom and liberty shall not perish forever from the face of the earth, and that chattel slavery having been abolished by our party, a more galling subserviency to the money plutocracy of foreign nations and their tory allies on American soil, aided and abetted by corporate greed, shall not forever destroy a government of the people, for the people, and by the people, we invite the co-operation of all republicans who adhere to the original principles of the party to convene in mass convention at the city of Lincoln, at 10 o'clock A. M., on Tuesday, October 6, A. D. 1896, for the purpose of placing

in nomination candidates for the following offices to be voted for at the coming election to be held Tuesday, November 3, 1896:

" 'One governor,
" 'One lieutenant governor,
" 'One secretary of state,
" 'One auditor of public accounts,
" 'One treasurer,
" 'One attorney general,
" 'One superintendent of public instruction,
" 'One commissioner of public lands and buildings,
" 'One supreme judge, contingent four years,
" 'One supreme judge, contingent two years,
" 'One regent state university,
" 'Eight presidential electors,
" 'And for the transaction of such other business as may properly come before the convention.

" 'We hereby instruct the chairman of this conference to publish this call. F. L. ROSE,
" *'Chairman.'*

"Third—I find that between the hours of 10 o'clock A. M. and 2 o'clock P. M., on the 6th day of October, 1896, there assembled in a private room on the fourth floor of the Lincoln Hotel, in Lincoln, Nebraska, a number of persons, variously estimated at from thirty-five to fifty, but not exceeding the latter number; that those persons nor any of them, were not chosen or delegated to attend said meeting or any meeting on said day by any political organization or claimed or pretended political organization whatever, or by any person or persons acting or claiming or pretending to act by or under the authority of any political party, political organization, or political committee or committeeman, and that said assemblage was wholly voluntary and self-constituted; that the persons in charge of said room and in the management of said meeting actively concealed the place of said assemblage from the knowledge of the republican voters of said state and city, and from the public generally, and allowed

information thereof to be given only to such persons as were actually present thereat, and that at said meeting so held, and not elsewhere or otherwise, were the several persons, or any of them, mentioned in said purported certificate of nomination attempted or pretended to be or to have been put in nomination as candidates for any of said offices.

"Fourth—I find that during the entire time of the existence of said assemblage and for several hours prior thereto a large concourse of persons, several hundred in number, professing to be members of the republican party in said state and in sympathy with the sentiments expressed in said published notice and of the persons therein named, and all or nearly all of whom are and have been for many years actively affiliated with said republican party, were making active and diligent search and inquiry of the proprietors and managers of the theaters and public halls and of the clerks and proprietors of the several hotels in said city, and at the place of business of said Rose, for the purpose of ascertaining if possible the whereabouts of said Rose and the time and place of the holding or assembling of any meeting or convention pursuant to said notice; and that the persons making such inquiries and the public generally, except such persons as were in fact present at said assemblage, were unable to ascertain the place or time of said assemblage and remained ignorant thereof until after the same had dispersed.

"Fifth—I find that between the hours of 10 o'clock A. M. and 2 o'clock P. M., on said 6th day of October, 1896, the concourse of persons mentioned in the last preceding paragraph of these findings, being unable to ascertain the place of said assemblage, themselves assembled to the number of several hundred, but to what exact number I have been unable to ascertain, at the Capital Hotel, in the city of Lincoln, Nebraska, and organized, by the choice of Charles H. Gere, of Lincoln, Nebraska, as chairman, and Samuel E. Low, of Lincoln, Nebraska, as sec-

retary of said meeting, and thereupon proceeded to nominate a candidate for each of the several offices to be voted for at said general election to be held in this state on the 3d day of November, 1896. And thereafter, and on the said day of October, 1896, the said Charles H. Gere as such chairman and the said Samuel E. Low as such secretary duly made, executed, and filed in this office, in due and apparent conformity with law, a certificate of the nominations of all of said candidates so nominated by said assemblage of voters at the said Capital Hotel on said day, and that no objection or protest to said certificate of nomination has ever been made in writing or filed in this office.

"Sixth—I find that according to the customs and usages of the republican party in the state of Nebraska, no convention thereof could have been or can be regularly called or held, except upon the call or proclamation of the chairman and secretary of the republican state central committee of said party, they being first duly authorized in that behalf by a resolution of said committee, and that no such call has been made or authorized for the holding of a state convention of said party in said state on the 6th day of October, 1896.

"Seventh—I find that the said assemblage of persons in a room on the fourth floor of the Lincoln Hotel on the 6th day of October, 1896, was not attended by or composed of so many persons as one per centum of the entire vote polled in the said state at the last election before said date, nor did they represent any political party or any political organization or association which at the last election in said state before said date polled so many as one per centum of the entire vote in said state, and that of said assemblage the said F. L. Rose was chosen and acted as chairman, and the said R. A. Williams was chosen and acted as secretary, and that said persons were not either of them chosen as chairman or secretary of any other meeting or assemblage held in said city of Lincoln on said day."

Conclusions of law: "I find (1) that the said assemblage mentioned in the last preceding paragraph numbered seventh was not such an assemblage of voters, convention, or primary meeting as was permitted by law to nominate candidates for office to be voted for at the general election in said state to be held on the 3d day of November, 1896; (2) that the said purported certificate of nominations signed by the said F. L. Rose as chairman and R. A. Williams as secretary is fraudulent and void, and the names of none of the persons therein contained ought to be certified to the several county clerks or printed on the official ballots to be used at said election to be held on the 3d day of November, 1896, and, in conclusion, I sustain the said written objections to said purported certificate of nominations and order that the names contained therein be not certified to the several county clerks of this state or printed upon the official ballots to be used or voted at said election."

The foregoing findings of fact must, for the purposes of this case, be treated as true, since they were not controverted on the hearing by evidence or otherwise. (*State v. Piper, supra.*)

It was contended by counsel for relator, in argument, that the respondent exceeded his authority in holding invalid the Rose certificate. The duties and powers of the secretary of state in passing upon objections to certificates of nomination, in view of the previous decisions of this court upon the subject, ought not longer to be misunderstood. It is the settled law of this state that such officer, in the consideration of objections, is not confined to mere formal matters relating to certificates, but that the Australian Ballot Law contemplates that he may ascertain and decide from extrinsic evidence whether the candidates named in the certificate were in fact placed in nomination by a convention or assemblage of voters or delegates called and held according to usages of the party and claiming in good faith to represent a political organization which cast the requisite number of

votes at the last election. Furthermore, that he has no power to decide which of two rival conventions thus called and held is the regular convention of the party, but where two factions of a party make nominations by regularly called conventions, it is his duty to certify the names of the candidates certified to him in due form by the officers of either convention. (*State v. Allen*, 43 Neb., 651; *Phelps v. Piper*, 48 Neb., 724; *State v. Piper*, 50 Neb., 25.)

It is insisted that the case at bar is controlled by the last two authorities cited. If the facts in the case were the same, the conclusion would be irresistible that the secretary should have certified the nominees mentioned in the Rose certificate. But they are not alike, and the facts herein are plainly distinguishable from those in the two decisions mentioned. In each of those cases two conventions were regularly called and held in conformity with party precedent and usage, by rival factions of the democratic party, and nominations made, each branch of the party having an organization and claiming in good faith to represent the party. Upon those facts it was properly ruled that it was the duty of the secretary of state to certify both sets of candidates, since both conventions had apparently the same right to make nominations as if they had represented different political parties, and it was not the province of the secretary of state to decide between them. In the case under consideration, so far as disclosed from this record, relator's claim of validity of the nominations made by the alleged Rose convention is based upon the certificate of nomination alone, it not having been disclosed that said convention was called according to party usages, or by any person or body having the right to represent the republican party of the state, or that the convention itself was composed of persons who had been chosen by said party, or a faction thereof, as its delegates and representatives. On the contrary, it appears that the call for the alleged convention was issued by a person who had no authority

to represent said party in that behalf; that only three days' notice of the time when the convention was to be held was given, and that it omitted to designate the building in which it was to convene; that the precise place of meeting was concealed from the knowledge of the republican voters of the state, as well as the general public, notwithstanding diligent inquiry and search for the place of holding the convention was made by several hundred persons claiming to be republicans and in sympathy with the sentiments expressed in the published convention call; that said alleged nominations were made in a private room in one of the hotels of the city of Lincoln, by an assemblage of persons not to exceed fifty in number, none of whom had been chosen or delegated to attend thereat by any political party or organization; and that the certificate of nomination purports to emanate from a delegate convention, while the call was for a mass convention,—in brief, that the candidates named in the Rose convention call were not nominated by a convention or assemblage of republican voters brought into existence by the action of the machinery of the republican party of the state empowered to call conventions, or by the authority of any considerable number of republican electors, but in pursuance of a call made by a person who did not represent, or claim to represent, the regularly constituted organization. In the light of the facts disclosed by this record, the names of the nominees of said convention so called and clandestinely held were not entitled to be printed upon the official ballots, and to so hold is not deciding between regularly called rival conventions, nor does this conclusion conflict with any prior adjudication of this court, but is in perfect harmony therewith. If said nominations are legal and entitled to recognition, then our Australian Ballot Law was wrongly entitled. Instead of being "An act to promote the independence of voters at public elections," etc., it should have been designated "An act to promote the deception of voters at public elections." Although the courts will not de-

cide which of two rival conventions is the regular convention of the party, when both were called and held in accordance with the precedents and usages of the party, and each claiming in good faith to represent the party, since that is not a subject of judicial inquiry, yet the courts, in a proper case, will determine whether nominations were in fact made by a *de facto* convention of the party, even though to do so may lead to an investigation of political methods. As was said by the supreme court of Missouri (*State v. Lesueur*, 103 Mo., 253): "The same considerations which should induce courts of justice to maintain the purity of the ballot-box, when the final vote is taken, should equally operate with them to promote honesty and prevent and condemn fraud when a preliminary vote is taken or a nominating convention held. There can be no difference in principle in its application to the various situations mentioned. And though it is said that 'the Decalogue has no place in politics,' yet when the tribunals of the country are appealed to in matters having political complexion and bearing; when once they acquire jurisdiction in a proper way of such matters, they will administer justice, promote honest dealing, and condemn fraud precisely as they do when administering the law in cases sounding in damages or sounding in contract."

The conclusion we have reached finds some support in the judicial decisions of other courts. *State v. Weir*, 31 Pac. Rep. [Wash.], 417, was an application for a *mandamus* to compel the secretary of state to certify the name of N. H. Bloomfield as the regular nominee of the republican party for the office of superior judge for Clarke, Cowlitz, and Skamania counties. Delegates from two of the counties, duly chosen, nine in number, met together and placed in nomination Mr. Bloomfield, and certified such nomination to the secretary of state. The thirteen delegates who had been duly chosen by the republican party of the other county held a judicial convention and nominated one A. L. Miller as a candidate for superior

judge for all of the three counties for which a judge was to be elected, whose nomination was duly certified to the secretary of state. The court held, under provisions of a ballot law relating to nominations for public office the same as ours, that Bloomfield was not the nominee of the republican party for said office, and denied the writ. The court, in the opinion, say: "The plain intent of said section, when examined in the light of all the other sections upon the subject, makes it perfectly clear that the primary meeting or convention must be by or on behalf of the entire body of voters of the respective party who are to be allowed to vote at the election of the officers therein nominated." To the same effect is *State v. Rotwitt*, 46 Pac. Rep. [Mont.], 370. In *Baker v. Board of Election Commissioners*, 68 N. W. Rep. [Mich.], 752, it appears that the regularly called democratic state convention met at Bay City, Michigan, on August 25, 1896, and upon the same day and in the same city the convention of the people's party and union silver party convened. By an amicable arrangement the three conventions sat as one body and nominated a joint state and electoral ticket, which it was agreed would be called the "Democratic People's Union Silver Ticket," the people's party and the union silver party being together accorded the same number of votes as the democratic party. Subsequently, a mass convention composed wholly of democrats was held at Lansing, at which candidates for state offices and presidential electors were placed in nomination as a democratic ticket, but which last convention was not called or held under the auspices of any previous democratic state organization. It was held that neither of the tickets so nominated was to be considered as the regular democratic ticket, and, as such, entitled to the place on the ballot belonging to the ticket of the democratic party. Both upon principle and authority we are satisfied that the secretary rightly determined that the names of the nominees of the so called Rose convention were not entitled to appear upon the official ballot.

Two other questions were argued at the hearing, namely: First—The Rose certificate is insufficient on its face, because it purported to come from a delegate convention when the call was for a mass convention. Second—Under our Australian Ballot Law, nominations for state offices cannot be made by a mass convention composed of less than 500 voters, or one per centum of the total vote of the state cast at the preceding general election. The conclusion reached makes it unnecessary to express our views upon either of these propositions, and we refrain from doing so, notwithstanding, at the hearing, the majority of the court was of the opinion, and so announced, that the second proposition above stated was the proper interpretation of the law.

WRIT DENIED.

IRVINE and RYAN, CC., not sitting.

RAGAN, C.

I concur in the conclusion reached only.

E. C. ACKERMAN AND A. M. HEINTZE, APPELLEES, V. G. A. ACKERMAN ET AL., APPELLEES, AND CARPENTER PAPER COMPANY ET AL., APPELLANTS.

FILED DECEMBER 16, 1896. No. 7214.

1. **Attachment**: LEVY: RECEIVER. Even though a sheriff in possession of personal property for its safe keeping pending an application for a receiver is to be deemed to be a receiver, a proposition not determined, the levy of an attachment on a portion of such property without leave of the court is not void in the absence of any objection by the sheriff as custodian, or by the receiver, on that ground.

2. **Chattel Mortgages**: REGISTRATION. Where the evidence showed affirmatively that a chattel mortgage was withheld from record more than a month in pursuance of an agreement so to continue to withhold it unless some change or difficulty should occur in the business affairs of the mortgagor which would make it necessary

to protect the interest of the mortgagee, and the mortgagor was to notify the mortgagee of any financial difficulty the mortgagor might meet with, upon which notification the mortgage was to be filed, *held*, to sufficiently establish a fraudulent purpose of both parties to the mortgage such as to render it invalid and void as to creditors of the mortgagor.

3. **Receivers: SALE: TIME.** A decree required a receiver to sell the assets of an insolvent firm on a day named. The receiver, without other authority, advertised and sold such assets after the date fixed by the decree. *Held*, That such sale was absolutely void, and not merely irregular in such a sense that a confirmation over objections could render it valid.

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

L. D. Holmes and *Byron G. Burbank*, for appellants.

Breckenridge & Breckenridge, Cavanagh, Thomas & McGilton, Duffie, Crane & Van Dusen, Horton & Blackburn, Schomp & Corson, Isaac E. Congdon, J. M. Woolworth, and *Rich, O'Neill & Sears, contra.*

RYAN, C.

On the 10th day of August, 1893, E. C. Ackerman and A. M. Heintze began this action against G. A. Ackerman in the district court of Douglas county. These plaintiffs alleged that in 1887 they, with the defendant, had entered into partnership for the purpose of conducting a general printing, engraving, and lithographing business in the city of Omaha; that the defendant was the financial manager for the firm; that its business had been, until about January 1, 1893, conducted profitably, but that thereafter, as shown by its books, its operations were at a great loss, as plaintiffs alleged, of $1,000 per month. For the purpose of accounting for this condition of affairs it was further alleged that the defendant had injudiciously purchased supplies and machinery and had appropriated to his own use $6,000 of the assets of the firm without the knowledge of either plaintiff, and that, upon the discovery by the plaintiffs, on January 1, 1893, of

this misappropriation the defendant had promised to make restitution to the firm, but had wholly failed to perform this promise, and that at the time of filing the petition he was insolvent, and was refusing, upon demand, to make an accounting of the affairs of the aforesaid firm. It was therefore charged by plaintiffs that the firm was, at the time of the commencement of this action, unable to meet its obligations and was insolvent; that its indebtedness was a large amount, as to which plaintiffs had no means of knowledge, but charged the fact to be that it was at least $45,000, and that the assets were reasonably of the value of $65,000, but that, if they were sold at a sacrifice, these assets would be wholly inadequate to the payment of the aforesaid indebtedness. The eleventh paragraph and the prayer of the petition which followed immediately thereafter was as follows:

"11. Plaintiffs further show that unless the property of said copartnership is preserved intact and saved, great loss will ensue to the copartners and their creditors and the assets of said firm sacrificed.

"Plaintiffs therefore pray that an accounting may be ordered between the parties to this action and the said firm dissolved, and that a receiver be appointed by the court to take charge of all the property of said firm and collect the debts due to the said firm and hold the said property and assets and money collected subject to the further order of the court; and plaintiffs further pray that pending the application for a receiver herein the sheriff of Douglas county be ordered to take charge of all the assets and business of said firm of Ackerman Bros. & Heintze and hold the same intact, subject to the further order of the court, and for such further relief as equity and good conscience demand."

Contemporaneously with the filing of this petition there was filed a motion for the appointment of a receiver, who should take charge of "all the property and assets of the firm of Ackerman Bros. & Heintze, upon the grounds set forth in the petition." Afterward, on

the 10th day of August, 1893, Hon. A. N. Ferguson, one of the judges of the said district court, on the presentation of the petition and motion at chambers, ordered that the hearing of the application for a receiver be had on the 17th day of August, 1893, and that, pending such application for a receiver, George A. Bennett, sheriff of Douglas county, take possession of all the partnership property of Ackerman Bros. & Heintze, situated at 1116 and 1118 Howard street, Omaha, and hold it subject to the further order of the court. Pursuant to the terms of this order the sheriff at once took possession. Later still, on the same day, the Carpenter Paper Company commenced its action in the aforesaid court against the firm of Ackerman Bros. & Heintze for the recovery of judgment of the sum of $3,421.83. A portion of this had not matured at this time, and accordingly there was the necessary showing made for an attachment in such case, as well as with respect to the amount which was then past due, and there was thereupon at chambers made the following order:

"Upon reading the petition of the plaintiff herein and the affidavit in attachment of the plaintiff herein, and it appearing to the court that the plaintiff's claims are just, it is ordered by the court that an attachment be granted in this case against the defendant for the sum of five thousand dollars ($5,000) upon the execution by the plaintiff of an undertaking in attachment on the part of the plaintiff to the defendant as required by law.

"August 10, 1893. A. N. FERGUSON, *Judge.*"

Immediately after the issue of the writ of attachment, and on the day of its allowance, the sheriff, then being in possession of the entire establishment of the firm of Ackerman Bros. & Heintze, as already indicated, levied said writ on a portion of its personal property. Afterward, on December 9, 1893, in due order, there was a judgment by default in favor of the Carpenter Paper Company as prayed, and in satisfaction thereof the attached property was ordered sold. On November 22,

1893, the Carpenter Paper Company filed its petition of intervention in this action, whereby it described the nature of the debt owing it by the firm of Ackerman Bros. & Heintze and detailed the proceedings had up to that time for the collection of said indebtedness. The prayer of the Carpenter Paper Company's petition of intervention was that its attachment lien might be enforced in this case and declared a lien paramount to all other liens against the property which was then in the hands of a receiver, who, on August 23, 1893, had been appointed and accordingly had succeeded to the possession of the sheriff. In this petition of intervention it was shown, and it is not questioned, that the order appointing the receiver on August 23, 1893, was expressly conditioned that the delivery of personal property by the sheriff to the receiver was without prejudice to the lien of said intervenor and that said intervenor's lien was in no way impaired by the delivery of the property taken under the aforesaid attachment proceedings. We learn from the record that the receiver was authorized to operate the plant of Ackerman Bros. & Heintze for a period of about five months; that this was done at a loss, and that in this unsuccessful attempt there was manufactured and sold the greater part of the property upon which the attachment had been levied in the suit of the Carpenter Paper Company against Ackerman Bros. & Heintze. As this property was raw material, which by the receiver, under the direction of the court, was manufactured and sold for the benefit of the estate of the insolvent firm, and as the other personal property attached had been appropriated to the payment of the debts of the firm of Ackerman Bros. & Heintze, the Carpenter Paper Company is entitled to be paid as a preferred creditor, if its attachment was valid and effective. After the Carpenter Paper Company had procured its attachment to be levied by the sheriff there were other attachment suits begun and like levies were procured to be made. There were several interventions in this action predicated on these attach-

ments, and other interventions for the purpose of having recognized and enforced the liens created by chattel mortgages executed by the firm of Ackerman Bros. & Heintze. An extended description could subserve no useful purpose, and of necessity would cause confusion. They will, therefore, be unmentioned, except where a different course is required by the exceptional relations to this action of some of the parties concerned. On the final hearing no claim for a lien was recognized, but all creditors of the firm of Ackerman Bros. & Heintze, whether parties to this action or not, were permitted to present their claims, and the property in the hands of the receiver having been sold, a *pro-rata* distribution of the proceeds was ordered to be made to the respective claimants. From this judgment two intervenors, the Carpenter Paper Company and the George R. Dickinson Paper Company, alone have appealed. The rights and status of the parties other than these two appellants will therefore remain as established by the decree of the district court, except as these shall be affected by the relief to which these appellants shall be found entitled. As the rights of these two appellants cannot be determined together, we shall first consider those of the Carpenter Paper Company.

It is urged that when the attachment suit was begun by the Carpenter Paper Company all the property of the firm of Ackerman Bros. & Heintze was *in custodia legis*, and, therefore, that no levy could be made upon it. The possession of the sheriff was merely for the preservation of the property until the statutory time necessary before the appointment of a receiver should elapse, and that, too, in an action between the partners for the dissolution of their relations as such and the distribution of the joint assets, without the least reference to the rights of the creditors. At any time plaintiffs could dismiss this action and thereby terminate the legal custody invoked against the enforcement of the claims of the creditors. Until there was actually an intervention and this

was subsequent to the levy of the Carpenter Company's attachment, this power of the partners to resume possession of their assets continued unlimited. It can readily be seen that such proceedings might be made available to hinder and delay creditors, and there are in this record some circumstances suggestive of such a purpose. In reference to the possession of the sheriff pending the application for a receiver and the rights and remedies of creditors of the firm of Ackerman Bros. & Heintze, meantime, there has been cited by counsel for the Carpenter Paper Company the following very instructive and apposite cases: *Adams v. Hackett*, 7 Cal., 187; *Adams v. Woods*, 8 Cal., 153; *Adams v. Woods*, 9 Cal., 24; *Ross v. Titsworth*, 37 N. J. Eq., 333; *Ellicott v. United States Ins. Co.*, 7 Gill [Md.], 307. Especially with reference to the difference between the relations of a mere custodian of property to it, *pendente lite*, and those of a receiver regularly appointed, the cases of *Weber v. Weber*, 63 N. W. Rep. [Wis.], 757, and *Devlin v. Mayor*, 23 N. Y. Supp., 888, are quite in point. Upon this distinction, however, we are not required to base our conclusions, for if, for the sake of the argument, it should be conceded that the custodian must be regarded as a receiver for all purposes, nevertheless the result claimed would by no means necessarily follow. In *Flentham v. Steward*, 45 Neb., 640, it was held that while it was proper to obtain permission to sue where the defendant's property was in the hands of the receiver, yet that this permission was not jurisdictional, and that by the failure of the receiver to insist upon this condition precedent it was waived and that a judgment under such circumstances was valid. To the same effect is *Mulcahey v. Strauss*, 37 N. E. Rep. [Ill.], 702, and *Tobias v. Tobias*, 38 N. E. Rep. [O.], 317. The Carpenter Paper Company is therefore, in any event, entitled to the first lien among the creditors of Ackerman Bros. & Heintze upon the assets of that firm.

The George R. Dickinson Paper Company, on August 17, 1893, filed its answer in this action alleging that on

June 29, 1893, it was a creditor of Ackerman Bros. & Heintze in the sum of $10,238.29, evidenced by the promissory note of said firm; that on said date last named the firm of Ackerman Bros. & Heintze, for the purpose of securing said note, executed a chattel mortgage on certain property of said firm; that on August 11, 1893, said chattel mortgage was filed in the office of the county clerk of Douglas county; that immediately thereafter authority was placed in the hands of the sheriff, and ever since the said sheriff has retained said mortgaged property subject to the order of the court. In effect the prayer of the George R. Dickinson Paper Company was that the said chattel mortgage might be enforced against the property therein described as a lien paramount to that of every other creditor of Ackerman Bros. & Heintze. On the trial it was developed that at the time the said chattel mortgage was made there was executed a written agreement by the George R. Dickinson Paper Company to the effect that if certain payments were made certain renewal notes would as often be accepted for the balance due in each instance. Following this provision was this language in the said agreement: "In case said Ackerman Bros. & Heintze make said payments promptly, said extensions are to be made and the mortgage to secure said note will not be recorded, unless a failure is made in such payment or some change or difficulty shall occur in the business affairs of said Ackerman Bros. & Heintze which shall make it necessary to protect our interest, and unless we shall deem ourselves in great danger of loss." It was shown on the trial that credits were extended on the faith of appearances too favorable to Ackerman Bros. & Heintze by reason of this mortgage being withheld from record, which credits would not have been extended if the existence of the mortgage had been known. The mortgagee claims that the failure to record the chattel mortgage is available only to the parties who have made a levy on the chattels in said mortgage described. Before this mortgage was recorded the property included

therein was placed in the custody of the sheriff. In the suit wherein this property was intrusted to the sheriff the George R. Dickinson Company became a party and sought relief affirmatively as a creditor entitled to a preference by virtue of its mortgage. By assuming this attitude this mortgagee presented the question of the validity of its mortgage as entitling it to such affirmative relief. Parties adversely interested put the validity of this mortgage upon its proof by a general denial. It was not requisite that they should qualify themselves as though they were instituting proceedings to set aside this mortgage, neither was it necessary that they should plead that this mortgage was fraudulent. These issues were sufficiently presented by the tender of the Dickinson Company's mortgage by the Dickinson Company as valid with that fact properly disputed. According to the showing of this mortgagee it received this mortgage on June 29 and failed to publish its existence by filing until August 11 thereafter. It seems to be conceded by counsel for the George R. Dickinson Paper Company that, under the provisions of section 14, chapter 32, of the Compiled Statutes, it might be that this mortgage should be deemed fraudulent until it was filed, but that thereafter it should be deemed valid as though the filing had been immediately after it was made. We need not consider what the results might be if only the question of filing long after the making of the mortgage was involved, for that would be limiting our inquiry to the inference raised by statute from mere failure to act. Unfortunately for the mortgagee its motive for withholding this mortgage from record was dependent on no mere implication from non-action, for, contemporaneously with receiving this mortgage, it executed a written agreement that it would not be recorded unless some change or difficulty should occur in the business affairs of the mortgagor which would make the filing necessary to protect the interest of the mortgagee. A practical construction was given this language when the filing took place, for this was not un-

til the financial condition of the mortgagor had become so hopeless that a majority of the members had found it necessary to apply for a receiver and some of its creditors, by attachment suits, were seeking to enforce payment of their claims. The agent of the mortgagee who, in its behalf, signed the qualifying agreement which accompanied the making of the mortgage, testified that the mortgage was to be kept from record because the mortgagor's business would be injured if that course was not taken. One of the members of the firm of Ackerman Bros. & Heintze testified that the mortgage was not to be recorded until the mortgagor notified the mortgagee that the mortgagor had gotten into financial trouble such as would endanger the interests of the mortgagee. Under these circumstances the district court very properly found this mortgage fraudulent and void as to the creditors of Ackerman Bros. & Heintze, and with equal propriety permitted the mortgagee to prove its claim as a general creditor of said last named firm.

We have already quoted the prayer of the petition of Emil C. Ackerman and A. M. Heintze, among other things, for the appointment of a receiver and the preliminary order made in respect thereto. When the receiver was appointed it was, in the language of the order of appointment, "to take possession of all the partnership property and hold the same subject to the further order of the court; and until such further order said receiver is authorized and directed to run the said business of Ackerman Bros. & Heintze, to buy such stock and merchandise as is necessary to the proper conduct of the business, to hire competent help to assist him and to pay for the same, and to take charge of the books and books of account of the firm and collect the outstanding accounts." This order was made on August 23, 1893, and no other or different definition of the powers of the receiver was prescribed until the entry of the final decree, which contained the following language: "It is further ordered, adjudged, and decreed that all of the assets of the firm of Ackerman

Bros. & Heintze be sold at public sale to the highest bidder for cash on May 29, 1894." It seems that the receiver was prevented from making the sale on the day above named. He, nevertheless, without further authority, advertised the sale of the assets of the firm of which he was receiver, to take place on the 18th day of June, 1894, and accordingly on that and the following day made such sale. The George R. Dickinson Paper Company gave due notice of its objections to this sale before it was made. After the report of the receiver showing such sale further objections were duly filed by said company and overruled by the court. To this ruling the George R. Dickinson Paper Company duly excepted, and we have now presented the question as to whether or not this sale by the receiver was void. In *Nebraska Loan & Trust Co. v. Hamer*, 40 Neb., 281, it was held that a judicial sale must be held in accordance with the decree of the court. This rule was enforced in *Hooper v. Castetter*, 45 Neb., 67. In *Mallard v. Dejan*, 14 So. Rep. [La.], 238, it was held that an order for the sale of the property of minors at private sale did not authorize a public sale, notwithstanding the fact that a few hours before the sale took place it was directed by the court that the sale should be public. In *Tompkins v. Tompkins*, 39 S. Car., 537, it was held that where the decretal order for a sale of land fixed the date thereof, a sale made at any other time was unauthorized and void. This same general principle was enforced in *Williamson v. Williamson*, 52 Miss., 725, *Macy v. Raymond*, 9 Pick. [Mass.], 284, *Marr v. Boothby*, 19 Me., 150, and *Mason v. Ham*, 36 Me., 573. The confirmation was operative, it is true, to the extent of curing defects and irregularities. (*O'Brien v. Gaslin*, 20 Neb., 347; *McKeighan v. Hopkins*, 19 Neb., 33; *Neligh v. Keene*, 16 Neb., 407; *Crowell v. Johnson*, 2 Neb., 146; *Watson v. Tromble*, 33 Neb., 450.) In *Schribar v. Platt*, 19 Neb., 625, the following language was used by COBB, J., in delivering the opinion of this court: "The only thing settled or adjudicated in the proceedings and order of confirmation, so called, was as to the proceedings

of the sheriff and those acting under and with him in the levy, appraisement, advertising, making and returning of said sale." In the sale under consideration there was no mere irregular or defective proceeding, for this sale was without authority,—a mere nullity; and a confirmation over objection presenting that question could not be made to take the place, and answer the purpose, of an order, in advance, directing the sale to be made. We are aware that this conclusion involves serious consequences from the fact that the greater part of the bid of the purchaser has already been distributed among numerous creditors of the firm of Ackerman Bros. & Heintze, but this cannot be avoided. In *Tompkins v. Tompkins*, *supra*, a sale had been made of real property as entirely without authority, as was the sale made in this case, and before appeal to the supreme court the cash which had been paid by the bidder had been distributed. This sale was held to be void, but the court, in the exercise of its equity jurisdiction, treated the bid of the purchaser as a continuing bid with the payment thereof made in advance, and directed that a decretal order should be made, on circuit, whereby the master should be directed to sell the tract in dispute after twenty-one days' public advertisement, but that the sale should, in the advertisement and in its conduct, provide that no bid would be received of less than $3,250, the amount of the former bid, and that if no more than this was bidden, the former sale should be ratified, but that, if a greater bid should be received, it would be accepted, and from the proceeds thereof it was directed that the first purchaser was to be reimbursed the amount of his bid. This decretal order could scarcely be entered in this court with the same degree of confidence that it might if the subject-matter of the sale had been real property of which the status was not liable to have changed pending the appeal.

The judgment of the district court upon the issues joined in this case, and the order confirming the sale, are

reversed, the sale itself is declared null and void, and this cause is remanded for further proceedings not inconsistent with the views hereinbefore expressed.

REVERSED AND REMANDED.

WILLIAM R. KING, CITY TREASURER, V. STATE OF NEBRASKA, EX REL. SCHOOL DISTRICT NO. 1, HALL COUNTY.

FILED DECEMBER 16, 1896. No. 8525.

1. **Mandamus:** ALTERNATIVE WRIT. The facts recited in an alternative writ of *mandamus*, unaided by extrinsic matter, must be sufficient to entitle to the issue of a peremptory writ.
2. ———: ———: DEMURRER. On a demurrer to the recitations in the alternative writ, all such recitations must be considered; and the refusal of compliance upon certain grounds by the respondent will be *held* to excuse technical exactness in stating why, on other grounds, the relator is entitled to the relief sought.
3. **Schools:** FINES AND LICENSE FEES: DISTRIBUTION. Where fines, penalties, or license moneys are in the hands of the treasurer of a city of the first class having over 8,000 and less than 25,000 inhabitants, such moneys are properly distributable among the common schools which territorially constitute a part of the city.

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

George H. Thummel, for plaintiff in error.

Charles G. Ryan, contra.

RYAN, C.

An application for a *mandamus* was made in the district court of Hall county on the relation of school district No. 1 to compel the defendant to pay certain money. The alternative writ recited the facts in this language: "It has been suggested to this court by the affidavit of Henry

Giese, treasurer of school district No. 1, Hall county, relator herein, that you have during the period between the 9th day of April, A. D. 1895, and the 10th day of July, A. D. 1895, both days inclusive, received, collected, and had paid over to you, as city treasurer of the city of Grand Island, Nebraska, the sum of $8,638.20 as fines, penalties, and licenses paid in said city, which city is a city of the first class governed by the provisions relative to cities over 8,000 and less than 25,000, and that the schools of said city are under the direction and control of a board of education consisting of nine members, as by the statute provided, and * * * it appears that, under the statutes of the state of Nebraska for such cases made and provided, the sum of $258.91 is due to the said school district No. 1, Hall county, Nebraska, of said moneys so collected and received, as its *pro rata* share according to the school census taken for the year 1894 in said school district No. 1, and in said school district of Grand Island, school districts Nos. 30, 38, and 74, which districts form in part or whole the corporate limits of said city of Grand Island, and it further appearing to the court that the relator made due and legal demand upon you for the said sum of $258.91, its *pro rata* share of the said moneys so collected and received by you as above set forth, and that you refused, and still do refuse, to pay to the said relator, or its treasurer, the said sum of $258.91, or any part thereof, but hold the same claiming that said money belongs in whole to the school district of the city of Grand Island, in the county of Hall, in the state of Nebraska, and that you did then and still do refuse to pay to said relator, or its treasurer, the said sum, or any part thereof, as by law in such cases made and provided, and that the relator is unable to procure from you the said money, or any part thereof, according to the duly filed petition of said relator heretofore filed in this court." The above recitations were followed by an alternative order requiring performance within the time therein specified, or that cause be shown for not

complying with such mandate. To the facts above recited as being contained in the alternative writ the defendant filed a general demurrer, which was overruled, to which ruling he excepted, and, electing to stand on his demurrer, a peremptory writ was ordered to issue.

Section 653 of the Code of Civil Procedure provides that no other pleading or written allegation is allowed than the writ and answer, and we must therefore determine the sufficiency of the facts upon the recitations of the writ unaided by anything which preceded it. Whether these were sufficient to entitle to the relief prayed is not wholly free from doubt. It is recited that "it appears that, under the statutes for the state of Nebraska for such cases made and provided, the sum of $258.91 is due to school district No. 1 of Hall county, Nebraska, of said moneys so collected, as its *pro rata* share according to the school census taken for the year 1894 in said school district No. 1, and in the said school district of the city of Grand Island, school districts Nos. 30, 38, and 74, which said districts form in part or whole the corporate limits of the city of Grand Island." This we admit was faulty, in that it did not state in detail the facts from which it appears how the sum of $258.91 became due to school district No. 1. The language last above quoted from the alternative writ bordered very closely upon mere conclusions as distinguished from statements of fact. The defendant, however, demurred to these statements, and a demurrer should not be made to perform the functions of a motion for a more specific statement. It admitted to be true all the facts stated in the alternative writ, one of which was that respondent, as treasurer of the city of Grand Island, had collected a certain sum as fines, penalties, and licenses, of which, under the statutes of this state and its *pro rata* share according to the school census taken for the proper year, it was the duty of the respondent to pay to the district No. 1 the sum of $258.91; that on demand the respondent had refused to pay any part of the

sum due said district, claiming that said money belonged wholly to the school district of the city of Grand Island. It appears to us that as defendant based his refusal to pay this sum on the ground that the school district of the city of Grand Island was alone entitled to it, the same technical exactness in describing the right of district No. 1 to this particular amount ought not to be required, as the defendant might insist upon if there was a question made as to what the school census disclosed. The respondent was not required to pay to school district No. 1 without satisfactory evidence. This it was entitled to receive, but as he saw fit to base his refusal solely on another ground, the sufficiency of that ground to justify the refusal is all that at this stage of the proceedings he should be permitted to question. We therefore conclude that in so far as the technicality of statements in the writ is thereby involved, there is no reversible error in overruling the demurrer.

This brings us to the next contention of the plaintiff in error, and that is that the views expressed by this court in *State v. Fenton*, 29 Neb., 348, are applicable to the case under consideration. The first criticism under this head is that the defendant acted as city treasurer and as treasurer of the school district, wherefore it is urged that it does not appear that he should be required to make the payment demanded. The recitation in the writ is that the collection was made as treasurer of the city of Grand Island. This recitation, for the purposes of the demurrer, is conclusive of the capacity in which the respondent was acting when he received the money which it is now sought to compel him to pay. Again, it is urged that *State v. Brodboll*, 28 Neb., 254, and *State v. Fenton*, *supra*, were decided under the statute applicable to school districts which levied taxes and collected their revenue in the same manner as did any other school district in their respective counties. We have been informed of no reason why the mere fact that the village in which was situated either of these school districts did not, as such, levy

taxes for the support of schools should control the following unequivocal language of section 5, article 8, of the constitution: "All fines, penalties, and license moneys arising under the general laws of the state shall belong to and be paid over to the counties, respectively, where the same may be levied or imposed; and all fines, penalties, and license moneys arising under the rules, by-laws, or ordinances of cities, villages, towns, precincts, or other municipal subdivisions less than a county shall belong to and be paid over to the same, respectively. All such fines, penalties, and license moneys shall be appropriated exclusively to the use and support of the common schools in the respective subdivisions where the same may accrue." In this case it is merely sought to compel the treasurer of Grand Island, one of the above referred to subdivisions of the state, to pay a school district composing a part of this subdivision the *pro rata* share of the money to be used for school purposes to which it is entitled. To this demand it is no answer to say that Grand Island is governed by a board consisting of nine members, and raises school revenues by virtue of a power of taxation vested in this subdivision and denied to country school districts. Another matter discussed by the defendant is the holding of the two cases last cited, that the division of school moneys arising from fines, etc., should be made equally between the school districts of which the village in which they are situated is composed. Under the statutes as they then stood there was no ratio of apportionment prescribed. Since that time there has been enacted chapter 63, Laws of 1895, of which act the first section is as follows: "That in cities and villages whose corporate limits form, in whole or in part, more than one school district, all money derived from fines, penalties, and licenses shall be apportioned to these several districts in proportion to the number of persons of school age residing in each district included, in whole or in part, in said corporate limits, according to the school census taken last before any such apportionment." This

change in the statute necessitated the method of apportionment indicated by the language of the alternative writ, and with this modification the language of the opinions referred to is applicable to the case under consideration. The judgment of the district court is

AFFIRMED.

MARY SHAFER, APPELLANT, V. EUGENE O. HOSTETLER ET AL., APPELLEES.

FILED DECEMBER 16, 1896. No. 6942.

Review: CONFLICTING EVIDENCE: AFFIRMANCE. There is presented by this appeal a mere question of fact determined by the district court upon fairly conflicting evidence.

APPEAL from the district court of Kearney county. Heard below before BEALL, J. *Affirmed.*

Ed L. Adams, for appellant.

Greene & Hostetler, contra.

RYAN, C.

Mary Shafer brought this action in the district court of Kearney county against the appellees herein to procure a decree canceling a deed executed by herself, with her husband, to the firm of Green & Shipman, and to have set aside a deed made by said firm to E. O. Hostetler. From the judgment, which denied the relief prayed, she has appealed to this court.

It is urged that there are presented two questions, of which the first is whether or not the lot conveyed was at the time of such conveyance a homestead; and second, whether or not appellant was then of sound mind. It is not questioned that she signed the deed and acknowledged it, if she was mentally capable of such acts, so

that in reality it is immaterial whether the lot at the time was a homestead or not. There is, therefore, in this case but one question, and that is whether or not, when appellant joined her husband in executing and acknowledging the deed, she was of sound mind. This question was one of fact, settled adversely to her by the district court upon fairly conflicting evidence. The judgment is therefore

AFFIRMED.

CHARLES W. EDGERTON V. STATE OF NEBRASKA, EX REL. V. O. STRICKLER.

FILED DECEMBER 16, 1896. No. 6955.

Review: SUBSTANTIVE RIGHT: DISMISSAL. Where the judgment of the district court required a justice of the peace to exercise his functions within a designated precinct, and by error proceedings it is sought to review only this part of the said judgment, and it is conceded that the term of office of the plaintiff in error has expired, the petition in error is dismissed as presenting no question of an existing substantive right of the plaintiff in error.

ERROR from the district court of Douglas county. Tried below before AMBROSE, J. *Dismissed.*

George G. Bowman and *B. S. Baker*, for plaintiff in error.

V. O. Strickler, *contra.*

RYAN, C.

In this proceeding plaintiff in error seeks to have reviewed that portion of the judgment of the district court of Douglas county against him, which judgment was in the following language: "It is therefore considered by the court that a peremptory writ of *mandamus* issue against said defendant, Charles W. Edgerton, commanding him to cease from exercising any of the functions

of justice of the peace in the city of Omaha, and that he hereafter perform all the functions and duties of a justice of the peace outside the city of Omaha, and in and for the precinct of West Omaha, in and for which he was elected as a justice of the peace." In his brief, plaintiff in error says that his term of office has expired, and that "An honored successor sits unchallenged in his place." The judgment for costs is not assigned as erroneous in his petition in error, and there remains solely the questions as to how and where the plaintiff in error should perform the duties of an office which, so far as he is now concerned, has ceased to exist. As there is presented upon the record no existing substantive matter of right of plaintiff in error for our consideration, his petition in error is

DISMISSED.

MATILDA BRASCH, APPELLEE, V. HERMAN BRASCH, APPELLANT.

FILED DECEMBER 16, 1896. No. 6945.

1. **Pending Actions.** Within the meaning of section 12, chapter 25, Compiled Statutes, an action is pending from its commencement until its final determination on appeal or error, or until the time fixed by statute for prosecuting an appeal or an error proceeding has expired.

2. **Divorce:** ALIMONY PENDENTE LITE: DISCRETION OF COURT. What sum a husband may be required to pay to his wife for her support during the pendency of a divorce suit for her "expenses" in prosecuting or defending the action, for counsel fees, and whether such sums shall be paid before the final hearing of the action and as a condition precedent to the right of the husband to further prosecute or defend, are matters within the discretion of the district court.

3. ———: ———: ———. It is equally within the discretion of the court to postpone until the final hearing of the case allowances made and then render a decree against the husband therefor.

4. ———: ———: ———. Allowances made in a divorce suit by a dis-

trict court for the temporary support of the wife for "expenses" and attorney's fees will not be disturbed unless it appears that the court abused its discretion.

APPEAL from the district court of Madison county. Heard below before JACKSON, J. *Affirmed.*

Robertson, Wigton & Whitham, for appellant.

Powers & Hays, contra.

RAGAN, C.

In the district court of Madison county, Matilda Brasch sued her husband, Herman Brasch, for a divorce. As a basis for her action she averred that her husband had been guilty of extreme cruelty toward her and was physically incompetent at the time of their marriage. The district court by its decree dismissed the action of Mrs. Brasch and taxed the costs of the action to her husband, and at the same time awarded her a decree against him for the sum of $100 for "costs and expenses incurred in the prosecution of the suit." From this part of the decree Herman Brasch appeals.

The argument is made that the court having dismissed the wife's action, was without authority to render a judgment against the husband for the "costs and expenses" incurred by the wife in the prosecution of the suit. Section 12, chapter 25, Compiled Statutes, is as follows: "In every suit brought either for a divorce or for a separation the court may in its discretion require the husband to pay any sum necessary to enable the wife to carry on or defend the suit during its pendency, and it may decree costs against either party, and award execution for the same," etc. The theory of appellant's counsel seems to be that this judgment of the district court awarding the wife "costs and expenses" incurred in the prosecution of the suit could have been made only by the court before the final decree was pronounced; or, in other words, that the decree appealed from was not

rendered during the "pendency" of the action within the meaning of the statute quoted above. We do not think this contention is tenable.

In *Wegman v. Childs*, 41 N. Y., 159, it was held that an action was pending, though judgment had been recovered therein, so long as such judgment remained unsatisfied. While no provision of our Code declares for what length of time an action shall be deemed pending, we think that it pends at least from its commencement until its final determination on appeal or error, or until the time fixed by statute for prosecuting an appeal or an error proceeding has expired; and that the order appealed from here was made during the pendency of the action in which it was made, within the meaning of the statute quoted above. (*Link v. Connell*, 48 Neb., 574.) Doubtless a district court, in a divorce suit, before the trial thereof, is invested with authority, upon application and a showing being made therefor, to order the husband to pay to the wife sufficient money to support her during the pendency of the litigation; to pay her reasonable counsel fees and other expenses necessary to enable her to prosecute or defend the action; and the court may compel the husband, as a condition precedent to further prosecute or defend his suit, to comply with the order made. But it by no means follows that if such an order for suit money or temporary alimony is not made by the court before the trial of the case that the court is divested of jurisdiction or authority to award the wife suit money or temporary alimony in the decree rendered. Or, to paraphrase the language of Bishop, the district court may make up by its decree at the close of the suit what was lacking in justice during its progress.

The Code of Civil Procedure of the state of New York provided that such allowances may be made from time to time during the pendency of an action for divorce as are necessary to enable the wife to carry on or defend the action. Construing this the court of appeals of that state, in *McBride v. McBride*, 23 N. E. Rep. [N. Y.], 1065,

held that where a judgment of divorce had been awarded the wife and the husband had appealed, that the court had authority to make an order directing the husband to pay such sums as might be necessary to enable the wife to defend the appeal.

Section 137 of the Code of Civil Procedure of the state of California provides that when an action for divorce is pending the court may in its discretion require the husband to pay, as alimony, any money necessary to enable the wife to support herself or her children or to prosecute or defend the action. *Bohnert v. Bohnert*, 27 Pac. Rep. [Cal.], 732, was an action for divorce in which a decree was rendered against the wife. The supreme court of California held that the district court in which the decree was pronounced was invested with authority to make an order compelling the husband to pay into the court a sum of money sufficient to enable the wife to employ counsel and pay the expenses for prosecuting an appeal.

O'Brien v. O'Brien, 19 Neb., 584, was an action brought by a wife to modify or set aside a decree of divorce, already granted in a suit between herself and husband, on the grounds that such decree had been obtained by fraud, and this court held that the district court in which the action was brought had authority to require the husband to pay into court a reasonable sum to enable her to prosecute the action.

Griffin v. Griffin, 47 N. Y., 134, is an instructive case as to the authority of a court of equity upon the final hearing of a divorce case to award, in addition to a decree disposing of the action, a further decree against the husband for expenses incurred by the wife for counsel fees and otherwise in litigating the action in her behalf. In that case the husband brought suit against the wife to annul their marriage contract upon the grounds that at the time of making the same she had a former husband living. It appears that prior to the rendition of the decree no order of the court was made awarding the wife

temporary alimony or suit money, but when the court rendered its final decree disposing of the action, and as a part thereof, it awarded her counsel fees of $1,200 and $929.50 for other expenses incurred by her in defending the action and decreed that the husband pay said sums to the wife. From this part of the decree the husband appealed. A statute of New York, in force at that time, provided that suits to annul a marriage should be by bill in chancery and should be conducted in the same manner as other suits prosecuted in courts of equity; and that the court should have the same power to award issues, to decree costs, and to enforce its decrees as in other cases. Another statute provided that in every suit brought for a divorce or separation the husband might be required to pay any sum necessary to enable the wife to carry on the suit during its pendency. The court of appeals, construing the first of the statutes quoted above, held that it contained no express authority authorizing the court in an action for divorce to award counsel fees or expenses on a final decree unless such authority was embraced in the term "costs;" and in construing the second statute quoted held that its provisions were only applicable to cases in which the wife had brought the suit; but the court said: "Yet it has been the constant practice of the courts of chancery, both before and since the revised statutes, to make equitable provision for all these matters; and in so doing, it has been guided by the decisions of the ecclesiastical courts of England in similar cases. * * * This has not been done upon the theory that the court of chancery of this state was vested with the jurisdiction of the ecclesiastical courts of England in matrimonial cases, or that * * * it ever possessed any jurisdiction in cases of divorce other than that which was conferred by our own statutes, but upon the ground of the general equitable jurisdiction of the court, and also that when our statutes did confer jurisdiction upon the court of chancery, in those actions for divorce which by the English law are solely cognizable in the ecclesi-

astical courts, the grant of that jurisdiction carried with it by implication the incidental powers which were indispensable to its proper exercise and not in conflict with our own statutory regulations on the same subject." And the court concluded that although no statute existed in New York authorizing in express terms the decree rendered by the *nisi prius* court, yet that court, as a part of its general equity jurisdiction, had authority to award the wife in the decree a sum of money sufficient to cover her expenses in defending her action and for paying her counsel.

But it is to be observed that section 12 of our statute quoted above differs from the New York statute just quoted in this respect: The language of the New York statute is that the husband may be required to pay any sum necessary to enable the wife to carry on the suit, while our statute provides that the husband may be ordered to pay any sum necessary to enable the wife to carry on or defend the suit. So that if express statute is necessary to invest the district court with authority to make a husband liable for the "expenses incurred" by a wife in prosecuting or defending an action for divorce it is found in section 12, chapter 25, quoted above. What sum a husband may be required to pay to his wife for her support during the pendency of a divorce suit, for her reasonable and necessary expenses in prosecuting or defending the action, for counsel fees, and when such sums shall be paid,—*i. e.*, whether before the final hearing of the action and as a condition precedent to the right of the husband to further prosecute or defend,—are matters entirely within the discretion of the district court; and it is equally within the discretion of that court to postpone until the final hearing of the case the allowance, if any, made the wife for expenses and counsel fees in prosecuting or defending the action, and to render a judgment or decree against the husband at the time of disposing of the suit for such sum as appears to be reasonable and necessary; and the allowance made by the district court

for the temporary support of the wife or for expenses and attorney's fees will not be disturbed unless it appears that the court has abused its discretion. (*Bohnert v. Bohnert*, 27 Pac. Rep. [Cal.], 732; *Graves v. Graves*, 33 N. E. Rep. [O.], 720; *Haines v. Haines*, 35 Mich., 138; *Burgess v. Burgess*, 25 Ill. App. Ct., 525.)

DECREE AFFIRMED.

C. E. BATES V. PHŒNIX PUBLISHING COMPANY.

FILED DECEMBER 16, 1896. No. 6918.

1. **Justice of the Peace:** APPEAL: AMOUNT OF CLAIM. Whether the judgment of a justice of the peace is appealable is made by section 985 of the Code of Civil Procedure to depend upon the amount claimed by either the plaintiff or defendant in the bill of particulars filed by him before such justice, and not upon the amount for which either party may recover a judgment.
2. ———: ———: TRANSCRIPT. For the purpose of determining whether it has jurisdiction to entertain such an appeal, the district court must look, and look only, to the transcript certified to it from the justice of the peace.

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

B. F. Thomas, for plaintiff in error.

I. J. Dunn, contra.

RAGAN, C.

The Phœnix Publishing Company recovered a judgment against C. E. Bates before a justice of the peace of Douglas county. Bates perfected an appeal to the district court. Thereupon the publishing company moved to dismiss the appeal, on the grounds "that this action is one that is not subject to appeal under the statutes, for the reason that the same is a civil action

for money and was tried in a justice court before a jury, and the amount claimed was less than twenty dollars." The district court sustained this motion and entered an order dismissing the appeal, to review which Bates prosecutes here a petition in error.

Section 985 of the Code of Civil Procedure provides: "If either the plaintiff or defendant, in his bill of particulars, claims more than twenty dollars, the case may be appealed to the district court; but if neither party demands a greater sum than twenty dollars, and the case is tried by jury, there shall be no appeal." The transcript of the proceedings had before the justice of the peace recites that the publishing company filed its bill of particulars asking judgment against Bates for $18.75 "upon a certain written contract;" that Bates filed a counter-claim asking judgment against the publishing company for $25, for damages sustained by him by reason of false statements contained in the said "sun and pen light sketches." No pleadings were filed by either party in the district court. Whether the judgment of the justice of the peace was appealable is made, by the section of the Code quoted, to depend upon the amount claimed by either the plaintiff or the defendant in the bill of particulars filed by him before the justice, and the jurisdiction of the district court is shown by the transcript of the justice; and such transcript of the proceedings had before the justice of the peace, certified to the district court, was the only thing to which the district court could look to determine its jurisdiction. That transcript recited that the defendant, before the justice of the peace, filed a counter-claim, claiming judgment against the plaintiff below for $25, and the claim made the judgment rendered appealable and invested the district court with jurisdiction. (*Kingsbury v. Franz*, 40 Neb., 400; *Moise v. Powell*, 40 Neb., 671.)

It is said here by counsel for Bates that the counter-claim interposed by him was for an alleged tort committed by the publishing company, and it seems to be his

theory that the district court was justified in entirely disregarding this counter-claim and in considering the case as if none had been filed. But suppose the subject of the counter-claim was the tort of the publishing company, still, if it constituted a cause of action in favor of Bates and against the publishing company, and arose out of the contract or transaction made the subject of the publishing company's bill of particulars, or if it was connected with the contract upon which the publishing company sued, it was then a counter-claim that might have been legally urged as a defense to the action of the publishing company. (Code of Civil Procedure, sec. 101.) We do not know whether the counter-claim filed by Bates stated a cause of action in his favor against the publishing company, and one that he might urge as a defense to the publishing company's action, as no copy of that pleading is in the record. If the publishing company had repleaded in the district court, and Bates had then filed his counter-claim therein, the district court would have been in a position to determine whether the alleged counter-claim was a valid one, and one that might be urged as a defense to the publishing company's action; and had it then appeared to the court that the counter-claim urged by Bates was not a cause of action existing in his favor and against the publishing company, or, if a cause of action, that it did not arise out of the contract or transactions made the basis of the publishing company's action, or was not connected with that cause of action, then the district court might have struck that counter-claim or answer out; but even then the district court would not have been justified in dismissing the appeal on the grounds that the judgment of the justice of the peace was not appealable, and that it, the district court, was without jurisdiction, as the defendant in the justice court, having filed a bill of particulars and claimed a judgment against the plaintiff below for more than $25, by that act made the judgment rendered below an appealable one, invested the district court with juris-

diction to hear the appeal, and was entitled to have the district court say, on appeal, as a matter of law, whether his counter-claim filed below was a valid one, and the power to so determine was jurisdictional.

It must be borne constantly in mind that section 985 of the Code makes the right to appeal from a judgment of a justice of the peace to depend upon the amount claimed by either a plaintiff or defendant in his bill of particulars, and not upon the amount which either the plaintiff or the defendant may recover a judgment for before the justice; and the appellate jurisdiction of the district court depends upon the question as to whether the judgment of the justice of the peace was appealable, and to determine that question, in the absence of new pleadings before it, the district court must look, and look only, to the transcript certified to it from the justice of the peace. This section of the Code is analogous to the acts of congress which made the right to remove an action brought in a state court to a federal court depend upon the amount in controversy. The judiciary act of 1789 provided, among other things, that if a suit should be commenced in a state court by a citizen of the state against a citizen of another state, and that the matter in dispute exceeded the sum or value of $500, exclusive of costs, that the defendant, upon complying with certain other provisions of the act, might remove the case to the federal court. A citizen of Kentucky brought a suit to the court of that state against a citizen of another state, and claimed, in his declaration, damages in the sum of $1,000. The state court denied the application of the defendant for an order removing it to the federal court, and the suit proceeded to judgment in the state court, where the plaintiff recovered $420. This judgment having been affirmed by the supreme court of Kentucky, the defendant carried the case to the supreme court of the United States, and that court, construing the judiciary act, held that the amount of damages claimed by the plaintiff in his declaration was the sum or value of the matter in

dispute; that it was the claim made by the plaintiff in his declaration which invested the defendant with a right to remove the case to the federal court, and that this claim of the plaintiff in his declaration was the only thing to which the federal court should look to determine its jurisdiction; that is, to determine whether the case was removable. (*Gordon v. Longest*, 16 Pet. [U. S.], 97.)

We think, in the case at bar, that the judgment rendered by the justice of the peace was appealable; that when the appeal was perfected the district court had jurisdiction of the action, and that it erred in dismissing the appeal, and its judgment is reversed.

REVERSED AND REMANDED.

GEORGE W. EGGLESTON, APPELLEE, V. JOHN D. SLUSHER ET AL., IMPLEADED WITH HANNAH BURCHAM, APPELLANT.

FILED DECEMBER 16, 1896. No. 6927.

1. **Husband and Wife:** OWNERSHIP OF PROPERTY. Under the common law, in force in this state prior to the taking effect of the Married Woman's Act, June 1, 1871, the wife's chattels became those of the husband and her choses in action became his when reduced to possession.

2. ———: ———: PROCEEDS OF INSURANCE POLICY: RIGHTS OF CREDITORS. Prior to 1871, a wife received moneys from the estates of her relatives, which she immediately delivered to her husband, who invested them in property in his own name. Certain of this property was insured against fire. It was destroyed by fire and he executed an assignment of the policy to his wife, ostensibly for the purpose of repaying her moneys so by him received. It was not shown that when the husband received the money there was any agreement between him and his wife for its repayment, or that it should be treated as a loan. In a contest between the wife and the husband's creditors, *held*, that the money became his under the law as it existed when it was received; that the subsequent assignment of the policy of insurance to the wife was without considera-

tion, and that the equities of creditors who had also procured assignments of the policy, or liens by garnishment proceedings upon its proceeds, were superior to those of the wife.

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

Stevens & Cochran, for appellant.

R. D. Stearns, F. A. Boehmer, and *Ricketts & Wilson*, *contra.*

IRVINE, C.

This was an action by Eggleston against John D. Slusher and others, the object of which was to have the proceeds of a certain policy of fire insurance, issued in favor of Henry Burcham, applied to the satisfaction of a judgment recovered by Eggleston against Burcham. There were several claimants of the fund, and the case can perhaps be best elucidated by stating, without reciting the numerous pleadings, the claims of the interested parties, together with a preliminary statement of certain facts not in dispute.

Henry Burcham was, in 1891, the apparent or actual owner of a grain elevator, together with certain machinery, grain therein, and other property connected therewith, on which he held a policy of insurance for $3,000. This property was destroyed by fire. After the loss Burcham's rights under the policy were assigned to the defendant Slusher to secure certain indebtedness from Burcham to Slusher. Slusher prosecuted an action against the insurance company, recovering a judgment, which was paid by the insurance company. After deducting attorneys' fees, together with another claim upon the fund, the validity of which is not disputed in the evidence, there remained in the hands of Slusher $1,950.35, upon which Slusher claims only a lien for $365; the remainder he is willing to pay to the party adjudged entitled thereto. Hannah Burcham, the wife of Henry

Burcham, claims this fund, because she received from sources other than by gift from her husband certain moneys, which she immediately paid to her husband, under an agreement, as she claims, that he would repay the same, with six per cent interest. After the loss by fire he assigned to her the policy of insurance for the purpose of securing and paying to her said debt. This assignment, if valid, antedated all other claims upon the fund, so far as they are evidenced by assignments of or garnishments upon the fund. The plaintiff, Eggleston, claims the fund by reason of an assignment thereof made to him after the loss, and subsequent to the assignment to Slusher. The principal contention, and, in fact, the only one argued in the briefs, is between Mrs. Burcham and Eggleston. Other parties claim liens upon the fund by virtue of garnishments issued after judgments rendered against Henry Burcham. The district court entered a decree finding generally in favor of the plaintiff, and then finding specially, among other things, that Henry Burcham and Hannah Burcham were married in 1867, "and that by the year 1871 she had received from her father's estate about $2,600, which was, immediately upon its receipt, turned over to her husband, Henry Burcham; that all of said money has been used by said Henry Burcham, either in his business, conducted entirely in his own name ever since that date, or used in purchasing land, and that the title to said land has been taken in every instance in his own name, and remained in his name until disposed of by him; that no part of said $2,600 so turned over to said Henry Burcham has ever been repaid to her, except $1,000 paid by Jacob Roche in the spring of 1893." The court further found specially that by reason of Mrs. Burcham's permitting her husband to invest the money in his own name, and to hold out the property thereby acquired by him as his own for more than fifteen years, she had estopped herself from claiming it as against her husband's creditors. Accordingly it was decreed that out of the fund in contro-

versy, after paying the costs, the sum of $365 should be paid to Slusher, and that the plaintiff and other creditors should then be paid in accordance with their claims as against that of Mrs. Burcham. From this decree Mrs. Burcham appeals.

The argument takes a wide range, covering, in a more or less specific manner, many of the problems which confront the court whenever a married woman becomes involved in litigation with creditors of her husband. In order to determine the case it is not necessary to consider many of these arguments. It will be observed that Mrs. Burcham's claim rests on the ground that with money which she obtained by inheritance she made her husband a loan, that he used this money in business, and that the assignment of the policy was an act on his part intended to secure her a preference, and to repay the loan. It may be conceded, as many of our cases indicate, that the effect of our Married Woman's Act is to validate such transactions between husband and wife; that when they occur they are to be measured according to the rules of law which govern similar transactions between strangers; that while it is true that the relationship existing between the parties shifts the burden of proof as to *bona fides*, and may raise other questions involving complications, still, when such exceptional facts arising out of the married relation are eliminated, the fundamental rules of law are the same, and a husband has the same right to prefer his wife as any other creditor, good faith being the main consideration for the courts. In order, however, for a wife to claim the advantage of such a conveyance, it is not sufficient for her to show that she has supplied her husband with money or property. The relationship of debtor and creditor must be established. The special findings in this case do not establish such a relationship. The finding merely is that "by the year 1871 she had received from her father's estate about $2,600, which was, immediately upon its receipt, turned over to her husband." The finding thus far is amply sus-

tained by the evidence; but it does not involve a finding that the "turning over" was by virtue of any contemporaneous agreement that it should be treated as a loan and repaid, with or without interest. There is a general finding for the plaintiff, and the evidence is not sufficient to conclusively show there was any such agreement. On the contrary, the almost irresistible inference is that the money was paid to the husband without any agreement, express or implied, and that there was no understanding in regard to its repayment until long afterwards, when the husband became involved in financial difficulties. It has been several times held that while such transactions between husband and wife, when conducted in good faith, will be sustained as against the creditors of the husband, there must, in order to support them, be shown that the transaction was a loan, and that there was an agreement to repay the money. (*Wake v. Griffin*, 9 Neb., 47; *Hoagland v. Wilson*, 15 Neb., 320.) Furthermore, the finding, supported by the evidence, is that "by the year 1871" Mrs. Burcham had received the money, and immediately on its receipt turned it over to her husband. Our Married Woman's Act took effect June 1, 1871. (Session Laws, 1871, p. 68.) Prior to the taking effect of that act the common law was in force, whereby the unity of husband and wife was recognized. Her chattels became his, and her choses in action became his when reduced to possession. This finding, then, must be taken to establish the fact that before the Married Woman's Act took effect the husband had obtained possession of these funds, and they were therefore his in law before the rights of married women were acquired by the act referred to. Without considering, therefore, the question of estoppel by reason of her permitting her husband to invest her money in his own name, and the contention that the other claimants to the fund had extended credit on the faith of his apparent ownership, we conclude that it was not shown that under the law existing at the time of the advancement, or by the facts surrounding the advancement, of the

money it was then intended or operated as a loan by the wife to him. The assignment of the policy was, consequently, voluntary and without consideration. It follows that she had no equity by virtue of the assignment superior to the rights of those acquiring liens upon the fund by virtue of debts owing from her husband. The decree of the district court is right and is

AFFIRMED.

STATE OF NEBRASKA, EX REL. NORFOLK BEET-SUGAR COMPANY, V. EUGENE MOORE, AUDITOR OF PUBLIC ACCOUNTS.

FILED DECEMBER 16, 1896. No. 8818.

1. **Bounties:** APPROPRIATIONS. Session Laws, 1895, chapter 1, providing bounties for sugar manufactured in the state, carries no appropriation for the payment of such bounties; and, there being no appropriation for that purpose elsewhere, the auditor has at present no authority to issue warrants in payment of such bounties.

2. **Legislative Appropriations:** CONSTITUTIONAL LAW. Our constitution requires a specific appropriation made by law to authorize the expenditure of public funds. In the absence of such an appropriation the executive officers have no power to make such expenditures no matter how great may be the state's moral or legal obligation to pay.

3. ———: ———. An appropriation, within the meaning of our constitution, is the setting apart by law of a certain sum from the public revenue for a specified purpose, so that the executive officers are authorized to expend that sum, and no more, for that purpose, and no other.

4. ———: ———. An appropriation is not specific if it leaves the amount to be expended to be limited only by the extent of claims which may regularly be made upon it by the recipients, the amount of those claims being uncertain.

5. ———: ———: TIME. Appropriations can only extend to the end of the next fiscal quarter succeeding the adjournment of the next regular session of the legislature. Therefore an act by its express terms enduring for a longer period cannot be construed as carry-

ing an appropriation without making it void as in conflict with the constitution.

6. **Statutes:** CONSTRUCTION. When certain language is used in a statute, and language of similar import has previously been used in other acts, and has received a practical interpretation by the legislative and executive departments of the government, while such practical construction will not control the courts in construing the later act, it will generally be presumed that the language of the later act was adopted with a view to such practical construction given the earlier act.

ORIGINAL application for *mandamus* to compel the auditor of public accounts to issue a warrant in payment of relator's claim for bounty on beet-sugar, under chapter 1, Session Laws of 1895. *Writ denied.*

The facts are stated in the commissioner's opinion.

Charles F. Manderson and *W. S. Summers*, for relator:

Where a producer of sugar accepts the offer of a bounty from the state and complies with the statute, it would seem to be as much of a contract as it is possible for any citizen to make with the government. All the elements of a contract are present,—the terms, the consideration, and the lawful object. (*Calder v. Henderson*, 54 Fed. Rep., 802.)

A state cannot impair the obligation of contracts. (*State of New Jersey v. Wilson*, 7 Cranch [U. S.], 164; *Woodruff v. Trapnall*, 10 How [U. S.], 190; *Charles River Bridge v. Warren Bridge*, 11 Pet. [U. S.], 549.)

The statute makes an appropriation. The use of technical words in a statute is not necessary in order to make an appropriation. It is sufficient if the legislative intention appears. (*Campbell v. Board of Commissioners of State Soldiers' and Sailors' Monument*, 115 Ind., 591; *In re Appropriations*, 32 Pac. Rep. [Colo.], 272; *Proll v. Dunn*, 80 Cal., 220; *Carr v. State*, 22 Am. St. Rep. [Ind.], 624; *Reynolds v. Taylor*, 43 Ala., 420; *Nichols v. Comptroller*, 4 Stew. & P. [Ala.], 154; *Thomas v. Owens*, 4 Md., 189; *Green v. Purnell*, 12 Md., 329; *State v. Hickman*, 10 Mont., 497;

State v. Weston, 4 Neb., 216; *People v. Brooks*, 16 Cal., 11; *Goodykoontz v. Acker*, 19 Colo., 360; *Ristine v. State*, 20 Ind., 329; *State v. Hoffman*, 35 O. St., 435; *State v. Burdick*, 33 Pac. Rep. [Wyo.], 125; *Reynolds v. Taylor*, 43 Ala., 420; *People v. Miner*, 46 Ill., 384; *Humbert v. Dunn*, 84 Cal., 57; *State v. Moore*, 40 Neb., 854; *Hartman v. Greenhow*, 102 U. S., 672; *Poindexter v. Greenhow*, 114 U. S., 270; *State v. Cardozo*, 28 Am. Rep. [S. Car.], 275.)

A. S. Churchill, Attorney General, and *George A. Day, Deputy Attorney General, contra:*

The act does not appropriate, within the meaning of the constitution, any money for payment of a bounty. (*State v. Babcock*, 22 Neb., 33; *State v. Moore*, 36 Neb., 579; *State v. Medberry*, 7 O. St., 522; *State v. Weston*, 6 Neb., 17; *State v. Liedtke*, 9 Neb., 468; *State v. Wallichs*, 12 Neb., 407; *State v. Kennon*, 7 O. St., 546; *State v. Babcock*, 18 Neb., 222; *State v. Stover*, 47 Kan., 119.)

IRVINE, C.

This is an original application for a writ of *mandamus* to compel the respondent, the auditor of public accounts, to draw a warrant in favor of the relator. The right to the warrant is claimed by virtue of "An act to provide for the encouragement of the manfacture of sugar and chicory, and to provide a compensation therefor." (Session Laws, 1895, ch. 1.) By the first section of this act it is provided "that there shall be paid out of the state treasury to any person, firm, or corporation engaged in the manufacture of sugar in this state from beets, sorghum, or other sugar-yielding canes or plants grown in Nebraska, the sum of five-eighths of one cent per pound upon each and every pound of sugar so manufactured under the conditions and restrictions of this act." This is followed by a further provision whereby persons establishing after the passage of the act additional factories shall receive an additional bounty of three-eighths of one cent per pound. Section 2 provides that no money shall

be paid upon sugar not containing at least ninety per cent crystallized sugar, nor upon sugar produced from beets for which as much as $5 per ton shall not have been paid by the producer, nor upon sugar produced from beets raised by a manufacturer of sugar. Means of determining these facts are then provided by the act. Following sections provide in the same manner for bounties upon chicory. Section 8 is as follows: "When any claim arising under this act is filed, verified, and approved by the secretary of state as herein provided, he shall certify the same to the auditor of state, who shall draw a warrant upon the treasurer for the amount due thereon, payable to the party or parties to whom said sum or sums are due." By section 9 of the act it is provided that it shall be in force a period of three years. The pleadings establish that the relator has manufactured sugar and presented proof thereof entitling it to a bounty of $805. The auditor justifies his refusal to issue a warrant upon two grounds: First, that there is no lawful appropriation out of which such bounties may be paid; and second, that if there be such an appropriation, it is in excess of the power of the legislature to make such expenditures, appropriations for other purposes having exhausted the power. No question is raised as to the general validity of statutes providing for bounties. Of the two questions presented, we find it necessary to consider only the first.

It is conceded that the legislature has not, in any general appropriation act or in any way outside of the particular act already cited, made a provision for the payment of the bounty claimed. It is, however, contended that in the provisions quoted from the act of 1895 there exists an appropriation wherewith to pay the bounty created. It is solely to this question that we direct our attention. It will be observed that the act, in brief, designates the amount of bounty to be paid for each pound of sugar manufactured, provides for the manner of ascertaining the amount of sugar manufactured, and directs the auditor, on production of proof of the

amount, to draw his warrant upon the treasurer therefor. It does not limit in any way the total sum of money to be so expended, and by its terms the act is to endure for a period of three years. By section 19 of article 3 of the constitution it is provided that "each legislature shall make appropriations for the expenses of the government until the expiration of the first fiscal quarter after the adjournment of the next regular session, and all appropriations shall end with such fiscal quarter." By section 3 of article 3 it is provided that the sessions of the legislature shall be biennial, except as otherwise provided in the constitution. By section 22 of article 3 it is provided that "no money shall be drawn from the treasury except in pursuance of a specific appropriation made by law and on the presentation of a warrant issued by the auditor thereon, and no money shall be diverted from any appropriation made for any purpose, or taken from any fund whatever, either by joint or separate resolution." Do the provisions of the act under consideration constitute a "specific appropriation" for the purpose designated within the meaning of these constitutional provisions, and did the legislature so intend? The relator contends that, having accepted the provisions of the act by manufacturing the sugar for which it claims the bounty, its relations with the state are contractual, and that the state cannot refuse payment, because to so do would be to impair the obligations of its own contract. There is, however, a broad distinction between the moral, and even in one sense the legal, obligation of a state to make a payment, and the duty or the power of its officers to fulfill that obligation. Under constitutions such as ours an appropriation for the purpose is indispensable to authorize the state's executive officers to make a payment, no matter how great the moral or the legal obligation may be on the part of the state to make such payment. The state being sovereign, while it may incur obligations, there is no method except those by itself established whereby such obligations may be enforced,

and it is in general for the legislature by means of an appropriation to recognize an obligation of the state and permit its enforcement. As said in *Ristine v. State*, 20 Ind., 328: "A promise by the government to pay money is not an appropriation. A duty on the part of the legislature to make an appropriation is not such. A promise to make an appropriation is not an appropriation. The pledge of the faith of the state is not an appropriation of money with which to redeem the pledge. Usage of paying money in the absence of an appropriation cannot make an appropriation for future payment." And, as said by the same court in *Carr v. State*, 127 Ind., 204, while clearly recognizing the obligations of a contract entered into by the state, "there is one essential and far-reaching difference between the contracts of citizens and those of sovereigns, not, indeed, as to the meaning and effect of the contract itself, but as to the capacity of the sovereign to defeat the enforcement of its contract. The one may defeat enforcement but the other cannot. This result flows from the established principle that a state cannot be sued. * * * Nor is this the only method under such a constitution as ours by which a state may defeat the enforcement of its obligation, for the failure to make the necessary appropriation will effectually accomplish that object. * * * The legislature has, therefore, the ability to avoid payment of the obligations of the state by a failure or refusal to make the necessary appropriation, although that body cannot impair the obligation of the contract. Creditors who accept the obligations of the state are bound to know that they cannot enforce their claims by an action against the state directly nor by an action against its officers where no appropriation has been made as the constitution requires." Such citations might be indefinitely multiplied, but the distinction between the obligation of a state to fulfill its contracts and the power of its ministerial officers to fulfill them in the absence of legislative authority is so marked and so well settled that we would not have gone

to this length in pointing it out were it not for the prominence given in argument to the proposition that a contractual relation exists and that therefore it should be enforced in this proceeding. It may be conceded for the purposes of this case that the premises of the relator are sound. Still it does not follow that the writ should issue in the absence of a valid appropriation. The relator contends that the language of the act itself created such an appropriation, and cites authorities for the purpose of establishing that to constitute an appropriation the word "appropriation" or "appropriate" is not essential; that it is sufficient that an intention to make an appropriation is disclosed by the act. This also may be conceded with the qualification that it is the settled law of this state that there can be no implied appropriation. (*State v. Wallichs*, 15 Neb., 609.) By that we understand that an appropriation cannot be implied from the fact that the legislature has by law created an obligation to make a payment. In addition to this it must appear that it has provided for the payment by a constitutional appropriation; in other words, the appropriation must be express, although the expression may be in any language evidencing the intent and need not be in any set form of words. Therefore, we cannot say, because the legislature did not in this act use the word "appropriate" that it does not carry an appropriation. To solve the question we must consider the meaning of the term "appropriation" as used in the constitution, and ascertain whether, in the law, the legislature has evidenced its intention to perform the act designated by that term.

The origin of legislative appropriations is so well known that it seems almost a work of supererogation to here allude to it. Legislative appropriations are the outgrowth of the long struggle in England against royal prerogative. By degrees the power of the crown to levy taxes was restrained and abolished, but it was found that, so long as the crown might at its own discretion disburse the revenue, the reservation to the people through parlia-

ment of the power to raise revenues was not a complete safeguard. Efforts to control the crown in disbursement as well as in the collection of revenues culminated with the revolution in 1688, and since then the crown may only disburse moneys in pursuance of appropriations made by act of parliament. Three evils were at that time felt. In the first place, the use of the realm's revenue for purposes unlawful or distasteful to the people; secondly, the inability to control the crown in the amounts expended for particular objects; and thirdly, the disposition of the crown to avoid encroachments upon its self-asserted prerogatives by dispensing for long periods with sessions of parliament. By requiring appropriations for limited periods it was sought to remedy all three evils—the first two by making appropriations specific in amount and object, and the third by making them for limited periods, so that frequent parliamentary sessions should be absolutely necessary. The first two objects have been the subjects of repeated comment. The third, in view of our constitutional provision for biennial legislative sessions, and limiting the duration of appropriations to the end of the quarter succeeding the following session, justifies us in quoting the following from 2 Hallam, Constitutional History, chapter 15, page 330: "The lords of the treasury, by a clause annually repeated in the appropriation act of every session, are forbidden, under severe penalties, to order by their warrant any moneys in the exchequer, so appropriated, from being issued for any other service, and the officers of the exchequer to obey any such warrant. This has given the house of commons so effectual a control over the executive power, or, more truly speaking, has rendered it so much a participator in that power, that no administration can possibly subsist without its concurrence; nor can the session of parliament be intermitted for an entire year, without leaving both the naval and military force of the kingdom unprovided for." (See, also, Creasy on the Constitution, page 293.) When our governments, state and federal,

came to be established, the requirement of legislative appropriations was adopted from England, along with many provisions having in view the preservation of the liberties of the people, and our own state constitution in the provisions quoted is somewhat more strict and more in accordance with the English practice than either the federal constitution or the constitution of most of the other states. Having in view the origin and history of appropriations as well as the general lexicographic meaning of the word, to "appropriate" is to set apart from the public revenue a certain sum of money for a specified object, in such manner that the executive officers of the government are authorized to use that money, and no more, for that object and for no other. This definition cannot be too strict as applied to our own constitution containing the requirement that the appropriations must be specific. In *Ristine v. State*, 20 Ind., 328, "appropriation" is defined to be "an authority from the legislature given at the proper time and in legal form to the proper officers to apply sums of money out of that which may be in the treasury in a given year to specified objects or demands against the state." In *Clayton v. Berry*, 27 Ark., 129, it is said that "'appropriated by law' means the act of the legislature setting apart or assigning to a particular use a certain sum of money to be used in the payment of debts or dues from the state to its creditors." In *Humbert v. Dunn*, 84 Cal., 57, the court said: "Has the legislature fixed the amount of the claim and designated its payment out of a certain fund? These are the only things necessary to the validity of the appropriation." In *McCauley v. Brooks*, 16 Cal., 11, it is said, "to an appropriation within the meaning of the constitution nothing more is requisite than a designation of the amount and the fund out of which it shall be paid." It will be observed that each of these definitions includes as one of its requisites certainty as to the amount appropriated. In *Stratton v. Green*, 45 Cal., 149, the court said: "By a specific appropriation we understand an act by which a

named sum of money has been set apart in the treasury and devoted to the payment of a particular claim or demand." This definition was quoted with approval by the supreme court of Nevada in *State v. La Grave*, 41 Pac. Rep. [Nev.], 1075. We are not without a judicial definition of the term in our own state. In *State v. Wallichs*, 12 Neb., 467, the court said: "Specific appropriation means a particular, a definite, a limited, a precise appropriation." This definition was approved in *State v. Wallichs*, 16 Neb., 679.

We might well rest the case here, holding that the act in question was not an appropriation because not falling within the definitions of that term as given by our own court, and reinforced by the courts of other states and by a consideration of the history of the subject; but the earnestness and ability with which the case has been presented by the relator, as well as the importance of the interests which it is claimed are affected by this decision, justify us in stating the results of the further investigation which we have made, with the aid of counsel in the case. In *State v. Weston*, 4 Neb., 216, it was held that no appropriation by the legislature was necessary in order to authorize the payment of salaries fixed by the constitution for officers created thereby. The reason was found in section 25 of the schedule, directing the auditor to draw warrants for the payment of such salaries; and it was stated that this provision being contained in the constitution, it operated as a continuing appropriation for that purpose, and was not annulled by the requirement in the same instrument of biennial appropriations for other purposes. This case by no means conflicts with the conclusion we have indicated, because the constitution fixes the amount of the salary and the time of its payment. Shortly afterwards the court, in *State v. Weston*, 6 Neb., 16, held that the rule established in the former case applied only to officers whose offices were created by the constitution, and that for offices created by the legislature a specific appropria-

tion was required. *In re Groff*, 21 Neb., 647, involved incidentally a question as to the validity of an appropriation for the payment of the salaries of district judges. The appropriation bill included a single item for the salaries of district judges of $95,000. While it was intimated that under section 25 of the schedule of the constitution above referred to a judge might be entitled to the salary in the absence of a legislative appropriation, it was held that this appropriation was sufficient. But it will be observed that it was specific only in its gross amount and in its general object. It is hardly possible that the court would have considered an appropriation of "so much as may be necessary," without fixing any amount, as a valid appropriation were a legislative appropriation necessary. In *State v. Babcock*, 24 Neb., 787, the court considered an act to provide for the selling of unsold lots and lands belonging to the state, in the city of Lincoln, and appropriating the proceeds of such sale to the construction of the capitol. It was held that the lands having been sold under the provisions of that act, there was an appropriation of the amount realized for the purpose designated. It is true that at the time of the passage of this act the amount appropriated thereby was not in dollars ascertained. It was equivalent to the appropriation of the lands themselves, and was limited to the proceeds of those lands. The uncertainty in amount arose not in regard to demands of the claimant to the fund, but in regard to the amount of the fund itself. No discretion was vested in the executive officers as to the amount to be disbursed. There is here a broad distinction. By section 1, article 9, of the constitution the legislature is required to "provide such revenue as may be needful" by levying taxes, etc. It is essential that appropriations shall be limited in amount, in order that the legislature may know what revenue shall be needful, and provide therefor. But when the state has property in its possession there can be no objection to appropriating the proceeds of the sale of that property,

because the value of the property itself limits the appropriation, and no uncertainty arises in regard to the revenue. An appropriation may be specific, according to any of the definitions heretofore given, when its amount is to be ascertained in the future from the collection of the revenue. It cannot be specific when it is to be ascertained only by the requisitions which may be made by the recipients. The case of *State v. Moore*, 40 Neb., 854, much relied on by the relator, is in nowise in point. In that case there was a specific, limited, precise appropriation, in express terms, of a certain sum of money for a certain purpose, and the question was as to the authority of the legislature to appropriate money for that purpose; and further, as to whether the amount designated should control as against the amount justly required. The fact of the appropriation was not contested and was incontestible. The foregoing cases comprise those which it is claimed give color to the relator's contention. We think none of them, in fact, tends in any way to support it. On the other hand, we might cite many cases illustrating how strictly the court has insisted upon express appropriations, in conformity with the constitution, in order to justify an expenditure, among them *State v. Wallichs*, 12 Neb., 407; *State v. Wallichs*, 15 Neb., 457; *State v. Wallichs*, 15 Neb., 609; *State v. Wallichs*, 16 Neb., 679. One case quite closely in point is *State v. Babcock*, 18 Neb., 221. In that case a statute was under consideration whereby it was provided that if any county treasurer shall have paid into the state treasury any greater sum of money than is legally and justly due, the auditor shall issue his warrant for the amount so overpaid, which shall be paid out of the fund or funds so overpaid on said warrant. This act provided as specifically for what purpose the warrant should be drawn, and in whose favor, as the act we are considering. It contained as specific a direction to draw the warrant and it was at least as certain in the amount appropriated; more so, we think, because it must be less than the amount actually received

by the treasurer, while in this case, if we should hold the act to be an appropriation, it might appropriate in itself vastly more than the whole revenue of the state. But the court held that this was not an appropriation and did not justify the drawing of a warrant. The act cannot be treated as an appropriation, therefore, because it is not certain and limited in its amount. It is contended that the circumstances render a limit impossible. If so, it might be an argument against the validity of any appropriations for such a purpose. It cannot be an argument in favor of the validity of this one. But the very fact that the number of pounds of sugar which might be manufactured under the provisions of the act cannot be ascertained in advance renders it the more necessary for the legislature to fix a limit beyond which the expenditure for that purpose may not go. Otherwise it is impossible to provide a revenue with a view to the appropriations made.

It is contended, in answer to the objection that appropriations cannot extend beyond the end of the quarter following the adjournment of the next session of the legislature, that this may be treated as a valid appropriation for that period. But by section 9 of the act it is expressly provided that it shall endure for three years, which would be beyond the constitutional limit. Therefore, the legislature could not have intended the act to operate as an appropriation; or, if it so intended, it transgressed its powers, and, the period provided for being an important element, this invalid portion of the act must be held to have operated as an inducement to its passage, and therefore would, if construed as an appropriation act, invalidate the whole measure.

Some of the decisions of other states seem at first blush to conflict with some of the views herein expressed, but we think the conflict is more apparent than real. Thus, in many states there is no provision by constitution limiting the duration of appropriations. Accordingly it is, in such states, held that general acts of the legislature

creating an obligation of the state and fixing the amount to be paid may operate as a continuing appropriation. As, for instance, in Colorado, *In re Continuing Appropriations*, 18 Colo., 192; in Alabama, *Nichols v. Comptroller*, 4 Stew. & P. [Ala.], 154, and *Reynolds v. Taylor*, 43 Ala., 420; in Wyoming, *State v. Burdick*, 33 Pac. Rep. [Wyo.], 125. In this class fall all those cases which hold that a statute creating an office and fixing the salary constitutes a continuing appropriation for its payment. Again, it is held in some states that an appropriation may be implied. In these states the constitution does not require all appropriations to be "specific," and that doctrine is contrary to the decisions of this court. So, too, in states having similar or somewhat similar provisions to our own, implied, indefinite, and continuing appropriations have been enforced on the ground that they were made by the territorial legislatures, and that the state constitutions were not retroactive in their effect. Such seems to be the doctrine in Montana and South Dakota. In Illinois an act of the legislature appropriated the proceeds of a certain tax to a particular purpose. It was held that this was sufficient, although the amount to be derived from such tax was then unknown. (*People v. Miner*, 46 Ill., 384. See, also, *State v. Hipple*, 64 N. W. Rep. [S. Dak.], 120.) The remarks made with reference to *State v. Babcock*, 24 Neb., 787, are applicable to this class of cases. But Kansas, under constitutional provisions like our own, holds otherwise. (*Martin v. Francis*, 13 Kan., 220.) In no case, however, which we have been able to discover, under any constitutional provision has it been held that an appropriation is valid when it is uncertain in its amount, and that uncertainty arises with regard to the extent of the demands or claims which the recipients of the fund may present against it. On the other hand, in nearly all the cases cited, and in many more which might be cited, among them a long line of California cases, wavering in other respects, but always steadfast in this, certainty in amount is treated as an

essential requisite of a valid appropriation. We are not without the aid of a construction placed on acts similar to this by the other departments of the government. We are aware that such construction is not conclusive, but when the legislature, in framing an act, resorts to language similar in its import to the language of other acts, which have received a practical construction by the executive departments and by the legislature itself, it is fair to presume that the language was used in the later act with a view to the construction so given the earlier. In 1877 there was passed (Session Laws, 1877, p. 213) an act "to provide for the payment of bounties for the destruction of wild animals in the state of Nebraska." This act provided, in brief, that any person killing wolves, wild cats, or coyotes within the state, and presenting the scalps thereof to the clerk of the county in which the same were killed, with other proof, should be entitled to a bounty of $1 for each of such animals so killed. It was provided that the county clerk should issue a certificate to the person entitled, and that upon the same being filed with the auditor, "said auditor shall draw his warrant on the treasury of the state, against the general fund, for the amount of such certificate, in favor of the person named therein or his assignee." It has never been assumed that this act operated as a continuing or even a temporary appropriation of money wherewith to pay such bounties. Appropriations to fulfill the purpose of the act have since its passage been made in certain years, and in one year at least, to-wit, 1889 (Session Laws, 1889, p. 611), the appropriation was made to cover not only future bounties, but outstanding claims, the previous legislature having failed to make any appropriation. It is a matter of general knowledge that payments of such bounties have been made when express appropriations existed, and not at other times. In 1875 (Session Laws, p. 156) an act was passed providing a bounty for the discoverer of a vein of coal, and providing, also, that warrants should be issued in payment thereof.

Once, at least, an item for the payment of such bounties has been included in the general appropriation bill.

We conclude that the provisions of the act in question do not make an appropriation. At most, they create an obligation and provide for the manner of its satisfaction when appropriation shall be made. It was not the intention of the legislature to make an appropriation by the act, and if it had been its intention so to do, such appropriation would be void for uncertainty in amount, and because it transgressed the constitutional limit of time.

WRIT DENIED.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NEBRASKA.

JANUARY TERM, A. D. 1897.

PRESENT:

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

WESTERN WHEELED SCRAPER COMPANY v. F. J. SADILEK.

FILED JANUARY 7, 1897. No. 6962.

1. **Bank Checks:** PRESENTMENT. A customer's bank check is not intended for circulation as a medium of exchange, and should be presented for payment with the dispatch consistent with the circumstances of the case and the transaction of other commercial business. (*First Nat. Bank of Wymore v. Miller*, 37 Neb., 500.)

2. ———: ———: COLLECTION: NEGLIGENCE: AGENCY. A bank which undertakes the collection of a customer's check is guilty of negligence in sending it for payment direct to the drawee bank, provided there is in the same town another bank in good standing.

3. ———: ———: PAYMENT: NOTICE. A bank receiving for collection a customer's check is required to pay the same upon the receipt thereof during business hours, or to promptly give notice of its dishonor in order to charge the drawer and indorsers thereof.

4. ———: ———: ———: ———. *Held*, from an examination of the

evidence, that prejudice to the defendant as drawer of the check which is the subject of controversy will be presumed from the failure to give notice of its dishonor, there being to his credit therein sufficient funds for its payment, the drawee bank having in the meantime become insolvent.

5. County Treasurers: BANK DEPOSITS: COLLATERAL ATTACK. The authority of a county treasurer to deposit for safe keeping in bank the funds entrusted to his care cannot be questioned in a strictly collateral proceeding.

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

The opinion contains a statement of the case.

Hastings & McGintie, for plaintiff in error:

Whether there was due diligence in presenting the check for payment was a question for the jury. (*Johnson v. Missouri P. R. Co.*, 18 Neb., 690; *Atchison & N. R. Co. v. Bailey*, 11 Neb., 332; *Sioux City & P. R. Co. v. Stout*, 17 Wall. [U. S.], 657; *Detroit & M. R. Co. v. Van Steinburg*, 17 Mich., 99; *Fox v. Spring Lake Iron Co.*, 50 N. W. Rep. [Mich.], 872; *Jucker v. Chicago & N. W. R. Co.*, 8 N. W. Rep. [Wis.], 862; *Dailey v. Linnehan*, 40 N. W. Rep. [Minn.], 250; *Park v. O'Brien*, 23 Conn., 338; *Paine v. Kohl*, 14 Neb., 580.)

Plaintiff was entitled to recover the amount claimed in the petition. (*Frieberg v. Cody*, 20 N. W. Rep. [Mich.], 813; *Nebraska Nat. Bank v. Logan*, 29 Neb., 278.)

A county treasurer can only pay county obligations in cash. (*Cedar County v. Jenal*, 14 Neb., 254; Compiled Statutes, ch. 18, secs. 91, 92; *State v. Keim*, 8 Neb., 67; *First Nat. Bank v. Gandy*, 11 Neb., 431.)

F. I. Foss and *W. R. Matson, contra:*

Plaintiff was bound to present the check within a reasonable time. (*Woodruff v. Plant*, 41 Conn., 344; 3 Randolph, Commercial Paper, sec. 1103; Chitty, Bills, 333, 435; *Smith v. Janes*, 20 Wend. [N. Y.], 192; *First Nat. Bank of Wymore v. Miller*, 37 Neb., 500.)

The Aurora bank was responsible for the negligence of its agent, the drawee, Bank of Western. (Morse, Banks & Banking, secs. 236, 271; *National Bank of Pawnee v. Sprague*, 34 Neb., 318; *Merchants Nat. Bank v. Goodman*, 109 Pa. St., 422; *Drovers' Nat. Bank v. Anglo-American Packing & Provision Co.*, 117 Ill., 100; *Titus v. Mechanics Bank*, 6 Vroom [N. J.], 588; *Whitney v. Esson*, 99 Mass., 308; *Briggs v. Central Nat. Bank*, 89 N. Y., 182; *Charlotte Iron Works v. American Exchange Bank*, 34 Hun [N. Y.], 26; *Hyde v. First Nat. Bank*, 7 Biss. [U. S.], 156; *Ætna Ins. Co. v. Alton City Bank*, 25 Ill., 243; *Stacy v. Dane County Bank*, 12 Wis., 629; *Fabens v. Mercantile Bank*, 23 Pick. [Mass.], 330; *Strong v. King*, 35 Ill., 11.)

POST, C. J.

This was an action by the Western Wheeled Scraper Company, hereafter called the plaintiff, against F. J. Sadilek, hereafter called the defendant, in the district court for Saline county. A trial was had of the issues joined by the pleadings, resulting in a verdict for the defendant in accordance with the peremptory direction of the court. A motion for a new trial having been overruled and judgment entered upon the verdict so rendered, the cause has been removed into this court for review upon allegations of error by the plaintiff company.

Among the facts established by the pleadings and proofs, and as to which there is no dispute, are the following, viz.: On the 15th day of June, 1891, a county warrant was in due form issued to the plaintiff for $330, being the amount of a claim previously allowed and payable out of the road fund of Saline county. On the 10th day of August, 1891, the plaintiff company, whose place of business was in the city of Aurora and state of Illinois, addressed to John N. Van Duyn, county clerk of said county, the following communication:

"*John N. Van Duyn, County Clerk, Wilber, Neb.*—DEAR SIR: Our Mr. Arnett informed us some time ago that your county had allowed our claim for $330. * * *

If the warrant has been issued, we hereby authorize you to receipt for warrant. If there is money on hand to pay the warrant, kindly send us draft for the am't. If not prepared to pay, please have warrant presented and registered so that it will be paid in its turn. We enclose bill herewith. Yours truly,

"WESTERN WHEELED SCRAPER CO."

On August 12, 1891, said warrant was by Mr. Van Duyn, as agent for the plaintiff company, presented for payment to the defendant as county treasurer and indorsed "Not paid for want of funds," and afterward on the same day the defendant, as county treasurer, drew his check to the order of plaintiff for the sum of $330, upon the Bank of Western, situated at the village of Western, in said county, and in which he, as such county treasurer, had then ample funds. Mr. Van Duyn, to whom said check was delivered, on the day of its date, forwarded the same to the plaintiff, who received it through the mail at Aurora on the 14th day of August. On the succeeding day, to-wit, August 15, the check in question was by the plaintiff deposited in the Second National Bank of Aurora, by which it was on the same day forwarded for collection and returned to the Bank of Western. Said check was on the 17th day of August received by the Bank of Western and has not been paid, although said bank continued open for the transaction of business until August 19, on which day it was closed by order of the state banking board, and is now insolvent. The village of Western is situated about twenty miles distant from Wilber, the defendant's home, and about five hundred miles from the city of Aurora. It has railroad and telegraph connection with both places named, and there was at the date in question another bank thereat in good standing. In addition to the foregoing, it is shown that the time required for the transmission of letters by mail between Aurora and Western does not exceed twenty-four hours, from which the inference necessarily arises that the check forwarded by the Aurora bank on the 15th was

received by the Bank of Western during business hours on the 17th.

Is the defendant in this action answerable for the loss resulting from the failure of the last named bank? We think not. There is eminent authority for the proposition that a bank which undertakes the collection of a customer's check is guilty of inexcusable negligence in sending it direct to the drawee bank instead of through the agency of a third person, provided loss ensue through the failure of such drawee. (*Merchants Nat. Bank v. Goodman*, 109 Pa. St., 422; *Drovers Nat. Bank v. Anglo-American Packing & Provision Co.*, 117 Ill., 100; *Anderson v. Rodgers*, 53 Kan., 542; *First Nat. Bank of Corsicana v. City Nat. Bank of Dallas*, 34 S. W. Rep. [Tex.], 459; *German Nat. Bank v. Burns*, 12 Colo., 539; *First Nat. Bank of Evansville v. Fourth Nat. Bank of Louisville*, 6 C. C. A., 183; 1 Daniel, Negotiable Instruments, sec. 328*a*.) The principle recognized in the foregoing authorities is that no party, whether a corporation, firm, or individual, can, in contemplation of law, be deemed a suitable agent to enforce in behalf of another a claim against itself. But independent of the rule there stated, the defendant was discharged in consequence of the negligence of plaintiff's chosen agent, the Bank of Western. A customer's check is, in the first place, not designed for circulation as a medium of exchange, and should be presented for payment with the dispatch and diligence consistent with the circumstances of the case and the transaction of other commercial business. (*First Nat. Bank of Wymore v. Miller*, 37 Neb., 500.) In the second place, it was the duty of the drawee bank to promptly pay the check upon receipt thereof for collection, or to give notice of its dishonor, in order to charge the drawer and indorsers. (*Wood River Bank v. First Nat. Bank of Omaha*, 36 Neb., 744.) Time may be necessary, it is true, for the drawee bank to examine its books in order to ascertain the condition of the drawer's account, but in the absence of evidence to the contrary it will be presumed that the officers

of the bank were aware of the fact conclusively established by the record, viz., that the defendant had therein to his credit at all times from the 12th to the 19th of August, inclusive of both dates, ample funds for the payment of the amount called for. The check was, therefore, as held in *Wood River Bank v. First Nat. Bank of Omaha, supra*, dishonored on the 17th, and the defendant, as drawer, was entitled to notice by the first regular mail, on the 18th. (3 Kent, Commentaries, 105; 1 Daniel, Negotiable Instruments, sec. 1039, and cases cited.) It is no answer to say that the defendant is not prejudiced by the neglect to give notice, since he might, had he been promptly advised of the non-payment of his check, by means of legal process have anticipated the impounding of the bank by the state, and for the further reason that it is an implied condition of the contract of the drawer or indorser that he shall be promptly notified of the non-payment or non-acceptance of the bill.

Counsel for the plaintiff indulge in some criticism upon the action of the defendant on account of the deposit in bank of the county funds, and the payment of the warrant after having been indorsed "Not paid for want of funds." To the first criticism a sufficient answer is that neither the validity nor propriety of the defendant's action in depositing the funds entrusted to his care can be questioned in this collateral proceeding. The other circumstance which is made the subject of criticism, although not material to the issues, is explained by the fact that the road fund, against which plaintiff's account was chargeable, was overdrawn at the date of the warrant, and that said warrant was, with plaintiff's knowledge and consent, paid by the defendant out of other funds belonging to the county. There is no error in the record and the judgment is

AFFIRMED.

EDWARD G. RYLEY, APPELLEE, V. JACOB SANDEAN, APPELLANT.

FILED JANUARY 7, 1897. NO. 6991.

Alley: NOTICE OF EXISTENCE: CONFLICTING EVIDENCE. The evidence in this case, although conflicting, *held* sufficient to sustain the decree appealed from.

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

George A. Magney, for appellant.

C. A. Baldwin, contra.

POST, C. J.

This is an appeal from the decree of the district court for Douglas county, the question at issue being the existence of an alleged alley in block 14, Walnut Hill Addition to the city of Omaha. Among the facts disclosed by the pleadings and proofs are the following: Some time during the year 1885 the plaintiff Ryley, Edholm, the defendant's grantor, and one Hunt, being the owners of a tract or parcel of land situated in the northeast corner of said block, agreed to so divide the same as to make three residence lots fifty feet in width, fronting on Lowe avenue on the east, by two hundred and fifty feet in length. Pursuant to such agreement said property was subdivided and subsequently improved by the several owners. The corner lot adjoining La Fayette avenue on the north was allotted to Edholm, the south lot, adjoining an alley extending east and west through said block, was assigned to Hunt, and the inside or middle lot to the plaintiff. Afterwards said parties, being desirous of access to their property by means of an alley on the west side thereof, executed the following agreement:

"OMAHA, NEB., ——, 1885.

"This agreement, entered into between the under-

signed, their heirs, executors, administrators, and assigns, witnesseth: That whereas P. L. Edholm, Charles G. Hunt, and E. G. Ryley having negotiated with and purchased from the Walnut Hill Building Association, an association legally and lawfully incorporated in the city of Omaha and state of Nebraska, three lots, to-wit, lots 2, 3, and 4, in block 14, said Walnut Hill, and the aforesaid Edholm, Hunt, and Ryley, being in lawful and peaceable possession of said real estate, do hereby covenant and dedicate the one to the other, ten feet of lot 4, in block 14, to be used by them and their successors as a private alley.

"In witness whereof, we have hereunto set our hands and seals this 8th day of July, 1886.

"CHARLES G. HUNT.
"P. L. EDHOLM.
"ED G. RYLEY."

The foregoing instrument appears to have been acknowledged in due form on the 8th day of July, 1886, and filed for record on the 18th day of April, 1891. It should be observed in this connection that the description therein employed has reference to the original subdivision of the property in question. It is alleged by the plaintiff that upon the execution of the agreement above set out there was a dedication in fact by each party of a strip of ground ten feet in width to the purpose therein contemplated; and the evidence in the bill of exceptions tends strongly to prove that stables and fences were constructed by said parties on the east line of the alley so laid out. That the evidence establishes a sufficient dedication as against Edholm and Hunt is a proposition not controverted on this appeal. It is, however, asserted by the defendant that he acquired title by purchase from Edholm, without notice, actual or constructive, of the plaintiff's claim in the premises. The deed through which defendant claims title bears date of March 9, 1887, and was filed for record March 19, 1887, or more than four years previous to the filing for record of the agree-

ment aforesaid. There is, accordingly, no foundation for the contention that the defendant had constructive notice of the plaintiff's rights. The evidence bearing upon the question of actual notice is conflicting, although, in our judgment, ample to sustain the finding adverse to the defendant, and the decree perpetually enjoining him from obstructing said alley or interfering with the plaintiff's use or enjoyment thereof will be affirmed.

DECREE AFFIRMED.

FLOYD HARSHMAN V. WILLIAM A. ROSE.

FILED JANUARY 7, 1897. No. 6973.

1. **Assault and Battery: DAMAGES: PLEADING.** It is, in a civil action for assault and battery, unnecessary to specially allege such damages as are the necessary and usual consequence of the act complained of.

2. ———: ———: ———. A petition charging the defendant with unlawfully beating and wounding the plaintiff on the head with a pitchfork whereby he, plaintiff, "was wounded and is, and for a long time will be, sick, and has suffered, and will suffer, great bodily pain and discomfort," states a cause of action for such physical and mental suffering as is the natural and proximate result of the wrong so alleged. (*American Water-Works Co. v. Dougherty*, 37 Neb., 373.)

3. ———: JUSTIFICATION. One who has commanded an intruder to leave his premises is authorized to use such means as may be reasonably necessary to enforce his command. But if in so doing he exceed the bounds of reasonable force he will be guilty of an assault.

4. ———: ———: VERDICT FOR PLAINTIFF: EVIDENCE. Evidence examined, and *held* to sustain the judgment of the district court.

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

Wooley & Gibson, for plaintiff in error.

A. N. Sullivan and *J. E. Douglas, contra.*

POST, C. J.

Rose, the defendant in error, recovered judgment against the plaintiff in error, Harshman, in the district court for Cass county on account of an alleged assault and battery. In the proceeding by means of which said judgment is presented to this court for review especial prominence is given to those assignments which challenge the sufficiency of the petition below as a basis for the recovery of other than the special damage therein alleged, to-wit, $8 expended for medical attendance in consequence of the assault charged. The petition assailed, which is very brief, is here set out, omitting caption and formal parts: "On the 3d day of August, 1891, in Cass county, and state of Nebraska, he, the defendant, unlawfully made an assault upon the plaintiff and him, the said plaintiff, did then and there beat, wound, and ill treat by striking plaintiff several blows on the head with a pitchfork; that plaintiff thereby was wounded and is, and for a long time will be, sick, and has suffered and still suffers great bodily pain and discomfort from said wounds; that plaintiff was disabled thereby from attending to his business for more than two weeks thereafter; that in the treatment and necessary care of said wound he has been compelled to pay for physician's services the sum of $8; that he has been injured in the premises in the sum of $1,000." It is in an action for assault and battery necessary to specially allege such damages only as the law does not presume to be the necessary or usual consequence of the act complained of. (2 Greenleaf, Evidence, sec. 89; 1 Chitty, Pleading, p. 428; 1 Kinkead, Code Pleading, sec. 221; 2 Ency. of Pl. & Pr., 862.) Tested by the rule thus stated, the plaintiff below was entitled to recover for such physical and mental suffering as was the natural and proximate result of the wrong complained of, and was not restricted to the damage alleged. (*American Water-Works Co. v. Dougherty*, 37 Neb., 373.)

The only other assignment requiring notice is that which relates to the fifth instruction given on the court's own motion. It is argued that certain expressions therein employed are unwarranted by the evidence, and also misleading, because intimating to the jury that the plaintiff below was lawfully upon the premises of the defendant where, it is alleged, the assault was committed. But the instruction, if erroneous, is error without prejudice, even assuming the plaintiff to have been a trespasser at the time of the assault. The defendant's version of the affair appears from a single question and answer, viz.: "Q. What then occurred? A. I was at work on my place and he (plaintiff) came and asked me for the scraper. I told him that I had no scraper for him and told him to get off my place. I cannot relate all the words that passed between us. Anyway I ordered him to get off my place and he said that he did not have to. He was on the north side of the stack and as he said that, I jumped over the stack and run to where he was and struck him over the head with my fork. His horse then turned and I hit him over the back." One who has commanded an intruder to leave his premises is authorized to use such means as may be reasonably necessary to enforce his commands. He must not, however, in so doing exceed the bounds of reasonable force, else he will be guilty of an assault. (*Everton v. Esgate*, 24 Neb., 235; 2 Wharton, Criminal Law [10th ed.], sec. 624; 2 Am. & Eng. Ency. of Law [2d ed.], p. 984.) We do not hesitate to assert as a proposition based upon the defendant's own testimony that the striking of the plaintiff on the head with a pitchfork upon the simple refusal of the latter to leave his, defendant's, premises, was an act of violence wholly unwarranted by the circumstances of the case. It follows from this view of the record that the question whether the plaintiff was a trespasser at the time of the injury charged is foreign to the real issue presented.

JUDGMENT AFFIRMED.

JAMES CHAPPELL, APPELLANT, V. WILLIAM H. SMITH ET AL., IMPLEADED WITH MICHIGAN SAVINGS & LOAN ASSOCIATION, APPELLEE.

FILED JANUARY 7, 1897. No. 7463.

Stipulation as to Effect of Appeal: INTEREST: JUDGMENT. *Held*, From an examination of the record, that the decree complained of is warranted by the judgment of this court on a former appeal and agreement of parties made pending such appeal.

APPEAL from the district court of Sheridan county. Heard below before BARTOW, J. *Affirmed.*

Allen G. Fisher, for appellant.

Albert W. Crites, contra.

POST, C. J.

This is an appeal by the plaintiff from so much of a decree of the district court for Sheridan county as allows interest upon the amount due the Michigan Savings & Loan Association, pending an appeal by the latter from the original decree of foreclosure. The proceeding as instituted by the plaintiff was to enforce a mechanic's lien for labor and material furnished in the erection of a certain building in the village of Hay Springs, in said county. A decree was in due time entered, by which the equities of the plaintiff and the several defendants were determined and from which the Michigan Savings & Loan Association prosecuted an appeal to this court. The appeal thus taken resulted in an order so modifying the decree below as to give the mortgage of the appellant priority over the lien of the plaintiff, and remanding the cause with direction to determine the equities of the parties affected, in accordance with the opinion therein filed. (See *Chappell v. Smith*, 40 Neb., 579.) The district court, as we infer from the briefs of counsel, upon the entry of

a second decree awarded interest in favor of the appellee association upon its mortgage debt, from the date of the original finding, to which the plaintiff excepted, and which, as already intimated, is the ground of complaint on this appeal. By agreement of parties the property which was the subject of controversy was sold pending the former appeal and the sale thereof confirmed as per stipulation, without prejudice to the rights of the appellant therein named, the proceeds of such sale, amounting to $1,500, being returned into court for distribution in accordance with the final decree in the cause.

It is argued that the second decree is erroneous (1) because the property in question was purchased by the savings and loan association through its trustee, John B. Corliss; (2) because said association having acquired title to the property, by means of its supersedeas undertaking, prevented enforcement of other liens thereon during the pendency of its appeal. It is not, according to our understanding of the record, necessary to pursue the subject by inquiring what would have been the equities of the parties in the absence of the stipulation to which reference has been made. It is sufficient for the purpose of the case actually presented that the parties in interest expressly stipulated for the sale of the property and confirmation thereof, notwithstanding the supersedeas undertaking of the defendant association; that such sale should be without prejudice to the rights of any party to appeal from the original decree; and that any party to such decree might purchase the property and receive a deed therefor. It was by said agreement further recited that the intention thereof was "to substitute the proceeds of such sale for the property affected by the decree and to hold said proceeds in court until the priorities of the parties and their rights thereto respectively may be finally determined." The necessary inference from the record is that the defendant association, as purchaser of the mortgaged property, advanced the full consideration therefor in cash, and that as such pur-

chaser its relation to the plaintiff and its co-defendants is that of a stranger to the decree. The rights of the parties were, according to their agreement, unaffected by the sale of the property pending the appeal, and it is not apparent to us in what manner the plaintiff as the holder of a subordinate lien can be prejudiced by a finding and decree in favor of the defendant association for the amount admitted to be due by the terms of its mortgage. Nor is the fact that the plaintiff was prevented from enforcing its lien pending the appeal to this court at all material, since the liability of the defendant association therefor as the appellant is measured by the terms of the supersedeas undertaking given by it.

DECREE AFFIRMED.

ASHLAND LAND & LIVE STOCK COMPANY V. ELEVEN WOODFORD.

FILED JANUARY 7, 1897. No. 6933.

Trial: COUNTER-CLAIM: PLEADING. Where, to a counter-claim well pleaded, the plaintiff interposes no reply, a verdict in his favor in excess of the amount claimed in his petition, less the amount of such counter-claim, should be set aside as unsupported by the pleading.

ERROR from the district court of Saunders county. Tried below before BATES, J. *Reversed.*

Simpson & Sornborger, for plaintiff in error.

O. C. Tarpenning, contra.

POST, C. J.

The defendant in error, Woodford, as plaintiff in the district court for Saunders county, alleged as his cause

of action against the Ashland Land & Live Stock Company, plaintiff in error herein, a lease for one hundred acres of land in said county during the year 1891. It was provided by said lease, a copy of which is set out in the petition below, that the proceeds of the grain and hay grown upon said premises to the amount of $250 should be and remain the property of the lessor, and that the crops in excess of the rents so reserved should belong to the lessee, who was to have the use and occupancy of the building situated upon the premises during the term of the lease. It was further alleged as a cause of action that the defendant company, during the existence of said lease, without the plaintiff's consent, entered said premises and carried away and converted to its own use corn grown thereon of the value of $40.50; that the defendant negligently permitted its cattle to trespass upon said premises during the said term and injure the crops growing thereon, to the plaintiff's damage in the sum of $50; that the defendant was indebted to the plaintiff for four tons of hay grown upon said premises of the agreed value of $12; and that the plaintiff was indebted to the defendant in the sum of $1.50 on account of board furnished the servants of the latter in the year 1891. Accompanying the petition was a prayer for judgment in the amount of the several items above enumerated, to-wit, $104. The answer admitted the execution of the lease set out and denied the other material allegations of the petition. There was also a counter-claim, in which the account between the parties was thus stated:

"ELEVEN WOODFORD,

"TO THE ASHLAND LAND & LIVE STOCK CO.

	Dr.
To interest in crop for 1891, as per agreement..	$250 00
To money advanced per check.....	14 00
	$264 00

	Cr.	
By 214 bushels corn	$55 90	
By 51 tons hay	153 25	
By error in number of acres described in lease	9 50	
		$218 65

"Balance, for which judgment was demanded ..... $45 35"

To the counter-claim so made there was no reply; hence the statement of the account therein must be taken as true. If we add to the sum with which the plaintiff is there credited the full amount claimed in his petition, to-wit, $104, we find he was entitled to a credit of $322.65 and that he was chargeable with the sum of $264. He was, in other words, according to the most favorable construction of the pleadings, entitled to judgment in the sum of $58.65 only, whereas a verdict was returned in his favor for the full amount claimed, upon which judgment was subsequently entered over the objection of the defendant company.

The foregoing statement renders unnecessary an examination of the other assignments, particularly in view of the fact that they present questions of practice only and it is not apparent that the determination thereof would materially assist the district court in a second trial of the cause. The judgment complained of being unsupported by the pleadings, the cause is reversed and remanded for further proceedings in the district court.

REVERSED.

HARRISON H. BLODGETT V. STATE OF NEBRASKA.

FILED JANUARY 7, 1897. No. 8465.

1. **Indictment and Information:** OBJECTIONS. A motion or objection directed to an indictment or information as a whole will be overruled unless applicable to each count thereof.
2. ———: DUPLICITY: ATTORNEYS: MALPRACTICE: CONTEMPT. A charge of malpractice against an attorney and counselor at law may be joined with a prosecution for a contempt of court where both charges involve a single transaction.
3. **Contempt:** FINDING: REVIEW. A finding without a judgment in a summary prosecution for contempt of court will not be reviewed by means of proceedings in error.
4. **Indictment and Information:** TEST OF SUFFICIENCY. The test by which to determine the sufficiency of an indictment is whether enough remains after rejecting all unnecessary averments thereof to satisfy the requirements of the statute.
5. ———: REMEDY OF ACCUSED. The remedy of the accused in an indictment or information is by plea and not by motion to strike unnecessary and immaterial allegations.

ERROR to the district court for Lancaster county. Tried below before HALL, HOLMES, and CORNISH, JJ. *Modified.*

James E. Philpott, for plaintiff in error.

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

POST, C. J.

The plaintiff in error was prosecuted in the district court for Lancaster county by means of an information presented by the county attorney, in which he is by the first count charged with a constructive contempt of court, in the willful attempt to hinder the due administration of justice in a proceeding pending before said court, and by a second count thereof with malfeasance as an at-

torney and counselor at law under the provisions of section 6, chapter 7, Compiled Statutes, entitled "Attorneys." The allegations of the first count which are deemed material to the present inquiry are, in substance, as follows: The plaintiff in error, on the 24th day of October, 1895, being the defendant in an action then pending and on trial in said court, in which the Lincoln Savings Bank was plaintiff, willfully conspired with one Wenzel to corrupt certain jurors previously impaneled and sworn to try the issues in said cause; that pursuant to such conspiracy, and with the knowledge and procurement of the plaintiff in error, said Wenzel approached one of the jurors so engaged in the trial of said cause and with money furnished for such purpose by the plaintiff in error treated said juror to intoxicating liquors, and at said time requested him, the said juror, to "stand for Blodgett," meaning thereby that said juror should in said cause endeavor to secure a verdict favorable to the plaintiff in error. The second count differs from the first in one respect, viz.: the plaintiff in error is therein described as an attorney and counselor at law, engaged in the practice of his profession in the courts of this state, and it is charged that the acts above enumerated were done by him as such attorney and counselor at law, with intent, corruptly, to influence and deceive the district court in the disposition of the cause above mentioned. Upon the filing of said information the plaintiff in error, who had in the meantime been arrested in obedience to a *capias* issued by order of court, was, on his own request, allowed time within which to plead thereto. He subsequently interposed motions to strike portions of each count, and to quash each count of the information, on the ground of misjoinder, which motions were in turn overruled, as were also demurrers to the several counts. He thereupon filed an answer denying *seriatim* the material allegations of the information, and demanding that he be discharged and the proceeding against him dismissed, which motion was likewise overruled. Having refused

to plead further, a plea of not guilty was entered by order of court, which was followed by a hearing and general finding of guilty as to each count of the information, upon which judgment was entered disbarring the accused from practice as an attorney and counselor before the district court for the third judicial district, and committing him to the custody of the sheriff until payment of the cost of prosecution, taxed at $——.

In this proceeding to review the judgment thus rendered we will, for convenience, first notice the assignments which present the refusal to dismiss the information upon the filing of the answer to which reference has been made. It has been held that in all prosecutions for contempt arising out of proceedings in common law actions, or which are cognizable by courts of law as distinguished from courts of equity, the answer of the accused unequivocally denying the alleged contemptuous act, unless committed in *facia curiæ*, is conclusive in his favor. (4 Ency. of Pl. & Pr., p. 795, and cases cited.) But the applicability of that rule to our practice is a question not presented by this record, since the motion was directed to the information as a whole and not merely to the charge of contempt. The argument of the plaintiff in error, so far as it relates to this branch of the case, appears to rest upon the assumption that a proceeding for the disbarment of an attorney is in effect a prosecution for contempt of court, and governed by the rules of practice incident thereto. The fact that a contempt may and in practice frequently has been held to be sufficient ground for disbarment has no doubt led to some confusion upon the subject, although the source of jurisdiction in the two classes of cases, as well as the end to be subserved by the respective proceedings, is essentially different. A contempt by a licensed attorney may, and indeed frequently does, constitute grounds for disbarment, but it by no means follows that cause for disbarment, of necessity, amounts to a contempt. The distinction between the two proceedings is thus correctly

stated by the supreme court of Colorado: "The purpose of proceedings for contempt and those for disbarment, and the powers and duties of courts in connection therewith, must not be confused. The former may be termed a police regulation or power for the protection of the court from present direct interference and annoyance in a trial or proceeding taking place before it; the latter is intended to protect, generally, the administration of justice, to save the legal profession from degradation by unworthy membership, and to guard the interests of litigants against injury from those entrusted with their legal business. The power to act in connection with the former is lodged in the court before or against whom the offense is committed; authority to proceed in the latter is possessed exclusively by the tribunal authorized to grant licenses admitting to the profession; the former is punished by fine or imprisonment, and in many instances the proceeding is summary and largely *ex parte;* the sole penalty in connection with the latter is a prohibition from practicing in courts of record, and this judgment can only be entered upon notice of the charge preferred and a full hearing in defense; ample time for preparation being given and all legitimate defenses being allowed and considered." (*People v. Green*, 7 Colo., 244.) Whatever might have been the merits of the objection had it been confined to the charge of contempt alone, it was, as directed to the information as a whole, not well taken, and the order overruling it is accordingly free from error.

Much has been said in argument respecting the joinder of the proceeding for disbarment with the prosecution for contempt. We are, however, unable to perceive any substantial objection to the practice complained of. There was, it should be observed, no motion or request for an order requiring the county attorney to elect between the two counts of the information. Where two or more distinct felonies, arising out of different transactions, are charged in the same indictment or information, the prosecutor will, on motion of the accused, be required to elect

upon which he will proceed. Such objection must, however, be made before trial and verdict, otherwise it will be waived. (*Thompson v. People*, 4 Neb., 524; *Aiken v. State*, 41 Neb., 263.) But the information in this case is, we think, free from the vice imputed to it. Where different criminal acts constitute parts of the same transaction, they may be joined in the same indictment or count thereof. "There are," as said in *Aiken v. State, supra*, "many illustrations of this rule, among which are burglary and larceny. It is permissible to charge a burglary only, as that the accused broke and entered with intent to steal property, and also a larceny, as that he then and there stole the property described; and such an indictment will sustain a conviction for either of the crimes so charged." If we concede, for the purpose of this discussion, that the inhibition against the joinder of distinct offenses is applicable to summary proceedings of the character here involved, it by no means follows that there is in this instance a transgression of the rule stated. It is, on the contrary, obvious that the two counts refer to the same transaction, of which the district court might have taken cognizance whenever brought to its attention by information or otherwise. And the statement in the second count of the plaintiff in error's character as an attorney and counselor at law is, we have no doubt, permissible under the rule recognized in *Aiken v. State*, 41 Neb., 263. But the objection is, at this time, without force for another reason. Although the finding apparently includes both counts of the information, the judgment is responsive to the second count, and the penalty imposed is that prescribed by section 6, chapter 7, Compiled Statutes, viz.: The disbarment of the accused as an attorney and counselor at law. The record, therefore, so far as it relates to the alleged contempt, unaffected by the charge of malfeasance as an attorney, like that of a verdict without a final judgment, cannot be made the subject of a review by means of a petition in error.

The remaining questions relate to the refusal of the dis-

trict court, on the motion of the plaintiff in error, to strike portions of the information. To set out at length the allegations assailed would result in the unwarranted prolonging of this opinion. They are, it may be conceded, matters of detail only, unnecessary in the statement of the offenses sought to be charged, and which should be rejected as mere surplusage. Unnecessary minuteness of description may operate to the prejudice of the prosecution, since no allegation, necessary or unnecessary, descriptive of that which is legally essential to the charge of the indictment can be rejected as surplusage." (1 Bishop, Criminal Procedure, sec. 485.) But, in general, unnecessary averments in an indictment or information "may be treated as mere waste material, to pass unnoticed, and having no legal effect whatever." (1 Bishop, Criminal Procedure, sec. 478.) The test by which to determine the sufficiency of an indictment is "whether enough remains after the rejection of all redundant matter to satisfy the requirement of the law." And the remedy of the accused is, in every such case, by plea, and not by motion to strike the unnecessary averments.

The attorney general has, it should be stated, expressed a doubt of the jurisdiction of the district court to commit plaintiff in error for non-payment of costs. The theory upon which the court acted in the imposition of that part of the penalty is not apparent from the record or briefs of counsel. We are satisfied, therefore, without pursuing the subject, to so modify the judgment as to award execution for taxable costs, in accordance with the statute above cited. The judgment as thus modified will be affirmed.

JUDGMENT ACCORDINGLY.

EMERY M. STENBERG ET AL. V. STATE OF NEBRASKA, EX REL. CHARLES B. KELLER ET AL.

FILED JANUARY 7, 1897. No. 8281.

1. **Counties: PROPOSITION TO SELL PUBLIC GROUNDS: ELECTION.** The requirements of section 30, article 1, chapter 18, Compiled Statutes, in regard to the proportion of votes which must have been cast in favor of a proposition submitted at an election, to work its adoption, *held* applicable to the submission of a proposition to sell the public grounds of a county.

2. **Statutes: REPEAL: CONSTRUCTION.** It is a settled rule of construction in this state that a simultaneous repeal and re-enactment of a statute or section thereof, in terms or in substance, is a mere affirmance of the original and not a repeal thereof in the strict or constitutional sense of the word. *State v. Bemis*, 45 Neb., 724, followed.

3. ———: ———: ———. The act passed during the legislative session of 1887 entitled "An act to amend section 23 of an act entitled 'An act concerning counties and county officers,' approved March 1, A. D. 1879," did not repeal the succeeding section 24 of the act of 1879, as dependent upon section 23; neither did it repeal section 24 by implication. (Session Laws, 1887, p. 350, ch. 26.)

4. **Counties: PROPOSITION TO SELL PUBLIC GROUNDS: RESULT OF ELECTION: COUNTY BOARD.** The determination of whether or not the proposition to sell the public grounds of the county received the required number of votes to work its adoption, was not a matter for the official determination of the county board. The authority to make the sale depended upon it appearing from the abstract of the votes made during the official canvass of the returns of the election and filed with the county clerk that in favor of the proposition the requisite number of votes had been cast. As no official finding of the board which attempted the sale was necessary, the action of the county board which subsequently entertained and passed upon the claim of purchasers at the sale for repayment of the consideration, the claim being based on the void character of the sale for lack of authority in the commissioners to make it, did not involve a review or reversal of the finding of the former board.

5. ———: ———: ———: ———. The question of the title to the land attempted to be sold by the commissioners, and the validity of the conveyance or deed, were but incidental to the main one of the validity of the sale and must follow its decision, hence were not so involved in the consideration and adjudication of the claim before the commissioners as to present the question of their effect on the jurisdiction to hear and pass thereon.

6. **Conveyance of Public Land:** COLLATERAL ATTACK. *Green v. Barker*, 47 Neb., 934, distinguished.

7. ———: COUNTY BOARDS. The conclusions announced in the former opinion, *Stenberg v. State*, 48 Neb., 299, including the adherence to the doctrine of *Douglas County v. Keller*, 43 Neb., 635, approved and reannounced, but need not be here restated.

REHEARING of case reported in 48 Neb., 299. *Reaffirmed.*

William D. Beckett and *Read & Beckett*, for plaintiffs in error.

Charles B. Keller and *George W. Doane*, *contra.*

HARRISON, J.

George W. Doane and Charles B. Keller filed a claim against the county of Douglas to recover a sum of money which they alleged they had paid the county in consideration of the sale to them of certain real estate by the county or its commissioners; alleging further that the attempted sale was of none effect, for lack of authority in the commissioners to make it, hence the vendees had received no consideration for the money paid and demanded its repayment. The claim was rejected by the county commissioners, from which action an appeal was duly perfected to the district court, where, as the result of issues joined and a trial thereof, the claimants were awarded judgment. The proceedings in the cause in the district court were reviewed in error proceedings in this court and the conclusions reached announced in an opinion written by POST, J., in *Douglas County v. Keller*, 43 Neb., 635, and in which opinion appears a statement of the facts deemed sufficient for a due understanding by the reader of the discussion therein made of the subject-matters involved. As a result of the hearing in this court the judgment of the trial court was affirmed, and after the mandate of this court had been forwarded and entered in the district court, an application to that court for the issuance of a peremptory *mandamus* ordering the

county board to take such action as would result in a warrant being drawn and issued in favor of the parties entitled thereto in lieu of and for the payment of the judgment and costs. The writ of *mandamus* was ordered to issue and the respondents in the action, the county commissioners of Douglas county, presented the case to this court for review, the result being an affirmance of the decision of the district court. The discussion of the questions presented and the decisions of them were embodied in an opinion prepared by NORVAL, J., in *Stenberg v. State*, 48 Neb., 299. A motion for rehearing on behalf of the unsuccessful parties was filed and sustained, and the case has been again argued and submitted. In the former opinion a statement of the facts was made, which for convenience of reference we will here reproduce:

"The county of Douglas, being the owner of 160 acres of land, which had been purchased and was used as a poor farm, its board of county commissioners adopted a resolution submitting to the voters of the county for their adoption or rejection the proposition to sell a part of the poor farm and with the proceeds build a county hospital. This question was voted upon at the general election held in said county November 2, 1886, and much less than one-half and but little over one-third of the total vote polled in said county at said election was cast in favor of said proposition, although it received more than two-thirds of all the votes cast on the question. In February, 1887, the east fifty acres of the poor-farm tract was subdivided into lots and blocks and platted as an addition to the city of Omaha. In the following April, Charles B. Keller and George W. Doane purchased from the county, at public auction, three of the lots for $4,950. One-third of the purchase money was paid in cash, and for the balance they gave to the county their three promissory notes, aggregating $3,300, and secured the same by mortgage upon the lots at the same time the county commissioners executed to the purchasers a warranty for said lots. Subsequently Keller and Doane paid two of the notes and

likewise paid the taxes upon the lots purchased by them, including taxes levied by the city of Omaha for street improvements. The other note remains wholly unpaid. In April, 1892, Keller and Doane filed with the county commissioners a verified itemized account or claim for the sums paid by them for said lots and for taxes, and demanded a return of the money thus paid, on the ground that the deed was void for lack of authority on the part of the commissioners to execute the same. The demand was refused, the claim was rejected and disallowed, and an appeal was prosecuted to the district court, where in May, 1893, the judgment in question was entered in favor of Keller and Doane. The latter has assigned his interest therein to the relator, the Merchants National Bank of Omaha. It is also shown by the record that there are available funds in the treasury of Douglas county sufficient to pay off and discharge said judgment."

Of the sections of the statute in force at the time in relation to the subject-matter of the sale of the public ground was one numbered 30, in relation to the submission of the proposition to sell to a vote of the electors of the county (see chapter 18, entitled "Counties and County Officers," Compiled Statutes, 1887), which reads as follows: "If it appears that two-thirds of the votes cast are in favor of the proposition, and the requirements of the law have been fully complied with, the same shall be entered at large by the county board upon the book containing the record of their proceedings, and they shall then have power to levy and collect the special tax in the same manner that the other county taxes are collected. Propositions thus acted upon cannot be rescinded by the county board." It is stated by counsel for plaintiffs in error that in the opinion in the case of *Douglas County v. Keller*, 43 Neb., 643, a doubt was expressed as to whether the section just quoted was applicable to an election on the subject of the sale of the public grounds. What was said in that opinion in regard to section 30 was as follows: "It is not clear from the language of the

sections which follow whether the provisions of section 30, requiring an affirmative vote of two-thirds of the electors voting at such election, applies to propositions for the sale of public property, or whether it relates exclusively to the authority for imposing such special taxes as are contemplated by law. But that question is not necessarily involved in this controversy, since it is not seriously contended that less than a majority of the voters could authorize the sale by the county of its public property." It will be noticed that it is stated that it "is not clear from the language of the section," etc., which is undoubtedly true, as the application of the section to an election on the question of the sale of the public land is far from being clearly apparent from the language employed. But what followed the statement in the opinion in regard to the doubt renders it clear that what was observed in reference to it was but a passing thought by the writer, made *arguendo*, and without further or other weight, as the applicability of the section was not involved or being considered.

Counsel have reviewed at some length the course of legislation on the subjects involved in portions of chapter 18, to which we have referred, prior to and resulting in the establishing in force the several sections on the subject of the submissions of various propositions by the county board to a vote of the electors, and urge that it becomes apparent that it is not only doubtful whether the provisions of section 30 apply to an election on the question of a sale of public grounds, but it is a verity that they do not. The precise question here mooted was under consideration by this court in the case of *State v. Anderson*, 26 Neb., 517, and it was announced: "The language of section 30 of part 1, chapter 18, of the Compiled Statutes, held to require a number of votes equal to two-thirds of all the votes cast upon any one question, or for all of the candidates for any one office voted for, or to be filled at the election at which is submitted a question of selling the public grounds or buildings of a county, to be

cast in favor of such proposition, in order to the adoption of such proposition." An examination of the legislation upon the subjects, and of the sections in force at the time of the transactions herein involved, leads us to the conclusion that the doctrine of *State v. Anderson* is correct, and it is therefore approved and followed.

It is contended for plaintiffs in error that, in the first enactments by the legislatures upon the subject of the sale of the public grounds of the county by the county commissioners, the requirement that, before any sale could be made, it should be authorized by a vote of the electors of the county, always appeared as a proviso in the section in which the powers generally of the commissioners were specified, which is true, and that in the laws passed in 1873 it appeared as an independent section, numbered 15 (it is now numbered 24); that although at all times since the change it has been numbered as a section of the statutes, it has retained its character of a proviso, a limitation of the grant made by the preceding section to which it refers and has referred in terms, and that a repeal of the section containing the grant would carry with it the proviso. It may be said that when the change was effected and the portion of the section which placed a limitation on the general grant was separated and numbered and made a distinct portion of the act, it lost, at least technically, if not in substance, its provisional character. It contained an allusion in direct terms to the sale mentioned in the preceding section, but was a separate part of the act. During the legislative session of 1887 section 23 of chapter 26, which contained the enumeration of the powers of the county commissioners, was passed, of which the portion we need notice was as follows: "The county boards of the several counties shall have power: * * * Third—To make all orders respecting the property of the county, to keep the county buildings insured, to sell the public grounds or buildings of the county and purchase other property in lieu thereof," etc., was the subject of amendment, and in

the amendatory act there appeared immediately after the word "thereof" the following: "*Provided*, That said county boards may, if they deem it for the best interests of the county to sell county property upon such terms of credit as shall by resolution of said county boards be determined upon; *Provided further*, That such deferred payments shall be for not more than two-thirds of the purchase price, the same to be secured by a note or notes, and a first mortgage upon the property so sold, said deferred payments to draw not less than six (6) per cent interest per annum from date until paid, said interest to be paid annually. Said county boards shall also have the power to sell or negotiate, without recourse upon the county, said notes and mortgage so by them taken; *Provided*, The same shall not be sold for less than par value including accrued interest." There being no other or further changing in the wording of the section of the statute, it being, except what we have last quoted, a re-enactment of the section. The title of the amendatory act (see Session Laws, 1887, ch. 26) was as follows: "An act to amend section twenty-three (23) of an act entitled 'An act concerning counties and county officers,' approved March 1, A. D. 1879." Section 2 thereof reads as follows: "All acts or parts of acts in conflict herewith are hereby repealed." The whole intent and purpose of the amendment of section 23 was to allow a sale to be made on credit. It was not the intention to in any manner or to any extent change the grant of power, either to enlarge or extend it, except in the particular just noted, but to continue the law in force as it was, to add to it no more than appeared in the proviso in regard to credit to be allowed purchasers. The amendatory act was otherwise but a literal re-enactment of the section, retaining its number and arrangement and number of subdivisions, in which were respectively stated the specific grants of powers, and was clearly intended to continue it in force uninterruptedly and was not in a strict or proper sense a repeal. (*State v. Wish*, 15 Neb., 448; *State v. Bemis*, 45

Neb., 724.) There was no inconsistency between the sections of the statute as amended and section 24, nor were they in any sense or degree repugnant or in conflict. Further, we think it clearly appears from a consideration of the scope and purpose of the amendment, the manner in which it was made, and the terms employed in the repealing clause of the amended section, that it was the evident intention of the legislators not to repeal section 24, but to retain it, and we are satisfied it was not repealed. The continued existence of section 24, while not of the questions presented, was, in the course of the decision, recognized in *State v. Anderson*, *supra*, and also in *Douglas County v. Keller*, *supra*, in which it was held: "The provision of section 24, chapter 18, Compiled Statutes, that county boards shall not sell the public grounds of any county without having first submitted the question to the electors thereof, is mandatory and an express limitation upon the powers of the several counties."

In the brief of counsel for plaintiff in error on motion for rehearing appeared the following statements of propositions which it was desired to urge; "The county board, as an administrative body, has no power to say that a deed of the county, valid upon its face, is void, and it has no power to audit a claim against the county based upon the alleged invalidity of such a deed prior to any adjudication that it is invalid." "The county board, as an administrative body, had no power to review and reverse the opinion and proceedings of a prior board in and about the sale of the lots in Douglas addition." In the brief on rehearing it was observed: "Stated generally, the only question in this case is, did the county board of 1892 have jurisdiction to hear and determine the issues involved in the controversy between Keller and Doane and the county of Douglas?" In argument, several points were discussed, all of them, however, connected with and bearing more or less directly upon the main issues. As we now view the matters in dispute, they all hinge upon the settlement of one or two main propositions, the most

important of which is whether the commissioners, when they attempted to make the sale of the public grounds, had authority or power so to do. In opening the discussion of this branch of the case we will first say that, as we gather the real substance of the cause of action, this being mooted to some extent in argument, it was to recover the money from the county, for the payment of which there was in fact no consideration, because for the sale of some property to the claimants there had existed no authority in the commissioners, hence the sale was void and of none effect. That an action at law may be maintained in a case of this nature, when the property sold and attempted to be conveyed was real estate, is sustained in *Clark v. Saline County*, 9 Neb., 516; *Argenti v. City of San Francisco*, 16 Cal., 282; *Pimental v. City of San Francisco*, 21 Cal., 362; *McCracken v. City of San Francisco*, 16 Cal., 620; *Grogan v. City of San Francisco*, 18 Cal., 590. The power of county commissioners generally to sell lands or public grounds of the county was conferred by the portions of section 23 of the statute hereinbefore quoted, but it was so limited and restricted in the succeeding section, 24, hereinbefore set out in terms, that it never could become operative or be exercised as to any of such property until the special authority was vested by a vote of the electors of the county. A submission of the proposition to such vote, the manner of submission, notice to be given, etc., are all provided in other sections to which we have alluded, also the requisite number of votes to carry it is prescribed, as we have seen in section 30, which we have discussed herein. There is another section of the statutes on the subject involved, which to our mind, in view of the conditions developed in the case at bar, must play quite an important part in its final adjudication, viz., section 29, which reads as follows: "At the time specified in such notice a vote of the qualified electors shall be taken in each precinct, at the place designated in such notice. The votes shall be received and returns thereof made, and the same shall be canvassed

by the same officers and in the same manner as required at each general election." It is a part of the duties in a canvass of the votes cast at an election that abstracts be made showing the number of votes and how cast, etc., which are preserved in the office of the county clerk. Such an abstract is an official showing of the facts required by law to be set forth therein, including the number of votes cast for or against any candidate for office or proposition before the voters at such election. That abstract of the canvass of the votes cast on the proposition submitted to the voters of Douglas county as to whether the county commissioners should be empowered to sell the lands of the county, out of the purported sale of which this controversy arose, furnished complete information, from which, when viewed in the light of section 30 of the law in which the proportion of the votes necessary to carry the proposition was specifically ascertained and stated, the fate of the proposition, and whether adopted or not, would appear with mathematical certainty, leaving nothing open for doubt, quibble, or investigation. The fact would there be shown,—would exist. It is clear that the statute did not contemplate an official finding or determination of the county board on the subject of whether the proposition had carried or not. No such task was required of them or committed to their consideration; their only duty was to enter the fact on their records which appeared from the official canvass. (See Compiled Statutes, 1887, ch. 18, sec. 30.) If they made an entry contrary to the reality as it appeared from the abstract of votes, it did not constitute an official finding or decision, and would not bind any one or confer any power on them to sell the land described in the proposition on which the electors voted. This must come to them from the actual existence of the fact that the requisite number of votes had been cast for the proposition, to carry it, as shown in the record of the votes. (*Dixon County v. Field*, 111 U. S., 92; *Miller v. City of Amsterdam*, 43 N. E. Rep. [N. Y.], 632.) There was no official finding

or determination of the county board in respect to the votes polled and the result of the election, consequently the board which entertained jurisdiction and passed upon the claim of Keller and Doane was not, in so doing, called upon to review or reverse any decision of a former board. The want of authority or power of the commissioners arose from the lack of the requisite number of votes to work the adoption by the people of the proposition submitted, and this appeared from the abstract or record of the votes, and the attempt of the commissioners to make the sale was but an assumption of authority in the premises on their part and the acts performed in furtherance thereof were void, and no title to the property ever passed to the purchasers. That the supposed conveyance of the land was void and of none effect and that no title passed were but incidents of, and subsidiary to, the main issue, and when the sale was proved void for want of authority in the commissioners, and so adjudicated, the incidental matters fell with it; hence there was no governing questions or issues of the validity of the conveyance, or inquiry in regard to the title to real property which could militate against the jurisdiction of the board to pass upon the merits of the claim.

It is insisted that the doctrine announced by this court in the opinion in the case of *Green v. Barker*, 47 Neb., 934, wherein it was said: "Where property has been conveyed under the provisions of the act of congress of May 22, 1844, which may be termed the 'Townsite Act' (see 5 U. S. Statutes at Large, 657), by the United States to the corporate authorities of a town or city, or a trustee designated by law, a deed executed by the trustee or the party authorized by law to make the transfer, evidences the determination, by the party executing it, that all the preliminary steps have been taken and necessary requirements complied with, and that the person to whom the deed runs is the one entitled to receive it, and the question of the validity of the deed cannot be litigated in a collateral proceeding,"—is applicable and governing in

the case at bar, and, on the other hand, that the two cases are clearly distinguishable and unlike. We incline to the latter view. In the case of *Green v. Barker* there was in adjudication the right to make a collateral attack upon a deed duly executed by a party in whom the power to dispose of the land conveyed was fully vested by law, and in whom further rested the power to examine and determine the right of the party applicant for or demandant of a conveyance to the property, to so demand and receive the conveyance and title, to settle whether any such party had performed the acts or made the payments which by law constituted a consideration for the conveyance to him,—a question of whether there had been an irregular or mistaken exercise of a fully vested power or authority. In the case at bar it was not a query as to any irregularity or mistake in the exercise of an existing power, but the authority itself was denied; the power to act was controverted, which presented an issue for settlement entirely different from that raised by the facts in *Green v. Barker*, 47 Neb., 934.

We have now noticed and disposed of the main questions argued on the rehearing. There were some others, the disposition of which turn upon and must follow that of those directly settled; also some which were disposed of in the former opinion and with the discussion and settling of which at that time, on further examination, we are entirely satisfied, and will content ourselves at this time by signifying our approval. It follows that we adhere to the conclusions announced in the former opinion and that the judgment of the district court is

REAFFIRMED.

DOUGLAS COUNTY V. CHARLES B. KELLER ET AL.

FILED JANUARY 7, 1897. No. 8280.

Counties: VOID SALE OF LAND: PURCHASE MONEY. The settlement of the questions presented in this case is governed by the conclusions stated in the case of *Stenberg v. State*, 50 Neb., 127.

REHEARING of case reported in 48 Neb., 317. *Reaffirmed.*

William D. Beckett and *Read & Beckett*, for plaintiff in error.

Charles B. Keller and *George W. Doane, contra.*

HARRISON, J.

There was a judgment in the district court for claimants in this case, on an appeal from the action of the county board of Douglas county, on a claim of Charles B. Keller and others presented against the county, which, in error proceedings to this court, was affirmed. (See *Douglas County v. Keller*, 43 Neb., 635.) A motion was afterwards filed in behalf of the county to set the judgment aside, which, on hearing, was overruled. To review such ruling error was prosecuted for the county, and on presentation here the judgment of the lower court was affirmed (see *Douglas County v. Keller*, 48 Neb., 317), and on motion a rehearing was granted, pursuant to which, in the regular course, the case has been again submitted. As this case presents the same points for settlement as have been determined in the case of *Stenberg v. State*, 50 Neb., 127, following the conclusions therein, the judgment herein must be

REAFFIRMED.

ABRAHAM LAUDER V. STATE OF NEBRASKA.

FILED JANUARY 7, 1897. No. 8630.

1. **Criminal Law**: INSTRUCTIONS: RECORD FOR REVIEW. Error in the refusal to give a proffered instruction must affirmatively appear from an inspection of the entire record; and if a case is presented on a transcript unaccompanied by a bill of exceptions, and there may have been a possible state of the facts disclosed by the evidence which would have warranted such refusal, the assignment of error must be overruled.
2. **Motion for New Trial**: JURISDICTION OF JUDGE. A judge of the district court, within his own judicial district, has jurisdiction to and may hear and determine a motion for new trial in a case wherein the judge of another district presided during the trial, but, before the hearing of the motion for new trial, has ceased to preside.

ERROR to the district court for Douglas county. Tried below before NORRIS, J. *Affirmed.*

The opinion contains a statement of the facts.

Lee S. Estelle, for plaintiff in error:

The instruction requested by defendant below was erroneously refused. (*State v. Wilkins*, 28 Atl. Rep. [Vt.], 327; *Baccio v. People*, 41 N. Y., 265; *Higgins v. People*, 58 N. Y., 377.)

The motion for a new trial could not lawfully be heard before a judge other than the one who presided at the trial. (*Ohms v. State*, 5 N. W. Rep. [Wis.], 829; *Manhattan, A. & B. R. Co. v. Keeler*, 32 Kan., 163; *Bass v. Swingley*, 22 Pac. Rep. [Kan.], 716.)

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

HARRISON, J.

July 12, 1895, an information was filed in the district court and by the county attorney of Douglas county, in which the plaintiff in error was charged with the crime

of assault with intent to commit rape. In the due course of the proceedings in the case he was arraigned, entered a plea of not guilty, was accorded a trial, as a result of which he was by the jury adjudged guilty, and, subsequent to the consideration and overruling of a motion for a new trial filed in his behalf, was sentenced to imprisonment in the penitentiary for a term of fifteen years.

One of the alleged errors assigned and urged in this court is that the trial court refused to give an instruction requested by plaintiff in error, in the following language: "You are instructed that you should take into consideration the delay of bringing prosecution, and the fact that Emma Anderson did not make complaint herself, or cause it to be done." The argument here is directed to the proposition that it was error to refuse to inform the jury that the delay in instituting the prosecution was an act for their consideration. The information, as we have before stated, was filed July 12, 1895, and the crime was alleged to have been committed September 15, 1894. Whether this instruction, viewed generally, was one proper to be given in criminal actions of the nature of the one at bar, we need not now determine. There might have existed a condition of the facts, as disclosed by the evidence, as applicable to which its giving would not have been proper, but there is no bill of exceptions in the record, hence the evidence is not before us; and if the instruction might have been correct and applicable to some state of the facts, we cannot say that there was not evidence which made the refusal to read it without error. If there was error in the denial of the request to give the instruction, it must affirmatively appear from the entire record. (*Willis v. State*, 27 Neb., 98; *Oltmanns v. Findlay*, 47 Neb., 289.)

Hon. W. F. Norris, judge of the eighth judicial district, presided at the trial of the case, acting for and as one of the judges of the fourth judicial district. The verdict of the jury was adverse to the plaintiff in error and a motion on his part for a new trial was duly filed. When

this motion was called for hearing Judge Norris had ceased to preside over the court, and Judge C. R. Scott, of the fourth judicial district, was then on the bench, who heard the motion for a new trial and acted upon it, with the result we have hereinbefore stated. It is urged that it was error for Judge Scott to hear and dispose of the motion for new trial; that none other than the trial judge is competent to or can intelligently pass upon the questions raised by such motions. We will first notice the fact that no objection was made at the time to the hearing of the motion by Judge Scott, and there was no request or demand that Judge Norris be called upon to be present and hear the motion. From all that appears of record, the plaintiff in error was willing that the matter should be submitted to Judge Scott for his decision, and not having complained there, plaintiff in error should not be heard to object now. But, passing to the main question, Judge Scott was one of the judges of the fourth judicial district, wherein the case was tried and the motion was for hearing, and had jurisdiction, was fully authorized and empowered to hear and determine this or any matter then pending in the courts of the district, except such as he might be disqualified by law from hearing; and that he heard and ruled on the points raised by the motion for a new trial in the present case, in its then existing condition as disclosed by the record here, was not error. We acknowledge the full force of the arguments of counsel for plaintiff in error on this point, and have examined the decisions cited in support of the doctrine for which he contends, but the subject has heretofore been considered by this court and decided, no doubt, after due deliberation, and we now feel disposed to follow the rule then announced. In the decision of the case of *State v. Gaslin*, 32 Neb., 291, wherein the judge of the then eighth judicial district had, at the request of the judge of the tenth judicial district, presided during the trial of a cause in a county in the last mentioned district, and before the hearing of the motion for a new

trial had left the county and district, and the motion for a new trial was heard and decided by one of the judges of such district, the main facts and conditions being parallel with the circumstances existent in the case at bar, it was stated: "Where, after a verdict has been returned in the district court, the judge of another district, who tried the cause, ceased to preside and returns to his own district before the motion for a new trial is heard and determined, the motion may be passed upon by the court where the case is pending where the judge of the district is sitting." (See, also, *Chicago, P. & S. R. Co. v. Town of Marseilles*, 107 Ill., 315; *Manufacturers Mutual Fire Ins. Co. v. Daboll*, 44 N. W. Rep. [Mich.], 604; *Malone v. Eastin*, 2 Port. [Ala.], 182.)

There are no other alleged errors presented, and it follows from the conclusions announced that the judgment of the district court will be

AFFIRMED.

CHICAGO LUMBER COMPANY V. JOHN S. BENJAMIN.

FILED JANUARY 7, 1897. No. 6982.

1. **Review**: UNAUTHENTICATED BILL OF EXCEPTIONS. A bill of exceptions which is not authenticated by the certificate of the clerk of the trial court is not entitled to consideration in this court.
2. ———: ———. Where to an examination and settlement of questions argued to this court an inspection of the evidence contained in a bill of exceptions is necessary, and such bill lacks the authentication of the clerk of the trial court, the points presented may be overruled.

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

H. W. Dickinson, Dickinson & Shinn, and *Wolfenbarger & Williams*, for plaintiff in error.

Campbell & Ludwich, contra.

HARRISON, J.

This case is presented to this court by petition in error to secure a review of the proceedings during its trial in the district court of Custer county, and the errors assigned and argued relate to the sufficiency of the evidence adduced to sustain the verdict rendered, and some other questions, all and singular of which require a reference to the evidence for their examination and settlement. There is attached to the record what purports to be a bill of exceptions, but it is not authenticated as such instrument by the certificate of the clerk of the trial court. This being true, the evidence is not properly before us for inspection, and as the points of complaint which are argued cannot be considered without it, they must be overruled. The judgment of the district court is

AFFIRMED.

GEORGE W. SCOTT, APPELLEE, V. EDWIN R. OVERALL, APPELLANT, ET AL.

FILED JANUARY 7, 1897. No. 6869.

Bill of Exceptions: AUTHENTICATION BY CLERK. The statute by which the clerk of the district court is allowed to settle and sign a bill of exceptions, instead of the judge who heard or tried the cause in which it is sought to make such bill a part of the record, must be strictly construed, and the methods prescribed by statute, if any, for making the facts on which the clerk's authority to settle and sign a bill of exceptions apparent of record, should be followed; and where the statute requires a showing of the facts to be by affidavit, a statement by the clerk, in the certificate, that he has personal knowledge of the facts, will not be sufficient to take the place of the required affidavit.

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

David Van Etten, for appellant.

Curtis & Shields, contra.

HARRISON, J.

The subjects argued on error in this case to this court are such as arise out of facts and circumstances presented in form of evidence to the attention of the trial court, and which, to entitle them to consideration here, must have been preserved in a bill of exceptions. Section 311 of the Code of Civil Procedure, which is in relation to bills of exceptions, provides that a bill of exceptions shall be settled and signed by the judge who heard or tried the cause in the record of which it is sought to incorporate such document; and further: "In case of the death of the judge, or when it is shown by affidavit that the judge is prevented by sickness or absence from his district, as well as in cases where the parties interested shall agree upon the bill of exceptions, and shall have attached a written stipulation to that effect to the bill, it shall be the duty of the clerk to settle and sign the bill in the same manner as the judge is by this act required to do." The instrument which is designated as the bill of exceptions in the record in the case at bar was signed by the clerk of the trial court, his authority for so doing being derived, it is claimed, from the fact of the absence from the district at the time of the trial judge. But the prescribed statutory method of making such fact a matter of record, *i. e.*, by affidavit, was not pursued. The party who desired the settlement of the bill apparently contented himself with a statement by the clerk of the district court, in the certificate attached to the instrument, of his personal knowledge in regard to the absence of the judge from the district, for the record contains no other showing of any statutory grounds for the clerk's acting in the matter, instead of the judge, than the statement we have just indicated. This was not sufficient. Statutes which allow the clerk or persons other than the trial judge to settle and sign bills of exceptions are strictly construed, and one of the statutory reasons must exist and it must be shown of record in the manner pre-

scribed, if any. (3 Ency. of Pleading & Practice, p. 453; *Schaffroneck v. Martin*, 9 Neb., 38.) This being true, there is no bill of exceptions in this case, and the points presented cannot be determined without a reference to the evidence, properly preserved in a bill. It follows that they are unavailing and the judgment of the district court must be

AFFIRMED.

RICHARD H. BELLAMY V. JONAS E. CHAMBERS.

FILED JANUARY 7, 1897. No. 6932.

1. **Issues in Appellate Court.** "In an appeal from the county court to the district court, the cause must be tried on the same issues as were tried in the county court, unless some new matter has arisen since the trial there, such as payment, etc." (*Halbert v. Rosenbalm*, 49 Neb., 498.)
2. **Covenant Against Incumbrances: LIMITATION OF ACTIONS.** A covenant against incumbrances in a conveyance of land is, in effect, that the premises then are free from incumbrances; and if any incumbrances exist, the covenant is broken and a cause of action therefor accrues in favor of the covenantee, which will be barred by limitation in five years.

ERROR from the district court of Gosper county. Tried below before WELTY, J. *Affirmed.*

W. S. Morlan, for plaintiff in error.

W. B. Miller, contra.

HARRISON, J.

On July 10, 1893, the plaintiff commenced this action in the county court of Gosper county to recover the sum of $29.91 and interest as prayed for in his bill of particulars. The cause of action was based upon a breach of covenant against incumbrances contained in a deed of a certain described tract of land, executed and delivered

by defendant to plaintiff, of date December 16, 1886, wherein there appeared a covenant by which it was warranted that, except a mortgage lien specifically stated, the premises conveyed were "free from incumbrance," etc. The breach was stated in the bill of particulars as follows: "Said premises were not free from incumbrance at the time of the execution of said deed, but were incumbered by the taxes which had been lawfully assessed against them for the year 1886, to the amount of $20 and accrued interest. The plaintiff was compelled to remove said incumbrance, and paid $29.91 to remove the same, of all which the defendant had due notice. Said sum was paid June 27, 1890." A trial in the county court resulted in a judgment favorable to defendant, from which an appeal to the district court was perfected on behalf of plaintiff. In the petition filed in the appellate court there appeared the following:

"The taxes assessed and levied against said land for the year 1886, amounting to the sum of $20, had not been paid, and at the time of said conveyance were a lien and incumbrance on said tract of land, and after the same became due, to-wit, about the 1st day of May, 1887, the plaintiff requested the defendant to pay the same and comply with the terms of covenants and warranty in said deed first mentioned; thereupon the defendant then requested the plaintiff to pay said taxes to the treasurer of Gosper county, Nebraska, and promised to repay the amount so to be advanced by this plaintiff necessary to pay said taxes and remove said incumbrance.

"4. In compliance with the said request of the defendant, and relying on the said promises of the said defendant, and for the purpose of preventing the said land from being conveyed by tax deed, this plaintiff, on the 27th day of June, 1890, paid to the treasurer of Gosper county, Nebraska, the delinquent taxes on the above described tract for the year 1886, which, with accrued interest, at that time amounted to the sum of $29.91, said amount then being the amount necessary to pay in order to dis-

charge said tract of land from the incumbrance thereon by reason of said taxes.

"5. No part of the said sum of money has been repaid by the defendant, and there is now due from the defendant to the plaintiff, for said taxes so paid, the sum of $29.91, with interest from the 27th day of June, 1890."

For the defendant there was presented the following motion: "Comes now the defendant in the above entitled cause, and moves the court for a rule on the plaintiff that he be made to strike out from his petition in this court, filed December 8, 1893, all that portion of allegation number three (3) commencing 'The plaintiff requested the defendant to pay the same and comply with the terms of covenants and warranty in said deed first mentioned; thereupon the defendant then requested the plaintiff to pay said taxes to the treasurer of Gosper county, Nebraska, and promised to repay the amount so to be advanced by this plaintiff necessary to pay said taxes and remove said incumbrance;' also to strike out therefrom all of allegation No. 4, reading as follows: 'In compliance with said request of the defendant, and relying on the said promises of said defendant;' and also that part of allegation No. 5, as follows, reading 'No part of the said sum of money has been repaid by the defendant,' for the reason that the issues in the court below, where this cause was tried, and from which it was appealed, did not include the matter set up in said petition, nor was the trial upon the said matter so set out, and the issues involved in said petition would not be the issues in the lower court, and the retaining of said matter would cause the raising of an entirely new issue in the case." This motion was sustained, and there was then filed a demurrer to the petition, which was also sustained, and the plaintiff having signified his intention to plead no further, his action was dismissed.

It is urged in this court, in error proceedings, that the district court erred in sustaining the motion for such action and striking out the portions of the petition. If

the matter which in effect was destroyed, or rendered of no avail by its removal from the petition, be viewed as an allegation of the right of action on the promise of defendant to reimburse the plaintiff for the payment of taxes assessed against the land prior to its conveyance, it was a change, or direct departure, from the cause of action, the breach of the covenant against incumbrances declared upon in the bill of particulars in the county court, in no sense identical therewith, and it was, therefore, proper to strike it out of the petition. (*Bishop v. Stevens*, 31 Neb., 786; *Halbert v. Rosenbalm*, 49 Neb., 498.) Conceding that it might be a promise to pay the debt, which had, at the time of the beginning of this action, become barred by the running of the statute of limitations, it could have been of no avail, because then, as to both the original cause of action and the subsequent promise relied upon, the statute had run. Viewed as an action predicated upon the covenant against incumbrances, the demurrer was well taken and the decision sustaining it was not erroneous. The defendant, the vendor of the land, was, on December 16, 1886, the date of his conveyance to the plaintiff, liable for the taxes assessed against the land for that year. (Compiled Statutes, 1895, ch. 77, sec. 44; *Campbell v. McClure*, 45 Neb., 609. See, also, *McClure v. Campbell*, 25 Neb., 57.) The taxes constituted a lien on the land. (Compiled Statutes, 1895, ch. 77, art. 1, sec. 138; *McClure v. Campbell, supra.*) In the decision of the case of *Chapman v. Kimball*, 7 Neb., 399, an action to recover the amount of taxes a lien on lands at the time of conveyance with covenant against incumbrances, it was said in the third paragraph of the syllabus: "A covenant against incumbrances is a present engagement that the grantor has an unincumbered title, and is not in the nature of a covenant of indemnity. The statute of limitations, therefore, commences to run at once if an incumbrance existed at the time of the conveyance." And in the body of the opinion it was stated: "The covenant against incumbrances is in the present

tense, 'that said premises are free from incumbrance.' If the taxes in question actually existed as a lien against the land in question at the time of the conveyance, the covenant was broken at that time and a cause of action at once accrued in favor of the covenantee for his damages." (*Davidson v. Cox*, 10 Neb., 150; *Kern v. Klocke*, 21 Neb., 529; *Cheney v. Straube*, 35 Neb., 524.) Section 10 of the Code of Civil Procedure, in reference to time in which actions can be brought, is as follows: "Within five years, an action upon a specialty, or any agreement, contract, or promise in writing, or foreign judgment." In *Kern v. Klocke, supra*, it was held: "An action for damages for the breach of the covenants of warranty contained in a deed conveying land is an action upon a specialty within the meaning of the tenth section of the Code of Civil Procedure, and may be brought at any time within five years after the cause of action shall have accrued." It follows from the views hereinbefore expressed that the judgment of the district court was right and will be

AFFIRMED.

EMIL HANS V. STATE OF NEBRASKA.

FILED JANUARY 7, 1897. No. 8463.

1. **Review:** CONTINUANCE. Affidavits for a continuance must be embodied in a bill of exceptions to be considered in the appellate court.

2. **Criminal Law:** CONTINUANCE: ABSENT WITNESS. Whether the prosecution in a criminal case may avoid a continuance sought by the defendant on a showing which entitles him to a postponement of the trial on the ground of an absent witness, by the state admitting merely that the witness, if present, would testify as represented in the application, is not involved in this case, and consequently not decided.

3. ———: ELECTION AS TO COUNTS: REVIEW. The ruling of the court, made before the trial commenced, denying the defendant's motion to require the state to elect under which count or counts of an in-

formation it would rely for conviction is reviewable without being assigned as error in the motion for a new trial.

4. **Intoxicating Liquors:** UNLAWFUL SALE: INFORMATION: JOINDER OF COUNTS. A count charging the illegal sale of intoxicating liquors may be joined in an information containing a count charging the defendant with keeping such liquors for sale in violation of law.

5. **Criminal Law:** WITHDRAWAL OF REST: REVIEW. An order in a criminal case permitting the state to withdraw its rest, for the purpose of introducing further testimony, will not be disturbed where an abuse of discretion on the part of the trial court has not been shown.

6. ———: BILL OF EXCEPTIONS: OMISSION OF EVIDENCE: REVIEW. Where the bill of exceptions reveals that material evidence introduced on the trial has been omitted, this court cannot review an order denying a motion to direct a verdict, when to do so would require an examination of the proofs.

7. ———: MISDEMEANOR: DATE: PROOF. In a prosecution for a misdemeanor it is not essential that the state should prove the commission of the offense on the precise date laid in the information. It is sufficient if it be established that the crime was committed within the statute of limitations.

8. **Intoxicating Liquors:** UNLAWFUL INTENT: PROOF. The unlawful intent with which intoxicating liquors are kept may be presumed by the recent prior sale by the defendant of the same kind of liquors, in violation of law.

9. ———: UNLAWFUL SALE: INSTRUCTIONS. *Held*, That the first instruction did not assume the possible existence of a single fact, but merely told the jury what were the material averments of the information.

10. **Instructions:** CONSTRUCTION. A charge which, construed as a whole, plainly states the law applicable to the case is without error.

11. **Assignments of Error.** An assignment in a petition in error that the court erred in denying the motion for a new trial is too indefinite to be available where several distinct grounds are stated in the motion.

12. **Intoxicating Liquors:** SALE WITHOUT LICENSE. Each act of keeping for the purpose of sale, without a license or permit issued by the proper body, any malt, spirituous, or vinous liquors in this state constitutes a misdemeanor.

13. ———: ———: SENTENCE. Where an information contains two counts, each charging the keeping for sale, in violation of law, of a different kind of intoxicating liquors, and defendant is found guilty on both counts, a separate sentence is to be imposed for each conviction.

14. ———: ———: STATUTES. *In re White*, 33 Neb., 812, followed upon the question of the constitutionality of chapter 33, Session Laws of 1889.

ERROR to the district court for Stanton county. Tried below before NORRIS, J. *Affirmed.*

The facts are stated in the opinion.

C. C. McNish, for plaintiff in error:

The overruling of accused's motion for a continuance upon condition that the prosecuting attorney would admit the witnesses would testify to facts set forth in the affidavit accompanying the motion, was erroneous. (*Newman v. State*, 22 Neb., 248; *State v. Warden*, 8 S. W. Rep. [Mo.], 233; *State v. Berkley*, 4 S. W. Rep. [Mo.], 24; *State v. Jennings*, 81 Mo., 193; *State v. Neider*, 6 S. W. Rep. [Mo.], 708; *State v. Dyke*, 9 S. W. Rep. [Mo.], 925; *People v. Vermilyea*, 7 Cow. [N. Y.], 369; *Dominges v. State*, 7 S. & M. [Miss.], 475; *State v. Dawson*, 1 S. W. Rep. [Mo.], 827; *Carter v. State*, 35 S. W. Rep. [Tex.], 378; *Clark v. State*, 33 S. W. Rep. [Tex.], 224; *Texas & P. R. Co. v. Yates*, 33 S. W. Rep. [Tex.], 291; *Miller v. State*, 29 Neb., 437; *Goodman v. State*, 1 Meigs [Tenn.], 195; *Brill v. Lord*, 14 Johns. [N. Y.], 341; *Hardesty v. Commonwealth*, 11 S. W. Rep. [Ky.], 589; *Pace v. Commonwealth*, 12 S. W. Rep. [Ky.], 271; *Gandy v. State*, 28 Neb., 707; *Hair v. State*, 14 Neb., 503; *Wassells v. State*, 26 Ind., 30; *Carmon v. State*, 18 Ind., 450; *Page v. Arnim*, 29 Tex., 54; *Baker v. State*, 58 Ark., 513; *Pannell v. State*, 29 Ga., 681; *McLaughlin v. State*, 8 Ind., 281; *People v. Diaz*, 6 Cal., 248; *People v. Brown*, 54 Cal., 243; *State v. Salge*, 2 Nev., 321; *Nave v. Horton*, 9 Ind., 563; *Skaro v. State*, 43 Tex., 88; *De Warren v. State*, 29 Tex., 464; *Hyde v. State*, 16 Tex., 445; *Trulock v. State*, 1 Ia., 519.)

The court erred in overruling the motion to require the state to elect as to the counts upon which it would proceed to trial. (*Burrell v. State*, 25 Neb., 581; *Martin v. State*, 30 Neb., 421; *State v. Valentine*, 63 N. W. Rep. [S. Dak.],

541; *People v. Rice*, 61 N. W. Rep. [Mich.], 540; *People v. Aiken*, 33 N. W. Rep. [Mich.], 821; *Menken v. City of Atlanta*, 2 S. E. Rep. [Ga.], 559; *Griffin v. City of Atlanta*, 4 S. E. Rep. [Ga.], 154; *State v. Harris*, 20 N. W. Rep. [Ia.], 439; *People v. Rohrer*, 58 N. W. Rep. [Mich.], 661.)

The court erred in imposing a double fine. (*State v. Lancaster County*, 6 Neb., 474; *City of Tecumseh v. Phillips*, 5 Neb., 305; *Ives v. Norris*, 13 Neb., 252; *Miller v. Hurford*, 11 Neb., 377.)

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

There was no error in the order overruling the motion for a continuance. (*State v. Hatfield*, 72 Mo., 518; *State v. Mooney*, 10 Ia., 506; *People v. Brown*, 59 Cal., 345; *Burrell v. State*, 25 Neb., 581.)

Other cases cited: *Hornberger v. State*, 47 Neb., 40; *Rauschkolb v. State*, 46 Neb., 658.

NORVAL, J.

John A. Ehrhardt, the county attorney of Stanton county, filed an information in the district court of that county containing seventeen counts, the first fifteen of which charged Emil Hans with the unlawful selling of intoxicating liquors to different persons at various dates, and the remaining two counts charged him with keeping intoxicating liquors for the purpose of sale in violation of law. The accused, upon the trial, was found guility as charged in the last two counts of the information, and acquitted on the other counts. A motion for a new trial was overruled, and the court sentenced the defendant to pay a fine of $100 on each of the two counts of the information under which he was found guilty.

The first matter of which complaint is made is the overruling of the defendant's motion for a continuance. A reversal cannot be had on this ground, for the reason it does not appear that the defendant was prejudiced by the ruling, or that there was any merit in his application.

The motion states no reason for the postponement of the trial over the term, but purports to have been based upon an affidavit of some person not named in the application, and no such affidavit has been incorporated in the bill of exceptions. There is contained in the transcript what purports to be the copy of an affidavit made by the defendant which, judging from its scope, is possibly the one referred to in the motion. But whether or not it was used on the hearing, the record is wholly silent. Not having been embodied in the bill of exceptions, the affidavit is not entitled to consideration. (*Strunk v. State*, 31 Neb., 119; *Vallindingham v. Scott*, 30 Neb., 187; *Olds Wagon Co. v. Benedict*, 25 Neb., 372; *Van Etten v. Kosters*, 31 Neb., 285.)

The attorney general argues that, should the affidavit referred to be considered, and it was sufficient to support the application, there was no error in refusing the continuance, because the record shows that the county attorney, in open court, admitted that the witnesses named in the affidavit, if present, would testify to the facts therein set forth, and that such facts could be read to the jury as evidence, and that thereupon the ruling assailed was made. Counsel for the accused strenuously insist that the admissions of the prosecutor just mentioned were insufficient to prevent a postponement of the trial or to cure the error in denying the application therefor. This court has held in a civil case (*Burris v. Court*, 48 Neb., 179) that it is not reversible error to deny an application for a continuance based upon allegations of the absence of a witness from the state, and of the facts to which he is expected to testify, when the party resisting such application admits that the testimony of the witness would be as represented and may be so treated on the trial. Whether the same rule obtains in criminal prosecutions this court has not hitherto offered an opinion, and it will not do so now, owing to the fact that the question is not sufficiently presented by the record. It may be noted in passing that the courts

of the sister states are divided in their holding upon the proposition. (See authorities cited in the briefs filed herein, also 4 Ency. Pl. & Pr., p. 865.)

Objection is taken to the overruling of the defendant's motion made prior to the commencement of the trial, to require the state to elect whether it would proceed to trial upon the first fifteen counts of the information or the last two counts thereof. The answer of the state to this is that the ruling cannot be considered because not raised in a motion for a new trial. In the last contention we do not concur. The purpose of a motion for a new trial is to challenge the attention of the trial court to its rulings made during the trial proper,—that is, from the beginning of the impaneling of the jury until the return of the verdict,—in order that any errors therein may be speedily corrected before the case has passed beyond its control. Decisions not made during the trial, to which class the one under consideration belongs, are available on review, although not mentioned in a motion for a new trial, because they are not grounds for which a new trial can be moved. In *Bohanan v. State*, 15 Neb., 209, it was asserted that the ruling on a plea in abatement could be reviewed without having been assigned as error in the motion for a new trial. (See *O'Donohue v. Hendrix*, 13 Neb., 255; *Graves v. Scoville*, 17 Neb., 593.) In *Ford v. State*, 46 Neb., 390, it was ruled that alleged errors in overruling challenges to jurors are not available when not called to the attention of the trial court in the motion for a new trial, since such rulings occurred during the trial.

As already stated, the last two counts charged the defendant with the unlawful keeping of intoxicating liquors for sale, while the other counts charged the illegal sale of liquors. Separate and distinct crimes, it must be conceded, are joined in the information. The rule in regard to joinder of counts in cases of misdemeanors is that several distinct offenses of the same kind may be united in that manner in the same information. As stated by

Mr. Black in his valuable treatise on Intoxicating Liquors, section 387: "To sell liquor unlawfully and to keep it for sale unlawfully are entirely distinct offenses under these statutes, founded on distinct criminal purposes, and completed by different criminal acts. Hence it follows that although the offender will be liable to prosecution under a statute for the unlawful selling of liquors when the sale is consummated, this will not hinder his being punished for the unlawful keeping of liquors before the sale. For the same reason, a conviction or acquittal for one of these offenses is no bar to the prosecution for the other, and the evidence of a sale admitted on the trial for the selling is admissible on a subsequent trial for the unlawful keeping." It does not follow, because more than one crime is charged, that the state was required to make an election of the counts of the information under which it would proceed to trial and rely for conviction. The selling of liquors without license and the keeping them for illegal sale, it is true, are separate and distinct offenses, but they are all of the same grade and belong to the same general group or class of crimes, therefore they are properly joined in separate counts of the same information. (*Burrell v. State*, 25 Neb., 581; *Martin v. State*, 30 Neb., 507; *Nichols v. State*, 49 Neb., 777; Black, Intoxicating Liquors, sec. 442; *State v. Klein*, 78 Mo., 627; *Tillery v. State*, 10 Lea [Tenn.], 35; *People v. Charbineau*, 115 N. Y., 433; *Commonwealth v. Gillon*, 84 Mass., 505; *Walters v. State*, 5 Ia., 507; *Commonwealth v. Moorhouse*, 67 Mass., 470.) In *Burrell v. State*, 25 Neb., 581, it is ruled that counts for selling intoxicating liquors on Sunday may be joined in an indictment containing a charge against the same person with selling such liquors to a minor; thus permitting the uniting in the same indictment or information of separate and distinct offenses belonging to the same class, although differing in degrees of punishment. In *Commonwealth v. Clark*, 80 Mass., 367, it was asserted that counts for the manufacturing for sale, for being a common seller, and

for a single sale of intoxicating liquors, in violation of statute could be properly joined in the same indictment. In *State v. McLaughlin*, 27 Pac. Rep. [Kan.], 840, it was held that a count for maintaining a nuisance under section 13 of the prohibitory law of Kansas was properly united in an information with other counts charging illegal sales of intoxicating liquors under another section of the same law. No good reason has been suggested why the several counts should not have been united in this information, and there is sufficient cause for their joinder. While the offense for selling intoxicating liquors without a license is separate and distinct from that of keeping such liquors for illegal sale, each belongs to the same class of crimes. The offenses are of a kindred nature, and whether tried jointly or separately, as was well said by the supreme court of Kansas, they "must be tried in the same way, and largely upon the same evidence." It was stated in *Hornberger v. State*, 47 Neb., 40: "The unlawful intent with which the liquors were kept may be presumed from the fact of their sale in violation of law. 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." We are persuaded that no error was committed in overruling the defendant's motion to elect.

Upon the state resting its case, the defendant requested the court to direct a verdict for the accused under the sixteenth and seventeenth counts of the information, whereupon the county attorney asked, and was given, leave, over objection of defendant, to withdraw the rest for the purpose of introducing further testimony, which request was granted, and additional testimony was received on behalf of the prosecution. Complaint is made of this action of the trial court, but as no abuse of discretion is shown, this court will not interfere. (*Seiber v. Weiden*, 17 Neb., 582; *Gillette v. Morrison*, 9 Neb., 395; *Tomer v. Densmore*, 8 Neb., 384; *Chicago, B. & Q. R. Co. v.*

Goracke, 32 Neb., 90; *Pence v. Uhl*, 11 Neb., 320; *Yeoman v. State*, 21 Neb., 171.)

Error is predicated upon the refusal of the court, after the state had rested its case the second time, to direct the jury to return a verdict of not guilty as to the last two counts of the information. This point is not properly saved by the record for review. It is disclosed on page 97 of the bill of exceptions that the state, in making out its case in chief, introduced in evidence the half barrel of "Raspberry Cordial" and two cases of "Eggine" identified and referred to by the witnesses as having been found secreted on defendant's premises, and that two samples of the last named liquid were marked by the official reporter for identification as exhibits "B" and "C," respectively, and that he likewise marked a sample of the "Raspberry Cordial" exhibit "D." It is also recited that those exhibits are made part of the bill of exceptions; but we are unable to discover as part of the record either the half barrel of "Cordial" or "Eggine" introduced in evidence, much less samples of either of them. The bill of exceptions contains internal evidence that it does not contain all the evidence which was before the court and jury when the request to direct a verdict of acquittal was made; hence this court is unable to determine whether the ruling assailed was right or wrong. The presumption must be indulged, in the absence of part of the testimony—the liquors in question, that the decision was right. One of the controverted questions of fact on the trial was whether the liquors were intoxicating, and samples thereof not having been preserved by the bill of exceptions, we have not the means afforded the trial court and jury, of determining the intoxicating character of the "Cordial" and "Eggine," and the assignment of error under consideration is accordingly overruled. (*Missouri P. R. Co. v. Hays*, 15 Neb., 224; *Nelson v. Jenkins*, 42 Neb., 133; *Warner v. Hutchins*, 48 Neb., 672.)

The ruling of the court is criticised which denied de-

fendant's motion to strike out the testimony of Solomon Denny as to the sale of the liquor made to him by the defendant on the 5th of November, 1894. The ground of this complaint is that the accused was not charged with selling, or keeping for sale, any intoxicating liquors on that date. This is true, but that did not render the testimony incompetent. The state was not confined in its proof to the particular dates alleged in the information. It is sufficient if the proof tended to establish the commission of the offense within the period limited by statute for the prosecution thereof. (*Yeoman v. State*, 21 Neb., 171; *Palin v. State*, 38 Neb., 862.) This doctrine does not conflict with *State v. Pischel*, 16 Neb., 490, cited by counsel for the accused, since in that case it was merely decided that each act of selling any of the liquors named in the statute constituted an offense, and that an indictment was therefore had which charged the sale of all the liquors mentioned in the law on a particular day with a *continuando*. The counts of the information under which the convictions in the case at bar were had fix the date of the commission of the offenses on November 17, 1894, just twelve days subsequent to the illegal sale of liquor to Denny. Such a sale was pertinent and proper to establish the unlawful purpose of the defendant in keeping the liquors found in his possession. (*Hornberger v. State*, 47 Neb., 40.)

The seventh and ninth assignments of error will be considered together, as they present the same question for review. The state was permitted to prove on the trial by W. L. Bowman and S. Persons the per cent of alcohol contained in the "Raspberry Cordial," also in the "Eggine," or "Tom and Jerry," as called by some of the witnesses. Several objections were made by the defendant's counsel to those witnesses answering the interrogatories of the state put to each of them for the purpose of eliciting testimony upon the line just indicated, but the only objection upon which reliance is now placed is that no proper foundation was laid for the introduction of the

testimony. It is obvious the purpose of the prosecutor was to establish that the liquors were intoxicating, which was a material issue in the case. Proofs having been introduced tending to show that said "Raspberry Cordial" and "Eggine" were found in the defendant's possession near the date mentioned in the information, and that he had previously sold the same kinds of liquors, it was then competent to show the intoxicating character of those in controversy. What was intended by the objection, doubtless, was that the witnesses had not shown themselves competent to testify upon the matter which the question put to them was sought to elicit, and, so regarding the scope and purpose of the objection, we think it was well taken, as the record had not at that time disclosed either witness was able to tell whether this "Raspberry Cordial" or "Eggine" contained alcohol, or was intoxicating or not. This omission was, however, supplied by the subsequent testimony of the same witnesses, although while both were physicians of long standing, it was not disclosed that either was a proficient judge of intoxicating liquors, yet sufficient knowledge of the subject was possessed to make the testimony of each competent. The weight to be accorded the same was solely for the jury to determine. Furthermore, after the objection alluded to was interposed, each witness unchallenged testified to the per cent of alcohol in the said samples submitted to him, besides the defendant's counsel also fully elicited the same evidence from each of them, so that any error committed in the ruling upon said objection was without prejudice.

Complaint is made of the first instruction, which reads as follows:

"1. The defendant, Emil Hans, is charged in the information with selling intoxicating liquors, at various times, to different individuals, as set forth in the information, without having obtained a license to sell such liquor, as provided by law. Defendant is also charged with keeping for sale on the 17th day of November, 1894,

vinous liquors, consisting of one half barrel of 'Raspberry Wine,' and spirituous liquors, consisting of two cases of prepared 'Tom and Jerry,' without having procured a license for the sale thereof in compliance with the laws of this state."

A single vice is imputed to the foregoing, which is that it assumes that the "Raspberry Wine" was vinous liquor and that "Tom and Jerry" was a spirituous liquor, and that it was necessary for the defendant to have a license to sell the same to entitle him to keep the same in his possession. This criticism is unjust. The court assumed the existence of no fact, but merely stated the nature of the offenses charged in substantially the language of the information.

Another assignment is that the court erred in giving the third paragraph of the charge. That instruction related alone to the offenses set forth in the first fifteen counts of the information, and informed the jury what was necessary for the state to establish before a conviction could be had thereunder. Since the defendant was acquitted under all of said counts, it is useless to examine the instruction, inasmuch as the defendant was not prejudiced by its giving.

It is next objected that the court erred in giving this instruction:

"4. The statutes of this state make it unlawful for any person to keep for the purpose of sale without license any malt, spirituous or vinous liquors in this state, and the possession of any such liquor is made presumptive evidence of the violation of the law, unless, after examination, he shall satisfactorily account for and explain the possession thereof, and that it was not kept for any unlawful purpose."

The foregoing is substantially in the language of a portion of section 20, chapter 50, Compiled Statutes, entitled "Liquors." It is argued that the presumption of a violation of said law arises from the possession of such liquors only when they have been seized under

a search warrant contemplated by the statute, and the person therein named has been taken before a magistrate for examination. For the purposes of the case at bar, the soundness of said contention may be conceded, and yet the instruction was not erroneous, because it was developed on the trial that the liquors were actually seized by the sheriff, on a warrant issued by the county judge, and that the defendant was taken before him for examination. So that upon the defendant's own construction of the statute, irrespective of what may be the true interpretation, the instruction was faultless.

The fifth instruction is assailed on the ground that it permitted the jury to find the defendant guilty of both the sixteenth and seventeenth counts, even though the evidence should disclose that he was only guilty of the offense charged in one of them. The instruction, when considered in connection with the one following it, is not susceptible of the construction placed thereon by counsel. The jury were directed by the sixth instruction to consider each count of the information and ascertain and decide from the evidence whether the defendant was guilty or not guilty of any one of the offenses charged. It is a familiar rule that instructions must be construed together.

The observations made on the criticisms urged against the third instruction are equally applicable to the assignment of error based upon the giving of the seventh instruction, and such assignment is overruled without further consideration. The charge, construed as a whole, plainly stated the law applicable to the case, and was not prejudicial to the accused.

A reversal is asked for the refusal of the court to give the following request of the defendant:

"5. You are instructed that the state must prove that on the 17th day of November, 1894, the defendant had in his possession the 'Raspberry Wine' and 'Tom and Jerry,' and the fact that on the 19th day of November, 1894, the sheriff found the same is not proof that he had said prop-

erty in his possession on the 17th day of November, 1894, and it is for you to determine whether the state has proven the same or not."

This request was erroneous and rightly refused, because it made it obligatory upon the state to prove that the defendant had possession of the liquors named on November 17, the date mentioned in the information. Such, as we have already shown by the adjudications of this court, is not the law.

We decline to consider the assignment that the verdict is not sustained by sufficient evidence, because the "Raspberry Cordial," and "Eggine," or "Tom and Jerry," introduced in evidence in the lower court are not before us. To consider the remainder of the evidence without them might lead us to a wrong conclusion.

Objection is made to the overruling of the motion in arrest of judgment. It contained five grounds. Only two are here relied upon, namely, that the information does not state facts sufficient to constitute a crime and the several different offenses are improperly joined. Neither of the grounds possesses any merit. The two counts under which convictions were had are sufficient in form and substance, and we have already held that there was no misjoinder of offenses.

The overruling of the motion for a new trial is assigned as error. This assignment is too indefinite to be available, inasmuch as the motion for a new trial was based upon several distinct grounds. (*Conger v. Dodd*, 45 Neb., 39; *Glaze v. Parcel*, 40 Neb., 732; *Pearce v. McKay*, 45 Neb., 296; *Sigler v. McConnell*, 45 Neb., 598.)

Section 1, chapter 33, Laws, 1889 (Compiled Statutes, ch. 50, sec. 20), provides, *inter alia*, that "Hereafter it shall be unlawful for any person to keep for the purpose of sale, without license, any malt, spirituous or vinous liquors in the state of Nebraska, and any person or persons who shall be found in possession of any intoxicating liquors in this state with the intention of disposing of the same without license in violation of this chapter, shall

be deemed guilty of a misdemeanor, and on conviction thereof shall be fined or imprisoned as provided in section eleven of this chapter," etc. The foregoing makes a crime of each and every act of keeping for unlawful sale any one of the liquors enumerated in the section; in other words, the having in one's possession any vinous liquors for the purpose of sale without a license or permit is a separate and distinct offense from that arising from the keeping of any spirituous liquors for disposal in violation of law. We must not be understood as intimating that each day the liquors are kept for illegal sale constitutes a separate offense. On the contrary, the offense is a continuing one, and so long as there has been no interruption, there is but one keeping. The sixteenth count of the information charges the unlawful keeping for the purpose of sale without a license certain vinous liquors, consisting of a half barrel of "Raspberry Wine," and the seventeenth count charges the keeping for the same unlawful purpose certain spirituous liquors, consisting of two cases of "Tom and Jerry." Therefore two separate and distinct offenses are alleged, and the defendant having been convicted of both, a separate sentence for each within the limit fixed by section 11, chapter 50, Compiled Statutes, was properly imposed for each offense. (*State v. Pischel*, 16 Neb., 490; *Smith v. State*, 32 Neb., 105; *Nichols v. State*, 49 Neb., 777.)

It is finally insisted that said chapter 33 of the Session Laws of 1889 is unconstitutional, in that the title of the act is too restrictive, or not broad enough to include the legislation embraced thereunder. The precise question was before the court in *Re White*, 33 Neb., 812, and was decided adversely to the contention of this defendant. No sufficient reason has been suggested for disturbing the construction of the act given in that case, and it will be followed.

After a scrupulous consideration of the several assignments of error, and the able argument of counsel for the

accused, we fail to discover any reversible error in the record, and the judgment is therefore

AFFIRMED.

JOHN REUTHER V. HENRY ZIMBLEMAN.

FILED JANUARY 7, 1897. No. 6885.

1. **Review:** BILL OF EXCEPTIONS. A bill of exceptions will be disregarded upon review unless certified by the clerk of the trial court to be the original or a true copy.
2. **Instructions:** REPETITIONS. It is not reversible error to refuse an instruction like one already given to the jury.

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

John Barsby, for plaintiff in error.

Charles H. Sloan, contra.

NORVAL, J.

This was an action by John Reuther against Henry Zimbleman for the recovery of damages claimed to have been sustained by the plaintiff by the discharge of surface waters upon his lands by the defendant. The answer admits that, by the cutting of a ditch by the defendant, the waters of a pond on the land previously having no outlet were discharged upon plaintiff's premises, denies that any damages were thereby sustained by plaintiff, and avers that such waters flowed in a natural waterway which crossed the lands of the latter. From a verdict and judgment in favor of the defendant, error is prosecuted by the plaintiff.

Three assignments of error are argued, the first being that the verdict is not sustained by the evidence. This assignment is not available, for the reason that the pur-

ported bill of exceptions is not authenticated by the clerk of the trial court to be the original or a true copy. (*Felber v. Gooding*, 47 Neb., 38; *Childerson v. Childerson*, 47 Neb., 162; *Romberg v. Fokken*, 47 Neb., 198; *Wood v. Gerhold*, 47 Neb., 397; *Andres v. Kridler*, 47 Neb., 585; *Sieberling v. Fletcher*, 47 Neb., 847.)

The next assignment is predicated upon the ruling of the court in refusing to permit plaintiff's witness, Henry Jacobs, to testify whether he had not received pay from the defendant as damages on account of the water flowing from the pond on the land owned and occupied by the witness. This objection cannot be considered, since the bill of exceptions is not authenticated.

It is finally insisted that the court erred in refusing plaintiff's second request to charge, which is as follows:

"2. To cause water to wrongfully flow onto the land of another which would not flow there naturally is to create a nuisance in itself, and calls for at least nominal damages."

The principle enunciated in the foregoing, at least so far as it stated the correct rule, was fairly submitted to the jury by the third, fourth, and fifth paragraphs of the instructions given by the court on its own motion; hence, the failure to give plaintiff's instruction is not a ground for reversal. (*Beavers v. Missouri P. R. Co.*, 47 Neb., 761.) The judgment is

AFFIRMED.

STATE OF NEBRASKA, EX REL. MICHAEL MORRISSEY ET AL., V. BASIL S. RAMSEY, JUDGE.

FILED JANUARY 7, 1897. No. 8917.

1. **Review**: SUPERSEDEAS. The filing of a supersedeas bond is not essential to obtain a review of a decree or final order of the district court, either by appeal or upon error; but such bond is indispensable to a stay of proceedings pending the review.

2. ———: ———. Such bond, when filed and approved, will not operate as a supersedeas unless it contains the conditions prescribed by law.

3. ———: ———. A proper supersedeas bond executed, filed, and approved in one cause will not act as a supersedeas of a decree subsequently rendered in another action between the same parties.

4. Pleading: DEMURRER. Averments of legal conclusions in a pleading are not admitted by a demurrer.

ORIGINAL application for *mandamus* to compel respondent, as judge of the second judicial district, to recall an order of sale issued by the clerk of the district court of Cass county upon a decree of foreclosure. *Dismissed.*

A. N. Sullivan, for relators.

Byron Clark and *C. A. Rawls*, *contra.*

NORVAL, J.

This was an original application for a peremptory writ of *mandamus* to require the respondent, as judge of the second judicial district, to recall an order of sale issued by the clerk of the district court of Cass county upon a decree of foreclosure rendered therein. The respondent has filed a general demurrer to the application, which has been argued and submitted.

The application is exceedingly verbose, but the following is believed to be a fair summary of its material averments: On the 16th day of October, 1893, relators, Michael Morrissey and Susan C. Morrissey, made, executed, and delivered to the Citizens Bank of Plattsmouth their mortgage deed, whereby they conveyed to the bank certain lands situate in Cass and Platte counties, to secure the payment of their promissory note for $10,000, with five interest coupons attached of $700 each; that on September 10, 1894, one Charles C. Parmele was duly appointed receiver of said bank, who entered upon the duties of his trust and has been so acting as receiver ever since; that on December 27, 1895, the relators and said receiver, and others interested in the said bank, entered

into an agreement, subject to approval by the court, for the settlement of said mortgage, by the terms of which relators were to convey to the receiver certain lands, consisting of 480 acres, at the agreed price of $43 per acre, in satisfaction of the amount due on said real estate mortgage, also two other notes of the relators, for $779 and $80, respectively, leaving a balance due them from the bank of the sum of $2,976, including a deposit of $107; that on the same day the district court rendered a decree canceling said real estate mortgage, and awarded relators a vendor's lien upon said land for said sum of $2,976; and they executed a deed to relators for said real estate, which conveyance was duly recorded in the office of the register of deeds of Cass county, and the receiver canceled said notes upon the books of the bank. On April 30, 1896, on the petition and application of one D. O. Dwyer, a creditor of said bank, the district court of Cass county entered a decree setting aside the said decree of December 27 approving the settlement with the Morrisseys, and also ordered said receiver to proceed at once to foreclose said mortgage, and that the said deed from Morrisseys be canceled of record. A motion for a new trial was filed and overruled, and supersedeas bond fixed by the court at $2,500; that "on the 12th day of June, 1896, these relators filed a supersedeas bond as required by law, which was duly approved by the clerk of said court;" that on the 10th day of October, 1896, a transcript of the proceedings and a petition in error were filed in this court, and a summons in error was issued, which was served upon the parties interested; that on May 25, 1896, in pursuance of said last mentioned decree, the said receiver commenced a suit in the district court of Cass county to foreclose said mortgage, and that the relators filed no answer therein and a decree of foreclosure was rendered as prayed. Subsequently, relators filed a motion, accompanied with an affidavit, setting forth the giving of the supersedeas bond as aforesaid and its approval by the clerk of the court. We are not definitely

advised as to the object of this motion, but presumably it was presented for the purpose of preventing further proceedings under the decree of foreclosure. The motion, whatever its scope and object, was overruled on November 18, 1896. The receiver was directed to proceed under said decree. An order of sale was issued and delivered to the sheriff, who is proceeding to sell the mortgaged premises, and relators have frequently requested the respondent, as judge of the district court, to recall the same, which he refuses to do.

There is no merit in the application. It is not claimed that any written request for a stay of the issuance of an order of sale upon the decree of foreclosure has been filed, as might have been done under section 477*b* of the Code of Civil Procedure. The record fails to disclose that any appeal has been taken, or proceedings in error prosecuted, from said decree foreclosing the mortgage, or that any supersedeas bond has been given under the provision of either section 588 or section 677 of the Code. The relators having neglected to avail themselves of the benefits of the statute relating to stays of orders of sales, and having taken no steps to obtain a review of said foreclosure decree, by either giving a supersedeas bond or by filing a transcript of said decree, it is not discoverable that they are in any position to invoke the aid of the court to prevent the enforcement of the decree in question by requiring the respondent to recall the order of sale from the hands of the sheriff before he has executed its mandate.

We are asked to hold that the supersedeas bond given by the relators on June 12, 1896, operated to suspend the decree foreclosing the mortgage. This cannot be done, for two reasons. In the first place, such bond was not filed in the foreclosure suit, but was executed and approved in another case or proceeding, before the action to foreclose the mortgage was ever commenced or the decree therein was extended. Manifestly a supersedeas bond furnished in one cause will not operate to suspend or prevent the enforcement of a judgment or decree ren-

dered in another and different action. Suppose a supersedeas bond should be given upon the rendition of a decree foreclosing a mortgage, and the plaintiff should bring another action in the same court upon the identical mortgage and obtain another decree of foreclosure; such bond would not supersede the second decree. The supposed case and the one before us are not distinguishable in principle.

There is another reason for refusing to hold that the said bond executed by the relators did not operate as a supersedeas, and that is it is not disclosed by this record that it was conditioned as prescribed by statute. The copy of the bond is neither attached to nor made a part of the application for *mandamus;* nor are the conditions of such bond set out in the application filed therein. The only allegation therein upon the subject is that "on the 12th day of June, 1896, these relators filed a supersedeas bond as required by law," which is the mere averment of a legal conclusion from facts not stated, and therefore not admitted by the demurrer. A supersedeas bond not conditioned as required by statute is insufficient to prevent the enforcement of the decree it was given to supersede. (*State v. Thiele*, 19 Neb., 220; *O'Chander v. State*, 46 Neb., 10.)

In view of the conclusion reached, it is unnecessary to discuss the proposition whether *mandamus* will lie against the respondent to compel the performance of a judicial act. The application fails to set forth sufficient facts to entitle relators to the relief demanded. The demurrer is sustained and the action

DISMISSED.

MAUD WALLACE V. SCHOOL DISTRICT NO. 27, SALINE COUNTY.

FILED JANUARY 7, 1897. No. 6902.

1. **Schools and School Districts:** TEACHERS: CONTRACTS OF EMPLOYMENT. Plaintiff entered into a written contract of employment as teacher with a school district for the term of three months, commencing at a stated time, with option to her to teach the school year if satisfaction was given. She taught under the contract the three months, exercised the option given her, and remained in the employ, without objection, another three months, when she was discharged without good or sufficient cause, before the close of the school year. *Held*, That the services rendered after the first three months were performed under said contract, and a new written contract was not necessary to bind the district for the entire school year.

2. ——— ———: ———. In the absence of a stipulation in the contrac to the contrary, under the existing statute, a qualified teacher cannot be discharged at the pleasure of the district, but only where just cause exists therefor.

3. ———: ———: ———. *Jones v. City of Nebraska City*, 1 Neb., 176, distinguished.

4. ———: ———: ———. If a teacher duly employed in the public schools for a specified period is dismissed by the school board prior to the expiration of the term of employment, without being shown to be incompetent, or for other good reason, the district is liable therefor.

5. ———: ———: ———: PLEADING. *Held*, That the petition stated a cause of action.

ERROR from the district court of Saline county. Tried below before HASTINGS, J. *Reversed.*

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

Hastings & McGintie and *A. S. Sands, contra.*

NORVAL, J.

This is a petition in error to review the judgment of the district court sustaining a general demurrer to plaintiff's

petition, in an action by a school teacher against a school district for the alleged breach of contract of employment. Plaintiff alleges in her petition that she is and was a qualified teacher of Saline county; that on the 7th day of September, 1891, she entered into a written contract with the defendant to teach its school for the term of three months, commencing on said date, with privilege of school year of nine months providing satisfaction was given, for which service defendant agreed to pay her the sum of $40 per month; that in pursuance of said contract she taught defendant's school for six months, that being the fall and winter terms; that in the month of March, 1892, and a few days prior to the close of the winter term, all the officers of the defendant came to plaintiff and agreed that she had given good satisfaction, and it was then and there agreed between plaintiff and defendant that she should teach the balance of the school year, the spring term of three months, under the written agreement then in force, commencing on March 14; that a few days prior to said date plaintiff's mother was taken violently ill, of which fact defendant was apprised by plaintiff, and at her request a few days' delay was granted by the defendant to commence the school; that on the 15th day of March defendant discharged plaintiff and refused to permit her to further perform said contract, and without any reasonable cause or excuse refused to allow plaintiff to continue in the employ as agreed, although she was ready and willing to commence at once, and immediately so informed the officers of the district; that she made all proper and reasonable endeavor to secure other employment, but was unable to do so, to her damage in the sum of $120. The contract attached to and made a part of the petition is as follows:

"This agreement, entered into this 7th day of September, 1891, between school district 27 of Saline county, Nebraska, and Maud Wallace, a qualified teacher of said county, witnesseth: That the said Maud Wallace agrees to teach the school of said district in a faithful and effi-

cient manner for the term of three (3) months and privilege of school year, providing satisfaction is given, commencing on the first Monday in September, 1891, and agrees to keep herself qualified and agrees in all things to observe the rules and regulations of the district board. In consideration whereof said school district agrees to pay said Maud Wallace the sum of $40 per month for said services, and agrees to keep the schoolhouse in good repair and provide necessary fuel; provided, that in case said Maud Wallace shall be discharged for sufficient cause by the district board, or shall have her certificate annulled, she shall not be entitled to any compensation from and after such dismissal or annulment.

"In witness whereof, we have hereunto subscribed our names this 7th day of September, A. D. 1891.

"E. A. ALLEN, *Director.*

"MAUD WALLACE, *Teacher.*

"Approved:

"A. LUNDY, *Treasurer.*"

It is contended by counsel for defendant that the contract limits the term of employment to a period of three months, commencing on the first Monday in September, 1891, and that neither party was bound at the end of that time unless a new contract in writing was entered into. It is true that the contract fixed definitely the time plaintiff should teach in the first instance at three months, and her services could not have been demanded by the district after that period without she exercised the privilege or option given by the contract; but it does not follow that a new contract in writing was necessary to entitle her to longer remain in the employ of the defendant. It was expressly stipulated at the time of the hiring that she should have the privilege of teaching the school year, which, the petition avers, was nine months, in the event she gave satisfaction. This option, the petition shows, she exercised, and the defendant accepted her services under the contract for six months, the officers of the district representing that she had given good satisfaction.

There was no want of mutuality when she availed herself of the option and continued to render services, which were accepted, beyond the three months' term. After that she was under obligation to continue to teach the entire school year, and the defendant was likewise bound to pay her the contract price. Her services rendered beyond the term of three months were not performed without any written contract, but under and in pursuance of the one above set out. No new or additional written agreement was required to bind either party. (Clark, Contracts, sec. 936.)

It is said plaintiff did not tender her services to the district for the time for which she seeks to recover, nor did she go to the schoolhouse to continue her employment. The petition avers that she requested the members of the board to permit her to so do; that they refused and informed her they would oust her from the building if she attempted to teach. This shows a sufficient offer to perform the contract on her part.

Another contention is that a school district has the power to discharge a teacher at any time, and when it exercises that right its decision is final and conclusive. On this question we are cited to *Jones v. City of Nebraska City*, 1 Neb., 176, and *Bays v. State*, 6 Neb., 167. The first case was founded upon a statute not now in existence, which in express terms conferred authority upon school boards to remove teachers at pleasure, and the court rightly held that this law entered into and formed part of the contract of hire, and that the teacher could be discharged by the board before the expiration of his employment, whether sufficient cause for dismissal existed or not. The statute under which that decision was rendered not now being in force, the case is not a precedent for any holding that this plaintiff is not entitled to recover. The court in *Bays v. State, supra*, construed sections 45 and 56 of chapter 68, General Statutes. By section 45 a majority of the members of the district board were empowered to "hire qualified teachers for and in the

name of the district," and by section 56 the board was given "the general care of the school, and may establish all needful regulations for the management not in conflict with rules prescribed by the superintendent." It was held, as an incident to the powers invested in a school board by said sections, that it had the right to dismiss for incompetence or any other sufficient cause. LAKE, C. J., after quoting the sections referred to, observes: "This language is somewhat general, but we think the authority is clearly implied for the board to discharge a teacher who, for any reason, is found to be incompetent. The authority to terminate the employment of a teacher must rest somewhere, and in the absence of an express provision on this subject it should, we think, be governed by the general rule of the common law applicable in analogous cases, and be held to reside with those whose duty it is to represent the district in making the contract, and who are directly responsible for the successful management of the school. By the common law, if a servant neglect the duties of his employment, or is incompetent to perform them with reasonable skill, he may be discharged at once, although hired for a definite time which has not yet elapsed. And where a servant is formally discharged, even although it be without adequate cause, he cannot continue the service against the will of his employer, but must seek redress by an action for damages." The sections of the statute under consideration in that case, as respect the power of district boards in the matter of hiring teachers and the management and general care of the schools, are substantially the same as section 11, article 4, and section 3, article 5, of our present school law; hence, *Bays v. State* justifies the conclusion that a school board may dispense with the services of a teacher, if good cause therefor exists, prior to the expiration of his term of employment, although no such express power is given in the statute. The question whether a teacher can recover damages against the district for a wrongful discharge was not before

the court in the case in 6 Nebraska, nor was any opinion there expressed upon the question. Applying the rule of law which governs the breach of contracts for hire entered into between individuals, it is very evident that a school district is liable for the damages sustained by a teacher on account of being dismissed by the board where no good and valid ground exists for such discharge. The court must not be understood as holding that such an action can be maintained where the contract of employment authorizes the school board to dispense with the services of the teacher whenever it chooses to do so. This contract confers no such power upon the defendant. Plaintiff obligated herself to give satisfaction, and it is averred in the petition, and by the demurrer admitted to be true, that the members of the board informed her that she had given satisfaction.

It is further urged that the petition fails to allege that plaintiff was not discharged for good cause or incompetency, therefore it will be presumed that the board had good cause for its action; and there can be no recovery. Counsel for defendant must have misread the petition. It is there averred that the defendant, "without any reasonable cause or excuse whatever, refused to suffer this plaintiff to continue in its employ." This shows that the discharge was wrongful. We are constrained to hold that the petition stated a cause of action, and that the court erred in sustaining the demurrer. The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

GOTTLIEB STORZ ET AL. V. LENA FINKLESTEIN, ADMINISTRATRIX, ET AL.

FILED JANUARY 7, 1897. No. 6308.

1. Attachment: ACTION ON BOND: BURDEN OF PROOF. In an action on an attachment bond, where the answer is a general denial of the averments of the petition, the burden is upon the plaintiff to show that the attachment was wrongfully issued; that is, that the averments in attachment affidavit as ground for the writ were untrue. RYAN and RAGAN, CC., dissenting.

2. ———: ———: INSTRUCTIONS. An instruction in such a case which permits the jury to return a verdict for the plaintiff if they find that the attachment was merely dissolved, *held* erroneous. RYAN and RAGAN, CC., dissenting.

3. Review: INSTRUCTIONS. A judgment will not be reversed for errors committed in giving instructions where it is not shown the unsuccessful party could have been prejudiced thereby.

4. Attachment: BOND: SIGNATURES. An attachment bond is valid without the signature of the attaching plaintiff, and where he does not sign the bond he is not liable thereon to defendant in attachment. RYAN and RAGAN, CC., dissenting.

REHEARING of case reported in 48 Neb., 27. *Reversed in part.*

Lake, Hamilton & Maxwell, for plaintiffs in error.

Estabrook & Davis and *Charles E. Clapp, contra.*

NORVAL, J.

Louis M. Finklestein recovered judgment in the court below against Gottlieb Storz, Joseph D. Iler, and Theodore Olsen upon an attachment bond. The defendants jointly and severally prosecuted error to this court, and a judgment of reversal was entered at the last term, the opinion being reported in 48 Nebraska, 27. A motion for a rehearing, based upon three grounds, was sustained, and the cause again submitted for consideration.

It is urged that the judgment of the lower court should, in any event, be affirmed as to the defendant Olsen. The

judgment as to him was reversed for the giving of this instruction:

"1. In order that plaintiff may recover in this action, he must satisfy you by a preponderance of all the evidence: First, that defendants Storz and Iler, in a suit brought by them against him, caused an attachment to be issued and levied on his bottling works; second, that said attachment was dissolved in due course of law; third, as to the amount of damages, if any, suffered by him as a direct result of the issuance and levy of said attachment; fourth, that the attachment bond was duly executed by defendant Olsen."

An examination of the briefs and arguments has failed to convince the writer that this instruction stated the correct rule applicable to the issues made by the pleadings either as to Olsen or his co-defendants. It will be observed that the suit is upon an attachment undertaking conditioned in accordance with the provisions of section 200 of the Code of Civil Procedure, "that the plaintiff shall pay the defendant all damages which he may sustain by reason of the attachment if the order be wrongfully obtained." There is no possible room for doubt that no liability arises upon such a bond unless the attachment was wrongfully issued, and the burden of establishing that fact is upon the plaintiff. No decision rendered under a statute like our own holds the contrary to be true. The element of the wrongful issuance of the attachment was omitted from the instruction quoted except it is contained in the second subdivision thereof, namely: "That said attachment was dissolved in due course of law." In the former opinion it was held that this language was not sufficient to show that the attachment was wrongfully sued out, and that view is evidently sound, inasmuch as the attachment may have been dissolved for mere defects, omissions, or irregularities committed by the officer in issuing the writ. Doubtless, the discharge of an attachment on a finding in favor of the defendant, on an issue as to the truth of the facts alleged

as the ground for the writ, is conclusive between the parties in an action on the bond that the writ was wrongfully obtained, unless it has been reversed on error. (*Hoge v. Norton*, 22 Kan., 374; *Mitchell v. Mattingly*, 1 Met. [Ky.], 237; *Boatwright v. Stewart*, 37 Ark., 614.) But the instruction under consideration failed to inform the jury that they must find the attachment was discharged for want of sufficient grounds for the obtaining of the writ to justify a recovery on the bond. The effect of the instruction was to withdraw from the consideration of the jury whether the attachment had been wrongfully obtained, and to allow a recovery if they found the writ had been discharged for any cause. The authorities generally hold that an attachment is not wrongfully obtained unless it is shown that the plaintiff has no meritorious cause of action against the defendant, or having such a cause of action, the ground stated in the attachment affidavit is untrue. The word "wrongful," as used in the statute, does not apply to a dissolution of an attachment on account of defects in the form of the proceedings or for mere omissions, irregularities, or informalities which the officer may have committed in the issuance of the process.

The statute of Florida requires the plaintiff in attachment to give a bond with at least two or more sureties in double the amount claimed conditioned "to pay all costs and damages which the defendant may sustain in consequence of improperly suing out said attachment." (Statutes of Florida, 1892, sec. 1046.) The court, in construing the above provision in *Steen v. Ross*, 22 Fla., 480, say: "We think the word 'improperly,' as used in the statute, has a broader signification than a mere irregularity, and that it is insufficient to allege as a breach of the condition, although in the express words of the bond, that it was improperly issued. The breach should state with distinction in what its impropriety consisted. It is only improperly issued when the plaintiff has no meritorious cause of action, of that class of actions in which the law

authorizes a resort to the remedy against the defendant, or having such a cause of action the ground alleged in the affidavit for its issue is untrue, or not one of the grounds enumerated which must exist before it can be obtained. We do not think it was intended to cover a case where the plaintiff had a meritorious cause of action of the class for which an attachment may legally issue, and when the cause for its issuance is one of those specified in the statute, and such cause is true if the attachment was dissolved for some irregularity or for some technical reason." The doctrine announced in the foregoing is stated with approval in Drake on Attachment, sec. 170, and Shinn on Attachment & Garnishment, secs. 183, 187.

Sharpe v. Hunter, 16 Ala., 765, was a suit upon an attachment bond conditioned substantially like the one at bar. The order for attachment was quashed for a defect in the affidavit upon which it issued. The trial court charged the jury that if they believed the writ of attachment sued out was abated on plea, the plaintiff was entitled to recover his actual damages sustained. The supreme court held this instruction erroneous. Chilton, J., in the course of his opinion, observed: "What is meant by the term 'wrongful' as used in the statute to which this bond conforms? Was it, as is contended by counsel for the defendant in error, designed to apply to defects in the form of the proceedings, on account of which the attachment should be quashed, as well as to the ground upon which it was to be issued? Or was the object of the framers of the act merely to provide a remedy against persons who should resort to this extraordinary remedy to the prejudice of another, without cause or sufficient ground therefor? It is, to my mind, perfectly clear that the latter construction is the correct one. * * * We think that by the wrongful suing out of the attachment is meant, not the omissions, irregularities, or informalities which the officer issuing the process may have committed in its issuance, but that

the party resorted to it without sufficient ground. The case of *Kirksey v. Jones*, 7 Ala., 622, not only fully sustains this view, but goes quite beyond it. So far as it conforms to this construction of the statute, we fully approve of that decision."

City Nat. Bank v. Jeffries, 73 Ala., 183, was founded on an attachment bond. The court on defining the term "wrongful" say: "The meaning of this is, not that the attachment proceedings are faulty and liable to be abated or quashed. Such defects furnish no grounds for recovery of damages. To be 'wrongful' within the statute, none of the statutory grounds for attachment must exist. (*Sharpe v. Hunter*, 16 Ala., 765; Drake, Attachment, sec. 170; *Durr v. Jackson*, 39 Ala., 203.) To justify an attachment there must be a debt, due or to become due, and one of the enumerated statutory grounds for attachment must exist. (*Lockhart v. Woods*, 38 Ala., 631; *Durr v. Jackson, supra.*) If either of these be wanting in fact, no matter how sincerely the attaching creditor may believe it to exist, then the attachment is wrongful. In such case the measure of recovery in a suit on the bond is the actual injury sustained. * * * And in such action the *onus* rests with the plaintiff to prove the falsity of the affidavit, or, what is the same thing, the nonexistence of the ground on which the attachment was sued out."

In *Calhoun v. Hannan*, 87 Ala., 277, it was ruled that an action could not be maintained on an attachment bond unless the attachment was wrongfully sued out; that is, unless it was issued without the existence of any one of the facts which authorize a resort to the process.

In *Garretson v. Zacharie*, 8 Martin, n. s. [La.], 481, it was decided that the surety on an attachment bond is not liable when the attaching creditor failed in his cause of action by reason of some irregularity in the proceedings, posterior to the bond.

In *Pettit v. Mercer*, 8 B. Mon. [Ky.], 51, it was decided that the mere failure of the plaintiff in attachment to

prosecute his suit to judgment does not constitute a breach of the condition of the bond. To the same effect are *Cooper v. Hill*, 3 Bush [Ky.], 219, and *Nockles v. Eggspieler*, 47 Ia., 400.

In the first opinion filed herein, *Eaton v. Bartscherer*, 5 Neb., 469,—two cases,—was cited to sustain the doctrine that a suit on an attachment bond cannot be maintained merely on account of the attachment having been dissolved for omissions or irregularities in issuing the writ. A reference to the opinion will disclose that it is decisive of the question under consideration. Both of those cases were suits upon attachment undertakings conditioned, like the one before us, according to the requirements of the statute. The petitions averred that the attachments were dissolved on proceedings in error, but contained no allegation showing that the orders of attachments were wrongfully issued. This court, by LAKE, C. J., held that each petition failed to state a cause of action. In the opinion it is said: "The undertakings upon which these actions were brought contain simply the statutory requirements, by which the obligors therein promise to pay the defendant all damages which he might sustain by reason of the attachments, if the orders therefor were 'wrongfully obtained.' There is no agreement to pay all damages that might be occasioned by the attachments, in any event, but only in case it should be established that the orders of attachment were 'wrongfully' sued out. In these petitions there is no charge that these orders of attachment were wrongfully or unjustly obtained, nor is there any statement from which that fact can possibly be inferred. There is, to be sure, in each of them an allegation that after the attached property had been sold, and the proceeds applied upon the judgment in pursuance of the order of the court, proceedings in error were prosecuted which resulted in the dissolution of the attachments. But there is nothing to show upon what this decision was based; and for aught that appears, it may have been for a mere tech-

nicality, or for some other cause entirely consistent with the fact that the plaintiffs were fully justified in resorting to the process of attachment for the collection of their claims." The chief justice, after quoting from the opinion in *Sharpe v. Hunter*, 16 Ala., 765, that "by the wrongful suing out of the attachment is meant, not the omissions, irregularities, or informalities which the officer issuing the process may have committed in its issuance, but that the party resorted to it without sufficient grounds," says: "The following are authorities on the same point under statutes quite similar to our own: *Pettit v. Mercer*, 8 B. Mon. [Ky.], 51; *Raver v. Webster*, 3 Ia., 502. We are of the opinion, therefore, that in failing to allege, or show by reasonable inference, that the orders of attachment were 'wrongfully' sued out, or, in other words, that no just grounds actually existed for a resort to this extraordinary process, these petitions are fatally defective and wholly inadequate to support these judgments." The principle underlying those cases is clearly applicable to the question now under consideration. It was distinctly ruled that a petition on an attachment undertaking is fatally defective which fails to show the order of attachment was wrongfully procured, and further, that no reasonable or just inference that the writ was so obtained can be drawn from the mere averment of the dissolution of the attachment. It cannot be successfully claimed that the petitions in those cases failed to aver the attachments had been dissolved, or that the effect of the pleadings was "that the court had made an order sustaining the attachments and ordering the attached property sold, and that the defendants in those actions had by proceedings in error suspended the judgments, and therefore they concluded that suspending the judgments rendered in those actions had discharged the attachments." The petition in each of these cases on file in this court, after setting forth the recovery of judgment by attachment plaintiffs in a justice court for a specified sum and an order for the sale

of the attached property, alleges that a petition in error was prosecuted to the district court, and that "it was considered and adjudged by said court that said order of attachment be dismissed and discharged, and the property thereby attached be released therefrom." From this it affirmatively appeared that the order of attachment had been dissolved and vacated. If a petition is not good which merely avers the dissolution of an attachment, because such an allegation does not show the attachment was wrongfully sued out, it requires no argument to show that the instruction quoted was erroneous, since it permitted a recovery on the bond whether the attachment was wrongfully sued out or not. While the attachment in this case was dissolved, there is nothing in the record to show us upon what ground the order of dissolution was entered. It may have been based upon mere irregularities, omissions, or technical objections, and if so, under the authorities cited the order of dissolution would not be *prima facie* evidence that the writ was wrongfully issued.

In the last brief filed by plaintiffs below they say they do not question the soundness, as an abstract proposition, of the criticism made in the former opinion upon this instruction, but it is insisted that the instruction was not prejudicial to the defendants. As to Storz & Iler this contention is not well founded, for the reason the charge of the court permitted the jury to find against them even though they did not execute the bond. The instruction on the question of signing the undertaking only required them to find that it was executed by Olsen. The instrument declared on disclosed on its face that Storz & Iler never signed; hence they were not liable thereon to the attaching creditor, as we shall presently show. The writer is, however, convinced upon further reflection that the record fails to establish that Olsen was in any manner prejudiced by this instruction. In the previous opinion it was mentioned that the bill of exceptions on its face revealed the fact that it did not contain all the

evidence adduced on the trial. It must, therefore, be presumed that the evidence before the jury was sufficient to establish that the attachment was wrongfully issued, and that it was dissolved for that reason. If such was the testimony, and it must be presumed in the absence of a showing to the contrary, then Olsen was not prejudiced by the charge of the court, unless that portion of the testimony incorporated in the bill of exceptions reveals that the question of the wrongful issuance of the attachment was a controverted or disputed fact. The testimony brought up does not disclose, nor tend to prove, that there was any ground for the attachment, nor is there anything in the record tending to controvert the fact that the attachment was sued out wrongfully, and without just cause for resorting to this extraordinary process. It is true the bill of exceptions contains testimony to the effect that Finklestein, at the time of the attachment, was indebted to Storz & Iler; that he was occupying their building and had removed a portion of his goods to Council Bluffs, and was about to remove the remainder to the same place, for the purpose of engaging in business there. But their testimony falls far short of establishing any one of the grounds for an attachment enumerated in the Code, since the element of fraudulent intent is lacking. In the absence of testimony tending to prove the attachment was not wrongfully obtained, it cannot be said there was any reversible error in not submitting that question to the jury. Error cannot be presumed, but must affirmatively appear to justify the reversal of a judgment. In the absence of a portion of the testimony this court cannot say that any prejudice was wrought by this instruction. It is the settled doctrine of this court that an erroneous charge will not work a reversal when it is not shown the party complaining could have been possibly prejudiced by its giving. (*Ryan v. State Bank*, 10 Neb., 524; *Converse v. Myer*, 14 Neb., 190; *Knowlton v. Mandeville*, 20 Neb., 59; *Western Union Telegraph Co. v. Lowery*, 32 Neb., 732; *State v. Hill*, 47 Neb., 456; *Burlington & M. R. R. Co. v. Gorsuch*, 47 Neb., 767.)

Another argument in the brief is that "section 200 of the Code, having been construed in *Eckman v. Hammond*, 27 Neb., 611, as dispensing with the necessity of the plaintiff in attachment signing the bond, it conclusively follows that his signature to the bond is presumed, and his primary obligation to pay damages for his wrongful attachment is created by statute." It is true this court, in *Eckman v. Hammond, supra*, decided that section 926 of the Code of Civil Procedure, which is substantially the same as section 200, does not require that an undertaking in attachment be signed by the plaintiff, but that if it be signed by a surety alone, the bond is sufficient. It does not, however, follow from this holding that the signature of the plaintiff is presumed, and that he is liable to the defendant in an action on the bond. If the plaintiff is not required to sign an attachment undertaking, how can it be presumed that he did so sign in the face of a record which shows he did not do so. It might be otherwise in case of a bond, which the statute requires to be signed by the principal named therein, which he has procured to be given and approved, but failed to subscribe his name thereto. (*State v. Hill*, 47 Neb., 456.) The bond in suit shows that Storz & Iler are not parties to it. It does not purport to bind them, but Olsen alone, to pay all damages sustained by Finklestein by reason of the wrongful suing out of the attachment, in case the attaching creditor fails to do so. This bond is an independent contract on the part of Olsen, and under our statute the signatures of Storz & Iler were not necessary. (*Eckman v. Hammond*, 27 Neb., 611; *Curtis v. Richards*, 9 Cal., 39; *City of Sacramento v. Dunlap*, 14 Cal., 424; *Murdock v. Brooks*, 38 Cal., 604; *Frankel v. Stern*, 44 Cal., 168.) The liability of Olsen, as between himself and the attaching creditor, is that of principal debtor. This principle was held and applied to the signers of an appeal undertaking in *Flannagan v. Cleveland*, 44 Neb., 59. In Indiana, as in this state (*Clark v. Strong*, 14 Neb., 229), the statute does not require an appellant to sign an appeal bond. The su-

preme court of Indiana held that an action will not lie against an appellant on an appeal bond which he did not sign. (*Supreme Council of Catholic Benevolent Legion v. Boyle*, 42 N. E. Rep. [Ind.], 828, 44 N. E. Rep., 56.) Applying the same doctrine to the bond in question, Storz & Iler are not liable thereon. It was never executed, nor intended to be executed by them. It was not their obligation, but the undertaking of Olsen alone.

Wolf v. Hahn, 28 Kan., 588, is not in point. That was not an action upon an attachment, nor any other kind of a bond. In that case Rhoda Parkin sued out an attachment against Jacob Poorman which was levied on certain personal property in the possession of Fred Hahn. Subsequently the latter procured one Wells to execute a redelivery bond for the forthcoming of the property, or its appraisal, to answer the judgment. Thereupon the officer returned the attached property to Hahn, who retained possession until after judgment had been rendered in the attachment case, when he delivered the property to the officer, by whom it was sold. Afterwards Hahn commenced an action against the officer to recover the value of said property. In Kansas the statute requires a forthcoming bond to be executed by the person in whose possession the property is found, with one or more sureties. The court held that Hahn having procured the bond to be executed, he thereby estopped himself to deny that the attached property belonged to Poorman, the attaching debtor. That was the only question before the court in that case. Whether Hahn was liable on the bond was neither involved nor adjudicated.

Another case relied on is *Pierse v. Miles*, 5 Mont., 549, which was an appeal from an order dissolving an attachment, on the ground, among others, that the undertaking was not signed by the plaintiff in attachment. The court held the statute did not require him to sign it. The same question, and none other, was involved in *McIntosh v. Hurst*, 6 Mont., 287, where it was held it was no defense to an action against a surety on an undertaking to pre-

vent an attachment that the defendant in the action in which the undertaking was given did not sign the bond. It is obvious that neither of those cases is in point upon the question before us.

Hoskins v. White, 13 Mont., 70, 32 Pac. Rep., 163, was an action upon an attachment bond, signed only by the sureties. The court decided the plaintiffs in attachment were properly joined as parties defendant. The opinion cites *Jennings v. Joiner*, 1 Cold. [Tenn.], 645, which was an action upon an attachment bond executed by the plaintiff in attachment and another as his surety. It was properly held that the principal and surety could be joined in an action on the bond, since it was the obligation of both, both having executed the instrument. But it is not an authority for holding that an attaching creditor is bound upon an attachment undertaking which he never signed, and was not required to execute in order to obtain the writ.

Shinn, Attachment & Garnishment, sec. 169, states that "the sureties, by executing the bond, and the plaintiff, by invoking the writ only, all become liable to actual damages occasioned by the wrongful issuing of the writ." The only decision cited by the author to sustain the doctrine is *State v. Fortinberry*, 54 Miss., 316. There the attachment bond was executed by the plaintiff in attachment and sureties, so that the proposition above quoted, which was taken from the opinion in that case, was mere *obiter*.

Attention is called to sections 41 and 50*a* of the Code of Civil Procedure, which read as follows:

"Sec. 41. Any person can be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved therein."

"Sec. 50*a*. Any person who has or claims an interest in the matter in litigation, in the success in either of the parties to an action, or against both, in an action pending

or to be brought in any of the courts of the state of Nebraska, may become a party," etc.

These sections merely provide who may be made parties to a suit. Obviously they do not create any contract or statutory liability. They certainly confer no authority for holding that one who does not sign an attachment bond is liable thereon. Conceding that Storz & Iler, by reason of their implied promise to make good to Olsen any damages he might be compelled to pay by reason of the wrongful suing out of the attachment, have such an interest in this litigation adverse to the attaching debtor as to make them proper parties in this litigation, it is no reason for holding them liable on this bond to the plaintiff. They had the right to set off against their claim of the attaching debtor the amount of the judgment they recovered against him in the attachment suit, not because they are primarily liable to Finklestein for the damages committed by the wrongful attachment, but for the reason they are required to reimburse Olsen for whatever sum he is compelled to pay to satisfy the judgment obtained against him. (*Gerson v. Harrison*, 34 Kan., 590.) The question in this case is not whether under our Code Storz & Iler are proper parties defendant, but are they liable to the attaching debtor on an undertaking which they never signed, and which does not on its face purport to bind them? The answer must be in the negative. It follows that the judgment should be affirmed as to Olsen, and reversed and dismissed as to Storz & Iler.

JUDGMENT ACCORDINGLY.

IRVINE, C., not sitting.

RAGAN and RYAN, CC., dissenting.

Section 41 of the Code of Civil Procedure provides: "Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved therein." Cer-

tainly the plaintiff in the attachment suit has an interest in this case adverse to that of the plaintiff herein. If this suit proceeded to judgment against the surety on the attachment bond only, then the plaintiff in the attachment would be liable to the attachment surety for whatever sum the latter might be compelled to pay on that judgment. What are the questions involved in this action? Whether such attachment was wrongfully obtained, and, if so, what damages the defendant thereto has sustained thereby; and certainly the plaintiff in the attachment suit is a necessary party to a complete determination or settlement of these questions. This section of our Code was copied from the Code of Ohio, and in *Osborn v. McClelland*, 43 O. St., 284, the supreme court of that state declared that this section was a legislative adoption of the equity rule for the prevention of a multiplicity of suits; and in *Penn v. Hayward*, 14 O. St., 306, the court held that this section of the Code was permissive, and whether one should be made a party defendant to an action was somewhat discretionary, but the court declared that if the effect of omitting a defendant would necessitate another suit, the discretion of the district court should be limited. Section 50*a* of the Code of Civil Procedure provides that "any person who has or claims an interest in the matter in litigation may intervene and become a party to such an action." If this suit, then, had been brought only against the surety on the attachment bond, we think it clear that the plaintiffs in the attachment suit would have had the right to intervene therein, as they were ultimately liable for the judgment rendered against the defendant in that action. Section 100 of the Code of Civil Procedure provides that "the defendant may set forth in his answer as many grounds of defense, counter-claim, and set-off as he may have;" and section 101 provides that "the counter-claim * * * must be one existing in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action, and arising out of the con-

tract or transaction set forth in the petition as the foundation of the plaintiff's claim, or connected with the subject of the action." From the record before us it appears that the plaintiffs in the attachment suit recovered a personal judgment in their main action against the defendant in the attachment. Now, in this suit by the attachment defendant on the attachment bond for damages for the wrongfully obtaining of the judgment, and for the payment of which judgment the plaintiffs in the attachment suit are ultimately liable, it is clear that the plaintiffs in the attachment might counter-claim as against the plaintiff in this action the amount of their judgment, because it exists in their favor against the attachment defendant and it arises out of the transaction set forth in the petition herein. It was not necessary for plaintiff in the attachment to sign the undertaking (*Eckman v. Hammond*, 27 Neb., 611), but it was none the less the bond or contract of the plaintiffs in the attachment. Section 200 of the Code of Civil Procedure provides that an order of attachment shall not be issued until there has been executed by one or more sufficient sureties of the plaintiff in attachment an undertaking, and this undertaking shall be to the effect that the plaintiff in the attachment will pay the defendant in attachment all damages which the latter may sustain by reason of the attachment, if the order be wrongfully obtained. Olsen, who signed the attachment bond, was simply the surety of the plaintiffs in attachment. It was in law the bond—the contract—of the plaintiffs in the attachment suit. (*Wolf v. Hahn*, 28 Kan., 588.)

It is the policy of the Code that all disputes existing and arising between parties, growing out of the same transaction, shall be settled in one action. The question now under consideration was before the supreme court of Montana in *Hoskins v. White*, 32 Pac. Rep., 163. That was a suit on an attachment bond for damages because the order of attachment had been wrongfully obtained. The plaintiffs in the attachment suit had not

signed the undertaking, but had been joined as defendants with the surety in the suit thereon. The district court held that the plaintiffs in the attachment could not be joined as defendants in the suit, and this holding was reversed. It appears that the attachment law of Montana and the provisions of its Code in reference to parties to suits are similar to ours. The court said: "The subject of the action is the damage committed by the wrongful attachment. The principal and sureties are all liable for one and the same thing, to the amount for which the undertaking provides. * * * Section 16 of the Code of Civil Procedure provides that 'any person may be made defendant who has or claims an interest in the controversy adverse to the plaintiff.' Is not the principal, who caused the attachment and whom the sureties guarantied would pay the damage, a party in interest adverse to the plaintiff? He is bound to reimburse the sureties for whatever they are compelled to pay on his behalf in the premises." (*McIntosh v. Hurst*, 6 Mont., 287; *Pierse v. Miles*, 5 Mont., 549; *Jennings v. Joiner*, 1 Cold. [Tenn.], 645.) In 1 Shinn, Attachment, section 169, it is said: "The sureties by executing the bond, and the plaintiff by invoking the writ only, all become liable to actual damages occasioned by the wrongful issuing of the writ. (See, also, *State v. Fortinberry*, 54 Miss., 316; Waples, Attachment & Garnishment [2d ed.], sec. 183.) We reach the conclusion, therefore, that in a suit upon an attachment bond for damages for wrongfully obtaining the attachment the plaintiffs in the attachment are proper parties defendant to such action, although they did not sign such bond; because they have an interest in the controversy adverse to the interest of the plaintiff; that the attachment bond is in law as much the bond and contract of the plaintiffs in the attachment as if they had actually signed it; and that in a suit upon such bond there is but one cause of action, namely, the wrongfully obtaining of the order of attachment, and on this cause of action the plaintiffs in the attachment and the surety

on the attachment bond are jointly and severally liable to the defendant in the attachment suit.

1. In the case at bar the plaintiff pleaded the issuing of the attachment; its levy upon the plaintiff's property; that the attachment was wrongfully obtained and was afterwards, by the court issuing it, discharged. The answer of the surety traversed these allegations, while the answer of the plaintiffs in the attachment admitted the dissolution of the attachment. The evidence shows that a motion was filed to discharge the attachment; that on the same day the plaintiffs therein filed affidavits in support of their attachment; that the defendant in the attachment filed affidavits in support of his motion to discharge, and that on hearing by the court the motion to dissolve the attachment was sustained. There is no intimation in the record that the order discharging the attachment was superseded, or that it was procured by collusion or fraud. The district court instructed the jury that to entitle the plaintiff in this case to recover they must find from the evidence, among other things, that the attachment had been dissolved in due course of law. On the former hearing we held that this instruction was erroneous, because the court did not tell the jury that to enable the plaintiff to recover they must find from the evidence not only that the attachment had been dissolved, but that it had been dissolved because the facts alleged to procure its issuance did not exist or were untrue. We think in that conclusion we were mistaken. To sustain us in that view we cited *Eaton v. Bartscherer*, 5 Neb., 469, but a careful examination of that case leads to the conclusion that it is not in point here. That case was a suit on an attachment bond, and the question was whether the petition filed stated a cause of action. This court said: "There is no agreement to pay all damages that might be occasioned by the attachments, in any event, but only in case it should be established that the orders of attachment were wrongfully sued out. In these petitions there is no charge that these orders of attach-

ment were wrongfully or unjustly obtained, nor is there any statement from which that fact can possibly be inferred. There is, to be sure, in each of them an allegation that after the attached property had been sold and the proceeds applied upon the judgments, in pursuance of the orders of the court, proceedings in error were prosecuted which resulted in the dissolution of the attachments. * * * We are of opinion, therefore, that in failing to allege or to show by reasonable inference that the orders of attachment were wrongfully sued out * * * these petitions are fatally defective," etc. It is obvious that in the petitions in those cases the plaintiffs not only failed to allege that the attachments had been wrongfully obtained, but they failed to allege that the attachment had ever been discharged. Their pleading, in effect, was that the main actions in which the attachments were issued had proceeded to judgment; that the court had made an order sustaining the attachments and ordering the attached property sold, and that the defendants in those actions had, by proceedings in error, suspended the judgments, and therefore they concluded that superseding the judgments rendered in those actions had discharged the attachments. We think, then, that we correctly held in that case that those petitions did not state a cause of action. But here the evidence shows that a motion was made to discharge the attachment; that affidavits were filed in support of the attachment and in support of the motion to discharge, and that on the hearing this attachment was discharged. The order dissolving this attachment was a judgment. The court could not have dissolved the attachment without finding that the order of attachment had been wrongfully obtained, and the finding and order made on the hearing to discharge the attachment conclude and estop the parties to the attachment proceedings. The language of the statute is that the plaintiff shall pay all damages which the defendant in attachment may sustain by reason of the attachment, if the order be wrongfully obtained.

When is an order of attachment rightfully obtained? It is rightfully obtained when the facts exist which the statute requires to exist to enable a party to avail himself of the attachment remedy, and when the party suing out an attachment complies with all the provisions of the law, such as filing an affidavit alleging certain things and the causing to be executed for the benefit of the defendant in attachment an undertaking conditioned as the law requires; and the converse is true, that the attachment is wrongfully obtained either when the facts do not exist which authorize the issuance of an attachment, or when the party suing it out has failed to comply with some requirement of the statute. Attachment is not a common-law remedy, but is purely a creature of the statute, and the same statute that has authorized a resort to the remedy by attachment has specifically pointed out what facts must exist before a resort to that remedy can be had; and it has quite as specifically provided just what the party resorting to the remedy shall do in order to be entitled to that remedy. If the necessary facts exist, and the party using the remedy complies with all the requirements of the statute, then the attachment is rightfully obtained and the sureties are protected. If none of the facts exist which the law says must exist in order that the remedy may be resorted to, or if the party using the writ does not comply with all the things with which the statute says he must comply, then the writ is wrongfully obtained. In other words, a party who resorts to the remedy of attachment does so at his peril; and the party who signs the attachment bond guaranties not only that the facts exist which the law requires shall exist in order that the remedy of attachment may be resorted to, but that the party using the writ has done and will do everything required by the statute to be done in order that he may avail himself of this extraordinary remedy. This brings us to the question of the effect as evidence of the judgment or order of the court dissolving an attachment when offered in evidence in a suit on an

attachment bond for damages for wrongfully obtaining the attachment.

Is this judgment or order dissolving the attachment conclusive evidence that the order of attachment was wrongfully obtained? There is a seeming conflict among the authorities, but this is largely due to the peculiar provisions of the attachment laws of the various states. The rule, and the correct rule, we think, is laid down in *Jerman v. Stewart*, 12 Fed. Rep., 266, where the court, in a suit upon an attachment bond, construing the attachment law of the state of Tennessee, said: "The wrongful suing out contemplated by these sections is conclusively proved by a judgment of the court in favor of the defendant in the attachment proceeding." In *Kennedy v. Meacham*, 18 Fed. Rep., 312, a suit for damages on an attachment bond for wrongfully issuing the attachment, the court charged the jury that the order dissolving the attachment was conclusive on the right of the plaintiff "to secure the actual damages resulting to him from the wrongful suing out of the attachment. The only possible question for you on this branch of the case is the amount of the actual damages." This case was another construction of the attachment law of the state of Tennessee, and the ruling was followed by the supreme court of that state in *Renkart v. Elliott*, 11 Lea [Tenn.], 235. In *McDaniel v. Gardner*, 34 La. Ann., 341, it was held that when "the judgment is simply one of non-suit, the fact of the dissolution of the attachment is a finality and entitles defendant to damages for a wrongfully taken attachment." In Drake, Attachment [7th ed.], section 185*b*, it is said: "Though a writ issued by competent authority and regular on its face will afford protection to an officer acting under it, it does not, if issued irregularly, afford the same protection to the party who caused its issue. The responsibility rests upon him not only to see that it is right in those particulars, but that it was regularly issued; for if it be set aside for irregularity, that makes the party a trespasser *ab initio* and affords him no protection as to

what has been done under it; as to him, it is then as though no process had ever been issued, and the property attached had been taken and detained by his order without any process." In *Seattle Crockery Co. v. Haley*, 33 Pac. Rep. [Wash.], 650, an affidavit for attachment alleged that defendant was about to dispose of its property with intent to defraud his creditors, and that it had so disposed of its property, or a part thereof. A traverse of such allegations was followed by an order to discharge the attachment, on the oral proofs of the parties, no findings being made. It was held that the order dissolving the attachment was a final adjudication that the attachment had been wrongfully obtained. *Hayden v. Sample*, 10 Mo., 215, was a suit upon an attachment bond. On the trial the defendants objected to the record of the proceedings which resulted in the discharge of the attachment. The court said: "But the truth of the affidavit made to obtain the attachment was not in issue here and could not be put in issue. The only inquiry in reference thereto and material in this case was the fact that an issue had been made, tried, and found against the plaintiffs, and that damages had by reason thereof accrued to the defendant." If in this action the defendants may retry the question as to whether the attachment was wrongfully obtained,—that is, whether the facts averred to obtain the attachment were true or existed,—then the order or judgment made by the court on hearing the motion to discharge the attachment was not binding upon any one. Suppose the petition in this case alleged the issuing of the attachment, the seizure of the property, a motion made to dissolve it, and that the court had overruled the motion and yet had averred that the attachments were wrongfully obtained. Can it be possible that the petition would have stated a cause of action on the attachment bond? Is it not clear that in such a case the order or judgment of the court sustaining the attachment would have been a conclusive adjudication that the attachment was rightfully obtained, and that the plaint-

iff had no cause of action upon his bond? But estoppels must be mutual, and if such a judgment or order of the court would preclude the attachment defendant from a suit upon the bond, it seems impossible to escape the conclusion that the judgment or order dissolving the attachment is conclusive evidence against all parties to the attachment proceeding that the attachment had been wrongfully obtained. This judgment is as binding upon the surety of a bond as it is upon the plaintiff in the attachment proceeding.

The principle underlying this question under consideration was extensively discussed in *Braiden v. Mercer*, 44 O. St., 339. This was an action upon a guardian's bond for the recovery of the amount found due his wards upon a final settlement and order of the guardian's account in the probate court. The sureties on the bond contended that they were not concluded by that settlement; but the court held that, in the absence of fraud or collusion, the judgment of the probate court against the guardian was conclusive evidence against the sureties of the amount owing by him to his wards. Owen, C. J., said: "By their bond the sureties contract with reference to the action of a court, and that their principal will obey its orders and conform to such action. Can they say they are strangers to such proceedings? Upon their principal's failure to obey the orders of the court, there is clearly a breach of the bond. The relation they assume to such court and its action so far makes them privy to the proceedings affecting their principal as to deny to them the right, when called upon to answer for the breach of the bond, to call in question the grounds upon which the court based its action, and to have the same cause retried. We find in our law numerous illustrations of this principle. The sureties in an undertaking in attachment contract to pay the defendant all damages sustained by reason of the attachment if the order prove to have been wrongfully obtained. Has it ever been doubted that the determination by the court in the at-

tachment proceeding that the order was wrongfully obtained concluded the sureties upon that question in an action upon their undertaking? By an undertaking in replevin the sureties contract that their principal will duly prosecute the action and pay all costs and damages which may be awarded against him. Nobody will claim that the award of damages in the replevin suit is not final against the sureties in an action against them upon the undertaking. An undertaking in an injunction proceeding is conditioned to secure the party enjoined the damages he may sustain if it be finally decided that the injunction ought not to have been granted. It has never been suposed that the sureties, in an action against them, could be heard to say that they were strangers to the injunction proceeding, and that the decision of the court that the injunction ought not to have been granted should be disregarded and that question again litigated." *Lothrop v. Southworth*, 5 Mich., 436, was a suit upon an injunction bond conditioned that the applicant for the injunction would pay the defendant all damages he might sustain should it be finally decided that the injunction ought not to have been granted. The surety on the injunction bond contended that as he was not a party to the injunction suit, that he was not concluded by the decree dissolving the injunction; but the court held that the decree was not only conclusive as against the plaintiff in the injunction suit, but upon the surety upon the injunction bond as well. The court said: "The cause was to be litigated by Lothrop; * * * Cleveland [the surety on the injunction bond] could not be heard in court, as he had no interest in the subject of the controversy. He, as an indifferent person, stepped in to the aid of Southworth to enable him to prosecute his action, and undertook that he should abide the judgment of the court. He can, therefore, raise no question as to the correctness of the decree, nor impeach it in this collateral proceeding. If he apprehends any fraudulent collusion between the parties to the decree, his remedy is in chan-

cery for relief against the bond. * * * To hold otherwise would be to introduce a dangerous and novel doctrine into the law of remedies, viz., that when an action is brought upon a bond given for the performance of a decree against principal and surety, the whole subject of the decree must be relitigated, if a defense is set up impeaching it, before a joint recovery can be had. We apprehend that such a rule would make litigation endless." The principle upon which these two cases rests is that the surety on an injunction, replevin, or attachment bond is a privy to the proceeding in which the bond was used; that the surety was aiding and abetting the action, and in that sense a party and bound by the judgment rendered in the proceeding. The same principle was applied by this court in *Turner v. Killian*, 12 Neb., 580; *Pasewalk v. Bollman*, 29 Neb., 519; *Thomas v. Markmann*, 43 Neb., 823.

In order that the litigant should have an attachment the statute requires him to swear that the cause for which he sues is just. Suppose that all the requirements of the statute are complied with except that the affidavit for attachment contains no such averment. The absence of this averment would not render the attachment proceedings void, but merely irregular, and the affidavit for attachment could be amended. (*Struthers v. McDowell*, 5 Neb., 491.) But suppose the attachment is assailed by motion to dissolve because of the absence of this averment from the affidavit and the plaintiff in attachment does not seek to amend and the court discharges the attachment. In the meantime the property of the defendant has been seized and he has been injured, perhaps ruined. Has he no remedy on the bond? If the averment required by the statute had been in the affidavit it would have been rightfully obtained and the surety on the undertaking would have been protected; but as the averment was not there, and as the statute forbade the resort to the attachment remedy without such an averment, the attachment was wrongfully obtained. In the

case supposed, had the court refused to discharge the attachment because of the absence of such averment, such action of the court would have been equivalent to its judgment that the attachment was rightfully obtained, and that judgment, though erroneous, would not have been void and could not have been called into question in any collateral proceeding; so that it comes to this: That an attachment is rightfully obtained when the facts exist which the law requires must exist in order to authorize a resort to the remedy, and when the plaintiff suing out the attachment has complied with all the provisions of the law; and an attachment is wrongfully obtained when the facts alleged for its issuance do not exist, or when the plaintiff in the attachment has failed to comply with some requirement of the statute to entitle him to an attachment. And whether rightfully or wrongfully obtained is proved by the judgment or order of the court sustaining it or discharging it, so long as such judgment or order remains unsuperseded and unimpeached for collusion or fraud. We reach the conclusion, therefore, that in a suit upon an attachment bond for damages for wrongfully obtaining the attachment that the judgment or order of the court dissolving the attachment is conclusive evidence that the attachment was wrongfully obtained.

2. In the fourth paragraph of the syllabus of this case as reported in 48 Neb., 27, we said: "To maintain an action independently of the statute, and not on the bond, malice in suing out the writ and want of probable cause must be averred and shown;" citing *Palmer v. Keith*, 16 Neb., 91, and *Jones v. Fruin*, 26 Neb., 76. Those cases are not authority for any question involved in this action, as neither of them was a suit upon an attachment bond. It has always been the policy of the law to encourage the citizen to resort to the courts for the redress of his grievances, and in conformity with this policy the rule of law is that one cannot be made liable in damages for using the process of the courts in any action, provided he acted

with probable cause and without malice. This is the doctrine upon which the last two cited cases rest, and we must not be understood from anything said in this opinion as modifying those cases in any particular whatever. This action is not one for malicious attachment. It is not a common-law action, but is an action founded upon a statutory bond. The judgment of the district court should be affirmed.

W. S. RAKER V. STATE OF NEBRASKA.

FILED JANUARY 7, 1897. NO. 8216.

1. **Review:** BRIEFS. A question discussed in the brief of counsel, but not raised by any assignment in the petition in error, will not be considered.
2. **Instructions:** MISSTATEMENT OF ISSUES. A material misstatement of the issues in an instruction in a criminal case is error which will not be cured by a correct statement in another instruction.
3. **Libel:** CRIMINAL LAW. A false or malicious publication, in print or writing, which tends to injure the reputation of another person, or to bring him in contempt, hatred, or ridicule, is libelous, and the publisher is amenable to the criminal law.
4. ———: ———: INSTRUCTIONS: BURDEN OF PROOF. In a prosecution for criminal libel it is error to so instruct the jury as to cast upon the defendant the burden of establishing that the alleged publication was not libelous.

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

James Hassett, *E. C. Strode*, and *W. S. Summers*, for plaintiff in error.

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

NORVAL, J.

W. S. Raker was convicted in the district court of Douglas county of the publication of a criminal libel, and

sentenced to imprisonment in the penitentiary for the period of one year. He has brought the record to this court for review, alleging forty-four grounds for reversal of the judgment pronounced against him, all of which will not be noticed, for the reason that to do so would necessitate our writing a treatise on the law of criminal libel and criminal procedure as well, which task we neither have the time nor inclination to now undertake. This opinion will be confined to a consideration of but a few of the principal questions raised.

The defendant, on March 1, 1895, was the editor and publisher of the Gretna *Reporter*, a weekly newspaper, published in Sarpy county, this state, and in the issue of his paper of the above date appeared the following article of and concerning Job Babbitt, the complaining witness, who was foreman of the grand jury then in session in the city of Omaha: "Job Babbitt, the foreman of the federal grand jury, now in session at Omaha, and also a *de facto* member of the Christian church, is untiring in his efforts to know the facts as well as to listen to the testimony as to the evils existing in the 'Gate City.' Accordingly, one night last week, he, together with a party of his colleagues, took advantage of the absence of his religious associates to visit one of the dives in the burnt district to while away an hour, and see Omaha by gaslight, listen to the entrancing music, but we hope not to cultivate the acquaintance of the sirens that danced attendance on them. At any rate the party were comfortably enjoying a cigar around a table from which the glasses had not yet been removed when our reporter entered. He was naturally somewhat surprised but reasoned that that was part of their business and let it go at that. The object of their business will doubtless be made known when the indictments are returned." The information charges that the defendant in Douglas county, "unlawfully, feloniously, and maliciously contriving and intending to injure, scandalize, and vilify the good name and reputation of one Job Babbitt, and to bring him into hatred and contempt, ridicule, and

disgrace, unlawfully, feloniously, and maliciously did publish a certain false, malicious, and defamatory libel of and concerning the said Job Babbitt in the Gretna *Reporter*, a weekly newspaper printed and published in the town of Gretna, Sarpy county, Nebraska, and having a general circulation, also then published and having a circulation in Douglas county, Nebraska, in a part of which said false, scandalous, malicious, and defamatory libel were and are contained the following false, malicious, scandalous, and libelous words and matters of and concerning the said Job Babbitt, to-wit: [Here follows that portion of the article above set forth, commencing with 'accordingly one night last week' and ending with 'danced attendance on them,' together with the innuendoes set out in the information.]" A demurrer to the information was overruled by the trial court, which decision is the first ground of complaint in the brief filed. This point cannot be considered, for the reason the ruling on the demurrer is not made the basis of any one of the assignments in the petition in error.

Objection is made to the first instruction by the court on its own motion, which undertook to state to the jury all the material averments contained in the information, but was not wholly successful in that regard. The jury were told, *inter alia*, the information charged that the alleged libelous article was published "in the Gretna *Reporter*, a weekly newspaper printed and published in the town of Gretna, Sarpy county, Nebraska, and having a general circulation in Douglas county." It is the quoted portion of the instruction which the defendant assails, and the criticism directed against it is well merited. The information contained no averment to the effect that the Gretna *Reporter* was a newspaper of general circulation in Douglas county, yet the jury were told by the first instruction that it did so allege, while the eighteenth paragraph of the charge advised the jury that the information stated that the paper "in which the alleged libel was published by the defendant was a newspaper having a

general circulation," not limiting it to any county, and that the publication of a false and malicious libel in a newspaper having a general circulation constitutes a felony punishable by imprisonment in the penitentiary; but if the paper did not have such a circulation, the publication of such an article therein would not be libel, but misdemeanor merely. The different parts of the charge were contradictory and conflicting upon the question of the character of the circulation of the paper, and tended to confuse and mislead the jury in their deliberations. If the Gretna *Reporter* merely had a general circulation in one county, as the court by the first instruction so directed the jury was the allegation of the information, then, under the decision in *Koen v. State*, 35 Neb., 676, no felony was charged against the accused, but at most a misdemeanor. The jurors may have believed that the defendant was being tried alone for the lesser offense, and hence misled, to return a verdict of guilty as set forth in the information, which charged the highest grade of criminal libel known in this state. The attorney general, in his brief filed, concedes that the instruction was bad, and that if the charge contained no other direction upon the question of the circulation of the Gretna *Reporter*, the conviction could not stand; but he insists that the charge of the court must be construed as a whole, and when thus considered, if it fully and fairly stated the issues, there is no error. Such is undoubtedly the doctrine recognized by this court, but this rule applied to this case will not cure the error in the first instruction. If it had merely failed to state some allegation contained in the information, this defect would have been rendered harmless if the omission was covered by some other portion of the charge of the court. The vice imputed to the first instruction is not that it merely omitted to state something, but that it misstated the averment of the information as to the circulation of the paper containing the alleged libelous article; and such error is not cured by the correct statement concerning the subject in another

paragraph of the charge. (*Ballard v. State*, 19 Neb., 609; *Galloway v. Hicks*, 26 Neb., 531.)

Complaint is made of the giving of the third instruction, which reads as follows:

"3. A libel is a false and malicious publication expressed either in print or in writing, or by pictures, effigies, or other signs, tending to injure the reputation of one alive and expose him to public hatred, contempt, or ridicule. It will be observed that in order to constitute the false and malicious publication, the print or writing need not in fact injure the reputation, nor in fact expose him to public hatred, contempt, or ridicule. It is sufficient if it tends to injure the reputation of the person, and tends to expose him to public hatred, contempt, or ridicule. Nor is the state required to prove, in order to prove a libel, that the false and malicious publication tends to injure the reputation of the person and expose him to public hatred, contempt, and ridicule. It is sufficient if the publication of the matter, either in print or writing, tends to injure the reputation of a person and expose him to public hatred or expose him to contempt or to expose him to public ridicule."

The criticism is directed against the portion of the instruction which says, "nor is the state required to prove, in order to prove a libel, that the false and malicious publication tends to injure the reputation of a person and expose him to public hatred, contempt, and ridicule." It is argued that by this language the burden was cast upon the defendant to prove that the portion of the article made the basis of the prosecution was not libelous. Conceding, without deciding the point, the language just quoted would be a correct statement of the law when applied to a false and malicious publication of an article which on its face discloses that it tends to injure the reputation of a particular person or to cause his social degradation, or to excite public distrust, contempt, or hatred for him, such rule was not appropriate in this case, since the part of the

article set out in the information does not import defamation on its face of a particular person. It does not even mention the name of the complaining witness, and standing alone, and disconnected with the remainder of the article, required proper inducement, innuendoes, and evidence to make it apply to Job Babbitt, and also to show the words were employed in a libelous sense. It was therefore for the state to prove that the publication tended to injure the complaining witness, or to expose him to public hatred or contempt, which fact, if it be a fact, was the province of the jury to determine from all the evidence in the case under proper instructions. It was not for the defendant to show the article was not libelous, but the burden was upon the state to establish every element of the offense.

It is insisted that the court erred in the fifth paragraph of its charge, which was to the effect that the publication of a false and malicious libel of and concerning a person, either in print or in writing, which tends to injure the estimation in which one is held and to injure his good name and to cause him to be despised and to be treated with contempt, constitutes a criminal libel within the meaning of the law. The point is made that the foregoing definition of libel is correct from the standpoint of civil liability, but that criminal prosecutions can only follow a public wrong, and that a publication must be of such a nature as tends to create a breach of the peace and to disturb the harmony of society, else it is not made the basis of criminal prosecution. In Moore's Criminal Law, section 724, it is said: "An indictment lies for publishing words which contained that sort of imputation which is calculated to vilify a man and bring him into hatred, contempt, or ridicule, though the words impute no punishable crime." In 2 Wharton's Criminal Law [10th ed.], section 1595, it is stated that "it is defamatory to publish that of another which will put him, supposing him to obey the impulses common to men under such circumstances, in a condition of mind which is likely to result in a breach

of the peace. And even supposing there be no danger of any such action on his part, it is defamatory to expose him to public hatred, contempt, or ridicule." The same author at section 1598 uses this language: "Whatever, if made the subject of a civil action, would be considered libelous, without laying special damage, is indictable in a criminal court, and by this test, therefore, the law of libel, as expressed in actions for damages, is brought to bear on criminal prosecutions." In *State v. Spear*, 13 R. I., 324, it was ruled that "a publication is libelous if, without charging an indictable offense, it falsely and maliciously imputes conduct tending to injure reputation, to cause social degradation, or to excite public distrust, or hatred." To the same effect are *Giles v. State*, 6 Ga., 276; *State v. Mayberry*, 33 Kan., 441; *State v. Jeandell*, 5 Harr. [Del.], 475; 13 Am. & Eng. Ency. of Law, 294, and the numerous cases cited in note 1. Applying the doctrines of the foregoing authorities to the question under consideration, the definition of libel as laid down by the court in the instruction under consideration is not faulty, but entirely sound.

The sixth instruction is criticised as being argumentative. After defining slander and libel it says: "The words of the slanderer may arouse anger, resentment, and revenge to-day; but they, like all human utterances, lose their potency, their vehemence, their power of producing anger, resentment, and revenge. Ere the end of the morrow they die, young and soon forgotten. Not so when those words are reduced to writing or print and published. They live on and on, and are read by the children and children's children to the last generation of the person libeled. They arise in all their hideous deformity to vex, sap, and destroy the happiness, the peace, the good names of the living and beloved memory of the dead while time lasts, because the ink that prints a published libel never fades, never dies." Argumentative instructions should not be given. Whether the language above quoted is faulty in that regard we shall not stop to decide,

but pass it with the observation that it, as well as other portions of the charge, very clearly, if not quite, invaded the province of the jury.

For the errors indicated the judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

LEROY S. WINTERS, APPELLEE, V. JOHN L. MEANS, APPELLANT.

FILED JANUARY 7, 1897. No. 6411.

1. **Partnership**: DESCRIPTION OF MEMBERS: PARTIES. The description of the individual members of a defendant partnership firm does not make such individuals defendants, the reference to them being merely *descriptio personæ*.
2. **Bill of Exceptions**: EVIDENCE OF AUTHENTICATION. Where there is satisfactory evidence that there had been a proper authentication of a bill of exceptions attached thereto, which, by accident, had become detached and lost, such showing was held sufficient secondary evidence to justify consideration of the bill of exceptions as such.
3. **Partnership**: PLEADING: APPEARANCE: LIMITATION OF ACTIONS. In an action under section 27, Code of Civil Procedure, to charge the property of an individual member of a firm with the payment of a judgment against it, an entry of appearance by the firm, whereby jurisdiction was conferred to render such judgment, and the failure to interpose the statute of limitations as a defense, conclude the individual as to the binding force of such judgment with respect to the objection indicated.

REHEARING of case reported in 48 Neb., 333. *Judgment below reversed.*

O. A. Abbott, for appellant.

B. F. Smith, contra.

RYAN, C.

In this case there was filed an opinion directing the affirmance of the judgment of the district court of Adams county. The evidence was not examined on that occasion, for the reason that it was not embodied in an authenticated bill of exceptions. (*Winters v. Means*, 48 Neb., 333.) Subsequently a satisfactory showing was made that before the cause was submitted there had been attached to the alleged bill of exceptions such authentication as entitled it to be considered, but that in some unaccountable manner this evidence had become detached. This, as secondary evidence, was deemed satisfactory within the rule recognized in *Warren v. Brown*, 31 Neb., 8, and accordingly a rehearing was granted. In this opinion we shall resume the history of this case at the point where it was broken off by the discovery that there was no properly authenticated bill of exceptions.

It is now proper to state that in the answer and cross-petition of Means it was alleged that executions had issued from time to time upon the judgment against the firm of W. L. Smith & Co., and that the same had been returned unsatisfied for want of property wherewith to satisfy the same. As we view it, this pleading, after the dismissal of the petition of Leroy S. Winters by himself, stood as a petition for affirmative relief against a partner made sole defendant by his own procurement. This being true, Winters could not be heard to complain that the other members of said firm had not been joined as defendants with him. The pleading disclosed the rendition of the judgment against the firm of W. L. Smith & Co. and the insufficiency of the partnership property to satisfy the same. The prayer was that execution might be issued against Leroy S. Winters, according to the statute in such cases made and provided, and for such other further and different relief as might be agreeable to equity and good conscience. By these averments, under the circumstances of this case, and by the prayer noted,

there was a sufficient compliance with the requirements of section 27, Code of Civil Procedure, to entitle Means to relief in accordance with the provisions of said section, provided Winters was a member of the firm and was bound by the judgment against it. It is proper to state, even at the risk of repeating what may have already been said in some former opinion, that the action instituted by Means against the firm of W. L. Smith & Co., with other defendants, as to whom there was subsequently a dismissal, was for the recovery of judgment in the sum of $15,000, and interest thereon from July 11, 1874, on account of labor performed and materials furnished in the construction of a certain railroad bridge, pursuant to the terms of a written contract between Means and said firm. It was alleged in the petition of Means that this labor was done and material furnished between the date of the contract, which was May 2, 1874, and July 11, 1874, inclusive of the last named day. This petition was filed on July 8, 1878. After it had been filed there were filed in succession, with the leave of the court, two amended petitions, but as there was no matter in either requiring special attention, we shall forbear describing these two pleadings. On June 22, 1880, there was a judgment in favor of Means in the sum of $22,691. It will be necessary to consider the record of the entry of this judgment in the course of this discussion, and at that time the particular matters to which attention should be directed will be described.

We shall now consider the objections urged by Winters to the granting of the relief prayed in the case at bar. In the original and amended petitions of Means the firm against which judgment was sought was described as "W. L. Smith & Co., consisting of William L. Smith, John J. Worswick, Leroy S. Winters, Charles Wells, and Henry P. Handy." In this language there was really named but one defendant—W. L. Smith & Co. The quoted language which followed the name of said firm was descriptive of its membership, and did not imply that these indi-

viduals were defendants. As this was an unincorporated association, formed for the purpose of doing business in this state, it was unnecessary, under the provisions of section 24, Code of Civil Procedure, to name the individuals composing it. This particularity in describing the firm was mere surplusage, and as such must be ignored. As a reason why, in this case, the judgment of Means against W. L. Smith & Co. should not be enforced against himself as a member thereof, Winters alleged that no service of summons had ever been made on W. L. Smith & Co., that said firm had never appeared, and that the district court never had obtained jurisdiction of said firm. On November 25, 1879, there was in the case of Means against W. L. Smith & Co. the following proceedings, as shown by the journal entry of said district court: "Come now the defendants and in open court present their motion for leave to answer said amended petition, which is also by the court sustained, and leave is hereby given said defendants to answer thereto within sixty (60) days," etc. In the same cause, under date of June 22, 1880, default was entered, the journal in that connection reciting that the defendants had appeared by attorney on November 25, 1879, asking leave to answer, which was then granted, and had then failed to plead, answer, or demur. It is true that this judgment was afterward reversed in this court, but that fact in no way invalidates the general appearance by the firm of W. L. Smith & Co. It is possible, as contended, that the use of the word "defendants" may have been because the members of the firm were regarded as being defendants, but this assumption, as already stated, was unwarranted. The record quoted shows that there was a general appearance for the firm, and whether or not originally there was proper service of summons is thereby rendered immaterial.

The second contention made by the reply of Winters was that he was not a member of the firm of W. L. Smith & Co. at the time the cause of action accrued upon which suit was brought, but had previously severed his connec-

tion with that firm, as was well known to Means, with whose knowledge and consent, before Means had done anything under his contract, the interest of Winters had been transferred to John J. Worswick, by whom all liabilities of Winters had been assumed. On the trial of this case Mr. Winters testified that he had sold his interest in the firm of W. L. Smith & Co. to his partner, Worswick, on June 5, 1874, but there was no attempt to show that this transfer was known, much less assented to, by Means. When the contract was made Mr. Worswick was one of its members, and the assumption of the responsibility of Winters by Worswick could merely operate to release Winters, for already Worswick, as partner, was personally liable for the entire indebtedness of the firm, and the alleged transfer to him of the liability of Winters added nothing to the assurance of payment to Means. Under this condition of the proofs, Mr. Means testified that he never knew that Winters claimed to have severed his connection with the firm of W. L. Smith & Co. until this action was begun by Winters. Under these circumstances there was not sufficient evidence to justify an assumption that Means assented to the withdrawal of Winters from the firm of W. L. Smith & Co., and to his release from liability as a member of said firm with respect to its existing contract obligations.

It was finally insisted by Winters that more than four years had elapsed after the cause of action had accrued in favor of Means before summons was served on the firm of W. L. Smith & Co., and more than five years had elapsed before an appearance was entered by said firm. This was an attempt to impeach the judgment by pleading matter which might have constituted a defense if, at proper time, it had been interposed as such by the firm of W. L. Smith & Co. This was not done, and thereby there was waived the benefit of the statute personal to the defendant. (*Taylor v. Courtnay*, 15 Neb., 190; *Atchison & N. R. Co. v. Miller*, 16 Neb., 661; *Scroggin v. National Lumber Co.*, 41 Neb., 195.)

This disposes of all the objections urged in the reply of Winters, and our conclusion is that Means was entitled to the relief prayed in his answer and cross-petition. The judgment of the district court is reversed and this cause is remanded with instructions to enter a decree accordingly.

REVERSED AND REMANDED.

RAGAN, C., having been of counsel, took no part in the determination of this case.

ABIGAIL A. BROTHERTON, ADMINISTRATRIX, V. MANHATTAN BEACH IMPROVEMENT COMPANY.

FILED JANUARY 7, 1897. No. 6639.

Bath-House Companies: NEGLIGENCE: DAMAGES. The conclusions reached in the former opinion in this case considered and adhered to on rehearing.

REHEARING of case reported in 48 Neb., 563. *Judgment below reversed.*

B. G. Burbank, for plaintiff in error.

Gregory, Day & Day, contra.

RYAN, C.

There has been filed in this case an opinion, which was reported in 48 Neb., 563. A rehearing was afterward granted, and from this it results that it has again been presented for our further consideration. It is unnecessary to restate the facts involved, for they were very fully and accurately stated in the opinion above mentioned.

Counsel for the defendant in error, in their brief for rehearing, say there is only one point to which they wish to invite attention, and this they state in the following

language: "It seems to us clear that the court overlooked the fact that the plaintiff's testimony failed to establish that the deceased was accidentally drowned under such conditions that the jury could have found, from the facts of the case, that in the exercise of ordinary diligence the defendant could have prevented the death complained of. The second ground in the motion brings up substantially, if not the same question, a question germane to this." After stating the substance of the holding in *Cooper v. Central R. Co. of Iowa*, 44 Ia., 134, the language of the aforesaid brief was as follows: "That is to say, that no liability for negligence can be charged to a party unless he could have been shown, or it could have been presumed from what was shown, that in the exercise of reasonable care he could have prevented the injury complained of. On page 19 of the transcript N. M. Campion testified of missing the deceased, and the facts to which he testified with reference to the same disclose all that was known of the alleged drowning. What we contend for is that nobody could have known the locality where the body could have been found had it been required of the defendant to have had a man in a boat watching for the deceased to prevent accident. There is nothing to show that the utmost diligence which the defendant could so use in that respect would have enabled the recovery of the body in time to have secured resuscitation. That is to say, that in going down under the water, whether he did it by plunging or by sinking, whether by struggling under the surface he had moved at a distance from where he disappeared of eight, ten, or fifteen feet, rests absolutely on conjecture. Now, before the jury could be satisfied in law in finding for the plaintiff, it must have been made to appear that in the exercise of reasonable care the body of the deceased could have been recovered and resuscitation produced." This extended quotation, which summarizes the contentions on behalf of the defendant in error, presents one general proposition, and that is that there was no evidence from which the jury

would have been justified in finding that by the exercise of ordinary diligence the defendant could have prevented the death complained of. The application of this principle was limited to the possibility of finding the body before life is extinct, and thereupon producing resuscitation. This, standing alone, was not the proposition of special importance in the opinion heretofore filed. A very careful re-examination of all the evidence has convinced us that no fairer summary of the salient features of this case can be formulated than is contained in the said opinion, and, acting on the principle of letting well enough alone, we reproduce the following language: "It is disclosed that the company kept at the beach a boat for the express purpose of use in case of accident to bathers. But there does not seem to have been any one whose duty it was to watch over the bathers or to rescue those in danger. In this case notice was brought home to an agent of the company, close to the shore, that a bather was missing, by Campion's inquiry upon entering the bath house. Campion says he told this man that he was unable to find Brotherton two minutes from the time he left the latter. Campion may have mistaken the time. But we have evidence other than his own estimate. From the testimony as to the depth of the water, coupled with the testimony of Campion that when he last saw Brotherton they were standing in water knee deep, it would seem that Brotherton must have proceeded out into the lake about seventy-five feet before he got beyond his depth. Campion must then have been on the way to the bath house. Assuming Campion's testimony to be true, the proof rises to a moral certainty that when Campion first discovered Brotherton's absence the latter could not have been dead. Assuming again the truth of Campion's testimony, instead of at once taking measures to search for Brotherton in the water, where he was last seen and where the danger existed, no search whatever was made by the company, and their direction to Campion was to search on the shore, where no danger was to be appre-

hended. We think that it is a reasonable inference that persons of ordinary prudence conducting a bathing resort frequented by 10,000 people a month should, in the exercise of ordinary care, keep someone on duty to supervise bathers and rescue any apparently in danger; and, if not, that it is certainly a reasonable inference that persons so situated should, on ascertaining that a person last seen in the water is missing, without a moment's delay, exert every effort to search for that person in the water, and not merely advise a youthful companion of the missing person to search on the land, and coolly watch the result of such search. We think in this aspect of the case, and this only, the evidence presented an issue which should have been submitted to the jury, and for that reason the peremptory instruction was erroneous." (*Brotherton v. Manhattan Beach Improvement Co.*, 48 Neb., 563.) From this quotation it will be seen that our former conclusion was not reached alone upon the assumption that the negligence of the defendant consisted in failing to find the body of Brotherton before life was extinct and producing resuscitation. The testimony, which might have justified a finding of negligence, tended to establish the fact that the company was informed soon enough after Brotherton's disappearance to have assisted him, perhaps before he sank, if proper means had been at once taken. Another fact proper to be taken into account by the jury was that there was no one at the bathing place charged with the duty of giving timely assistance to bathers in case of accident. It seems to be assumed by the argument of the defendant in error that immediately upon Brotherton's being missed, there remained nothing to be done but to look for his submerged body. If this assumption is correct, it quite conclusively implies that necessary relief, to be effective, must be rendered as soon as the bather is seen to be in trouble. The evidence shows that the defendant invited everyone to partake of its privileges, without regard to his or her ability to swim. It was, therefore, to be reasonably expected that among

10,000 monthly patrons there would be some without skill or experience. It must be admitted that in case an unskillful swimmer was about to drown, tardy aid would probably be unavailing. It therefore seems to us that a jury would have been justified in finding, in respect to Brotherton, that the failure to provide a watcher in advance to prevent such accidents, and, upon timely information of existing imminent danger to him, to neglect attempting to afford him immediate assistance was negligence on the part of the defendant. In *Dinnihan v. Lake Ontario Beach Improvement Co.*, 8 App. Div., 509, 40 N. Y. Supp., 764, it was held that one who maintains a public bathing beach must be vigilant in keeping the premises safe for his customers, and that he cannot escape liability merely by showing that he has done nothing to render the premises unsafe. In the case just cited the improvement company offered a bathing place for the use of the general public for a small consideration, and the deceased, while availing herself of the privilege, was drowned in deep water caused by a depression in the bottom of the lake, which defendant claimed to have been recently formed by a current in the water. The principle above stated, as applied to the facts, was very analogous to that which we recognize as applicable to the facts of this case. We are satisfied that our former conclusion was correct, and accordingly the judgment of the district court is

REVERSED.

BENJAMIN ROSENTHAL ET AL. V. CHARLES OGDEN ET AL.

FILED JANUARY 7, 1897. No. 6858.

1. Contracts: CONSTRUCTION: QUESTIONS OF FACT. If a written contract is to be construed with reference to its terms alone, it is the duty of the court to interpret it; but if the construction or application must depend upon other and extrinsic facts, the contract, in

connection with these questions of fact, should be submitted to the jury, under proper instructions.

2. Trial: EXCEPTIONS: WAIVER. An exception, well taken, to the exclusion of evidence is not waived by a failure to present the same ground of objection by an exception to an instruction given or refused.

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

Schomp & Corson and *G. M. Lambertson*, for plaintiffs in error.

References: *Barnes v. Newcomb*, 89 N. Y., 115; *Attaway v. Third Nat. Bank*, 10 West. Rep. [Mo.], 412; *Atlee v. Fink*, 75 Mo., 100; *Bent v. Priest*, 86 Mo., 476, 1 West. Rep., 749; *Bliss v. Matteson*, 45 N. Y., 22; *Tobey v. Robinson*, 99 Ill., 223; *Harrington v. Victoria Dock Co.*, 47 L. J., n. s. [Eng.], 594; *Bowman v. Phillips*, 3 L. R. A. [Kan.], 631; *Tyler v. Larimore*, 2 West. Rep. [Mo.], 177; *Suits v. Taylor*, 2 West. Rep. [Mo.], 579; *Gray v. Hook*, 4 Comst. [N. Y.], 449; *Gregg v. Wyman*, 58 Mass., 322; *Herrick v. Catley*, 1 Daily [N. Y.], 512; *Sherwood v. Saratoga & W. R. Co.*, 15 Barb. [N. Y.], 650; *Valentine v. Stewart*, 15 Cal., 387; *Gooch v. Peebles*, 11 S. E. Rep. [N. Car.], 421; *Weidekind v. Tuolumne Water Co.*, 5 Am. St. Rep. [Cal.], 445; *In re Cowdery*, 58 Am. Rep. [Cal.], 550; *Spinrad v. Finelite*, 26 N. Y. Supp., 761; *Daniel v. Wilber*, 60 Ill., 526; *Nicholson v. Pelanne*, 14 La. Ann., 514.

Cowin & McHugh and *Ogden & West, contra.*

RYAN, C.

In the district court of Douglas county there was in this case a verdict and judgment in the sum of $2,123.67 in favor of the plaintiffs in that court. By error proceedings in this court the defendants seek a reversal of this judgment. In describing the history of this case and discussing the principles involved we shall retain the designation of the parties as above given.

Plaintiffs, Charles Ogden and Joel W. West, in their amended petition in the district court, alleged that, as partners, they were engaged in business as attorneys and counselors at law in Omaha; that about September 12, 1892, the defendants employed plaintiffs as their attorneys in a matter in controversy between said defendants and one Samuel Rosenthal; that from said date of employment until December 1, 1892, the said defendants, and each of them, consulted with plaintiffs with reference to said controversy; that on September 28, 1892, Samuel Rosenthal applied to one of the judges of the United States circuit court of appeals for an order of injunction and an application for a receiver against the People's Mammoth Installment House, in which suit the defendants herein were joined as defendants; that at the special instance and request of said defendants, plaintiffs performed all the professional services in and on behalf of said suit as attorneys for the said Benjamin and Maurice Rosenthal, at Omaha, between June 1 and December 1, 1892, to-wit, on or about the —— day of June, —— day of July, —— day of August, 14th, 26th, and 30th days of September, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, and 19th days of October, and the —— day of November, 1892. It was alleged by plaintiffs that the professional services rendered by them were well worth the sum of $2,500, and that no part thereof had been paid, but that the full amount of $2,500 was still due. There was a prayer for judgment in the above sum. The defendants, in their answer, alleged that the People's Mammoth Installment Company, referred to in the petition, was a corporation in which Samuel Rosenthal and the defendants were the sole stockholders; that Benjamin Rosenthal was its president and that Maurice Rosenthal was an agent of said corporation; that about May 2, 1892, Charles Ogden, one of the plaintiffs, and the People's Mammoth Installment Company entered into a written agreement, of which the following is a copy:

"This agreement, entered into by and between Charles

Ogden of the first part and the People's Mammoth Installment Company of the second part, witnesseth: That for and in consideration of the sum of $300, to be paid by the said second parties, or either of them, to the said first party, the said first party agrees to do all the law business as attorney and counselor at law for the said second parties for a period commencing on the first of May, A. D. 1892, and terminating on the first day of May, 1893. It is agreed that said amount shall be paid in equal installments of seventy-five dollars ($75.00) every three months included in said period, and that this contract is considered to be one of entirety, and that in consideration of said first party doing all of said legal work for said second parties at such reduced rate, that the whole of said sum shall be considered earned during any period of said agreement should said parties of the second part fail to perform any of the covenants by them to be performed herein, or should they, or either of them, desire to abrogate this contract. In witness whereof, we have hereunto set our hands this second day of May, A. D. 1892.

"CHARLES OGDEN."

It was alleged in the answer that the existence of the above contract was known to Mr. West, of the firm of Ogden & West, during the time set forth in the petition, and that said corporation and the defendant, as its president and agent, and either of them, during said time, did not employ said firm of Ogden & West to transact any law business for them, or any one of them. Following the above described averments in the answer was this language: "These defendants further show that the legal services and consultations set forth in said petition, and sued on therein as the services of Ogden & West, were rendered in and about a suit wherein Samuel Rosenthal was named as plaintiff and the People's Mammoth Installment Company, together with these defendants, were named as defendants, and were such legal services as said Ogden was bound to render and perform under and by virtue of such contract of service, and not such

as these defendants, or either of them in their individual capacities, promised to pay or become liable for. And these defendants further show that if said West, or said alleged firm of Ogden & West, performed any service in and about said suit as set forth in said petition herein, he and said alleged firm did so at the request and instance of said Ogden, and for said Ogden, and because of his, said Ogden's, obligation to perform the same under his said contract of service as aforesaid, and not at the instance and request of these defendants, or either of them." There was a reply in denial of each allegation of new matter in the answer. In support of the above matters pleaded in the answer the defendants offered in evidence the above described written contract, to which an objection was interposed because of the contract as evidence being incompetent, irrelevant, and immaterial. Thereupon counsel for plaintiffs stated that they made no claim for services against the defendants in this case under said written contract with respect to the matters involved in the bill of complaint in the United States court and services with reference thereto, whereupon the contract was excluded and the defendants excepted. In regard to this ruling we find in the brief of counsel for the parties in whose favor it was made the following suggestion, by way of argument: "The construction of the legal effect of a contract belongs to a court, and the admission of the same in a case like this would have tended to mislead the jury and confuse them as to the relative rights of the parties to the controversy. It would have been impossible for the jury to draw the distinction between the personal rights of stockholders in a trading corporation and those in a corporation *per se*. Further, the instruction of the court which embodied the law of the case, and which superseded the ruling of the court in withholding the contract from the jury, was not excepted to. Every instruction was read to the jury with full approval of counsel for plaintiffs in error. It will be observed, however, that when the defendants of-

fered the contract in evidence, counsel for the plaintiffs expressly stated that no claim, of whatsoever nature, was made by reason of the existence of said contract—the whole claim of plaintiff being based upon the question as to whether a new and independent agreement had been made by defendants to represent them in their suit and controversy against their brother Samuel." This argument involves three propositions, which shall now receive consideration.

It is argued that as there were involved the personal rights of stockholders, and the rights of the corporation as such, it would have been impossible for the jury to draw the proper distinction, therefore (proposition 1) the construction of the legal effect of the contract belonged to the court. In *Coquillard v. Hovey*, 23 Neb., 622, it was said: "As we understand the rule for the construction of contracts, it is that if a contract is to be construed by reference to its terms alone, and without calling in the aid of extrinsic facts and circumstances, it is the duty of the court to interpret it. But if the construction must depend upon proof of other and extrinsic facts, then those questions of fact should be submitted to the jury, under proper instructions from the court. (*Begg v. Forbes*, 30 Eng. Law & Eq., 508; *Etting v. United States Bank*, 11 Wheat. [U. S.], 74; *First Nat. Bank of Springfield, Illinois, v. Dana*, 79 N. Y., 108; *Edelman v. Yeasel*, 27 Pa. St., 26." The province of the court with reference to the construction of contracts is sufficiently indicated by the above language, and the principle involved was recognized in *Rosewater v. Hoffman*, 24 Neb., 222, and again invoked in *Simms v. Summers*, 39 Neb., 781. The theory of plaintiffs was that they were specially employed by the Rosenthals independently of the above written contract, and solely under that employment they were entitled to compensation. The defense was that there was no such special employment, but that the services were rendered for the company pursuant to the provisions of said written contract, and that whatever was done for the Rosenthals

was merely incidental to the main controversy with their principal. It was proper to permit plaintiffs to introduce proofs conformably to the averments of their petition, but upon this being done, there was no good reason for shutting out all evidence in support of a defense specially pleaded.

In the presentation of proofs by defendants it was necessary to introduce the written contract, for it was the best evidence that one of the plaintiffs had been employed by the People's Mammoth Installment Company to render services of the same character as these for which compensation was claimed, during the period within which they were rendered and for a stipulated compensation much less than that sued for. The fact that this evidence might require to be supplemented with testimony that there was no other or further employment rendered it none the less competent. Without the written contract, the testimony that there was no employment other than was provided in said written contract would have fallen far short of establishing the defense pleaded. It was, therefore, not a question of the interpretation of this written agreement by reference to its own terms alone, without calling in the aid of extrinsic facts and circumstances, but the construction and application were dependent upon proof of other and extrinsic facts, therefore the written contract should have been submitted to the jury, in connection with other competent evidence, under the instructions of the court.

Counsel for Ogden & West seek to avoid the force of this reasoning by observing that at any rate there was no exception to the instruction given which embodied the law of the case. The exclusion of the written contract left the defense so necessarily incomplete that exceptions to instructions given or to the refusal to instruct could not supply the deficiency. The failure to take an exception to the giving or refusal of an instruction, therefore, in no way operated to waive the exception already well taken as to the ruling in exclusion of the written con-

tract. It is urged in support of the ruling just mentioned that when the defendants offered the contract in evidence, counsel for plaintiffs expressly stated that no claim, of whatsoever nature, was made by reason of the existence of said contract, and that plaintiffs' claim was based upon a new and independent agreement with the Rosenthals. This statement in no degree modified the already existing issues, for from the first the plaintiffs had disclaimed a right of recovery under this written agreement, and had relied upon a special employment by Benjamin and Maurice Rosenthal as individuals. This written contract was offered as a part of their defense to this claim, and no waiver by plaintiffs could impair its competency or relevancy as such.

For the error pointed out the judgment of the district court is reversed and this cause is remanded for further proceedings, not inconsistent with the views herein expressed.

REVERSED AND REMANDED.

ELISHA P. REYNOLDS ET AL. V. A. D. MCCANDLESS.

FILED JANUARY 7, 1897. No. 6984.

Review Without Bill of Exceptions. The alleged errors in this case being wholly dependent upon the nature of the evidence admitted and excluded, are not available to plaintiffs in error, because of the bill of exceptions having been quashed on motion before the final submission.

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

E. N. Kauffman, for plaintiffs in error.

Samuel J. Tuttle, contra.

RYAN, C.

In this case there was in the district court of Gage county a verdict and a judgment in favor of the defendant in error for services as an attorney at law rendered on behalf of the plaintiff in error in the trial of said district court of the case of *Dolan v. McLaughlin*, 46 Neb., 449, and on rehearing again reported in 48 Neb., 842. On motion the bill of exceptions was quashed in this case, and upon examination of the record we find that the instructions criticised embodied propositions of law abstractly correct. Whether or not in view of the evidence they should have been given we cannot say, for there is no means of ascertaining what the evidence was in the absence of a bill of exceptions. This same consideration prevents an examination of the alleged error in the exclusion of evidence tendered by the plaintiff in error. The judgment of the district court is

AFFIRMED.

FRANK LISY V. STATE OF NEBRASKA, EX REL. ANNA DUFEK.

FILED JANUARY 7, 1897. No. 8459.

Bastardy: EVIDENCE OF OFFER OF MARRIAGE. In a bastardy action it is prejudicial error to admit in evidence, over proper objections, an offer of marriage by the putative father to the mother of the bastard child, made with a view to the settlement of such proceedings about to be commenced.

ERROR from the district court of Butler county. Tried below before BATES, J. *Reversed.*

L. S. Hastings, for plaintiff in error.

Matt Miller and *W. M. Cain*, *contra.*

RYAN, C.

Plaintiff in error, in the district court of Butler county, was found guilty upon the charge of being the father of a bastard child of which Anna Dufek, an unmarried woman, was the mother. To reverse the judgment requiring the payment of the aggregate amount of $1,000 and in default of such payment that plaintiff in error be imprisoned in the county jail, these error proceedings are prosecuted.

On the trial there was introduced evidence, over proper objections of the plaintiff in error, to the effect that Mr. Lisy, in view of the bastardy proceedings about to be commenced, had offered to settle with the mother of the child aforesaid by marrying her, and that this offer had been met with a proposition on the part of Anna Dufek that she would marry plaintiff in error if certain land was by him conveyed to her as an earnest that he would not desert her. It has been held that it is prejudicially erroneous to admit testimony of this character when properly objected to. (*Olson v. Peterson*, 33 Neb., 358; *Robb v. Hewitt*, 39 Neb., 217.) For the error indicated the judgment of the district court is reversed and the cause is remanded for further proceedings.

REVERSED AND REMANDED.

NETTIE PECK V. NEBRASKA LOAN & TRUST COMPANY.

FILED JANUARY 7, 1897. No. 6976.

Review: TRANSCRIPT: ORIGINAL PLEADINGS. The requirement that there shall be a transcript of the proceedings of the district court filed in the supreme court is not complied with by filing the original pleadings with a certified transcript of the record showing the entry of a judgment; and under such circumstances the judgment sought to be reversed, when found from the transcript to have been within the jurisdiction of district court, will be affirmed.

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

Capps & Stevens and *A. W. Agee*, for plaintiff in error.

John A. Casto and *J. B. Cessna, contra.*

RYAN, C.

There was in this case a judgment in the district court of Adams county in favor of the plaintiff in error for the sum of $425.65, and an order requiring that the clerk of said court pay said judgment with an equal amount of money deposited in his hands for that purpose. The transcript of this judgment shows that it was within the jurisdiction of the said court; indeed, plaintiff in error practically admits this, contending, moreover, that it should have been for a greater sum. By stipulation, the parties brought into this court the original pleadings, certified as such by the clerk of the district court, and there is on file no other means of ascertaining what issues were presented and tried in the district court. It has been repeatedly held that the filing of a certified transcript of the pleadings is jurisdictional, and that where the judgment is one within the jurisdiction of the district court, as shown by a transcript thereof, it will be affirmed. (*Moore v. Waterman*, 40 Neb., 498; *Bell v. Beller*, 40 Neb., 501; *School District v. Cooper*, 44 Neb., 714; *Romberg v. Fokken*, 47 Neb., 198.) The judgment of the district court is accordingly

AFFIRMED.

RAGAN, C., having been of counsel, took no part in the consideration of this case.

VILLAGE OF CULBERTSON V. ALEXANDER G. HOLLIDAY.

FILED JANUARY 7, 1897. No. 7605.

1. **Municipal Corporations:** DANGEROUS PREMISES: EVIDENCE. In a suit against a municipal corporation for damages alleged to have been sustained by plaintiff's falling into an unguarded excavation in a lot fronting on a street, a correct plan or drawing of the excavation and the surrounding locality is competent evidence.
2. **Negligence.** The law requires of a person the exercise of care and caution commensurate with the danger confronted, but this rule involves no more than the exercise of ordinary care and prudence in view of the circumstances.
3. ———: ORDINARY CARE. The law does not require of an old person the exercise of greater care to avoid injury than it requires of a young and vigorous one. It requires of each the exercise of ordinary care. It requires of neither the exercise of extraordinary care.
4. ———: EVIDENCE. Whether a certain act or omission is or is not evidence of negligence is for the court, but whether such evidence convicts a party of negligence is for the jury.
5. ———: INSTRUCTIONS. It is error for a court to state to a jury a circumstance or group of circumstances as to which there has been evidence on the trial, and instruct that they amount to negligence. *Missouri P. R. Co. v. Baier*, 37 Neb., 253, followed.
6. ———: ———. Such expressions as "slight negligence" and "slight want of ordinary care" should not be used in instructions, as they tend to obscure and confuse what should be stated in plain and concise language.
7. ———: PERSONAL INJURIES. In an action for damages for injuries alleged to have been sustained through the negligence of another, there is no such issue as the slight negligence of any one.
8. ———: ———. The doctrine of comparative negligence is not in force in this state. Our courts recognize no degrees of negligence. The rule is that if a person himself, in the exercise of ordinary care, is injured through the negligence of another, he may recover; but if his own negligence contributed to or was the proximate cause of the injury he cannot recover.

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

L. H. Blackledge, for plaintiff in error.

William O. Woolman and *Cobb & Harvey, contra.*

RAGAN, C.

On April 12, 1893, Alexander G. Holliday was conducting a store on the southeast corner of the intersection of Taylor avenue and Wyoming street, in the village of Culbertson. Holliday's residence was a block west and a half block south of his store. At that date there existed an excavation in the lot on the southwest corner of the intersection of said thoroughfares, and immediately west of Holliday's store. This excavation had been made for the purpose of erecting a building on said lot. The night of said day was very dark, and Holliday, then going from his store to his residence, fell into said excavation and was injured. He brought this suit against the village of Culbertson to recover damages for said injury, claiming that he had sustained the same while in the exercise of ordinary care, and through the negligence of the village in failing to protect such excavation by barriers, danger signals, or otherwise. He had a verdict and judgment and the village has brought the same here for review on error.

1. On the trial of the case the court permitted to be given in evidence a diagram, plan, or drawing of the place of the excavation and the surrounding locality. This ruling of the court is assigned for error. A proper foundation was laid for the introduction of this diagram and it was competent evidence.

2. It appeared from Holliday's testimony that prior to falling into the excavation he was aware of its existence. The village requested the court to give an instruction to the jury to the effect that since Holliday was aware of the excavation prior to his injury, that in attempting to pass along the street by the excavation it was incumbent upon him to use extraordinary care and precaution, and unless he did so he could not recover. The district court refused to give this and instructed the jury, in effect, that

Holliday was not required, in attempting to pass along the street by the excavation, to exercise the highest possible degree of caution, and that it was sufficient if he exercised reasonable and ordinary care and caution under the circumstances of the case. This action of the court, it is claimed, is erroneous. We do not think it was. It is true that the law requires of a person that he shall exercise care and caution commensurate with the danger confronted, but this is only exercising ordinary care and prudence in view of the circumstances. In *City of Beatrice v. Reid*, 41 Neb., 214, it was held that "if one attempts to pass over a place of danger, the law requires him to exercise caution commensurate with the obvious peril; but this means that the law only requires of the party to exercise ordinary care, the danger and his knowledge thereof considered." And here we remark that the defendant in error was a man seventy-seven years of age, and the court, at the request of the village, instructed the jury as follows: "You are instructed that a person far advanced in years and feeble is bound to use greater care in avoiding defects and dangers such as the excavation testified about than a young and vigorous person." This instruction was wrong, all wrong. The law does not require an old person to exercise greater care to avoid injury than it requires of a young and vigorous one. It requires of each the exercise of ordinary care.

3. The third assignment of error is that the court erred in refusing to give an instruction asked by the village to the effect that it was not an insurer against accidents upon its streets, and the mere fact that Holliday fell into the excavation and was injured would not enable him to recover. The court did not err in refusing to give this instruction, as instruction No. 14, given at the request of the village, told the jury that the fact that Holliday fell into the excavation and was injured was not sufficient to entitle him to recover, unless they should find that his injury was caused by the negligence of the village and that no negligence of Holliday's contributed to such in-

jury. The court was not obliged to tell the jury that the village was not an insurer against accidents upon its streets. No such issue was made in the pleadings and no such a claim made at the trial.

4. It is insisted that the court erred in refusing to give the following instruction: "You are instructed that the mere fact that the defendant village permitted an excavation to be made and exist alongside of or extending a short distance into the highway, for the purpose of the erection of a building, would not of itself constitute negligence." If the village permitted an excavation to be made in one of its public streets, and permitted it to exist there without barriers or danger signals, then these facts were evidence of negligence. Whether a certain act or omission is or is not evidence of negligence is for the court, but whether such evidence convicts a party of negligence is for the jury. (*Spears v. Chicago, B. & Q. R. Co.*, 43 Neb., 720.) By the instruction under consideration, the village requested the court to charge the jury, in effect, that certain acts or omissions did not constitute negligence. The court correctly declined to so charge.

5. Another argument is that the court erred in refusing to give the jury the following instruction: "You are instructed that if you find that the injury complained of by plaintiff was caused by the mutual, concurring negligence or fault of both plaintiff and defendant, then the plaintiff cannot recover." The court had already instructed the jury, in No. 9, at the request of the village, that though there may have been negligence on the part of the village, yet if the plaintiff, by the exercise of reasonable and ordinary care, could have avoided the consequences of such negligence he could not recover. This was all the village was entitled to. The court did not err in refusing to give the instruction requested.

6. The next argument we notice is that the court erred in refusing to give instructions 12, 14, and 17 requested by the village. By these instructions the court was requested to charge the jury, in effect, that if there was no

sidewalk by the excavation, but there was a sidewalk on the opposite side of the street, and that Holliday, knowing these facts, attempted to pass along the south side of the street, by the excavation, on a dark night, that he was guilty of contributory negligence. It is error for a court to state to a jury a circumstance or group of circumstances as to which there has been evidence on the trial, and instruct the jury that they amount to contributory negligence. The court may tell the jury what act or omission is evidence of negligence or contributory negligence, but it is for the jury to say whether these facts convict the party of negligence. (*Missouri P. R. Co. v. Baier*, 37 Neb., 253; *Omaha Street R. Co. v. Craig*, 39 Neb., 601, and cases there cited.) This has been ruled so many times in this court that we are surprised to find counsel asking the district court to instruct the jury that certain acts or omissions of a litigant constitute negligence on his part. The court correctly refused the instructions.

7. The village requested the court to instruct the jury in effect that if Holliday, knowing of the existence of the excavation and its condition, had passed by the same daily for some time, and knowing that there was no sidewalk along the street in front of such excavation, but there was a sidewalk on the opposite side of the street, chose to go on the south side of the street and by said excavation, that these facts were proper for the jury to consider in determining whether Holliday's conduct, under the circumstances, was negligence. The court refused to give this instruction and, at the request of Holliday, instructed the jury to the effect that Holliday knowing of the excavation, his conduct under the circumstances was not conclusive evidence of negligence. The instruction refused was a correct statement of the law, but since the court told the jury that his conduct was not conclusive evidence of negligence against him, the village was entitled to have the jury instructed that they might take into consideration his knowledge and conduct in deter-

mining whether he had been guilty of negligence. We do not think that it would have been error for the court to have refused the instruction requested if the one requested by the village had not been given.

8. Another argument is that the court erred in refusing to instruct the jury as follows: "You are instructed that if the plaintiff was guilty of any negligence, however slight, which contributed directly to cause the injury complained of he cannot recover." In *Omaha Street R. Co. v. Craig*, 39 Neb., 601, we said that such expressions as "slight negligence" and "slight want of ordinary care" should never be used in instructions to juries, as such expressions tend to obscure and confuse what should be stated in plain and concise language. We adhere to that ruling and accordingly hold that the court did not err in refusing to give the instruction requested. This instruction was copied from *Village of Orleans v. Perry*, 24 Neb., 831. But this court, in that case, did not approve of the instruction. All we did say of the instruction in that case was that the giving it was not prejudicially erroneous. In the case at bar, Holliday was injured; and the inquiry here, as in all other cases of this character, was and is: By whose fault was it that the injury was inflicted? If Holliday himself, while in the exercise of ordinary care, was injured through the fault and the negligence of the village, he is entitled to recover. If the proximate cause of his injury was his own negligence, he is not entitled to recover. There was not and cannot be in such a case any question of the slight negligence of any one.

9. At the request of Holiday, the court instructed the jury that to entitle him to recover "he need not be wholly free from negligence, provided his negligence is but slight and the other party is guilty of gross negligence in comparison therewith as defined in these instructions." A final argument is that the giving of this instruction was error. We think it was. The instruction is an application of the doctrine of comparative negligence, a rule

in force, so far as we know, only in the courts of the state of Illinois. This rule is not, and has never been, in force in this state. There are no degrees of negligence here. The rule here is that if a person, himself in the exercise of ordinary care, is injured through the negligence of another, he may recover; but if his own negligence contributed to, or was the proximate cause of, the injury received, he cannot recover. It is said by counsel for Holliday that this court in *City of Lincoln v. Gillilan*, 18 Neb., 114, and *Village of Orleans v. Perry*, 24 Neb., 831, has approved of the rule involved in the instruction under consideration; but counsel are mistaken. It is true that an instruction very similar to the one here was given in each of those cases, but this court did not approve of the instruction in either of said cases. All that we did say was that if the instruction given in those cases was erroneous, it was error without prejudice to the plaintiff in error. We think that the classification of negligence attempted in the instruction given by the district court is wrong in principle and leads to confusion. (*New York C. R. Co. v. Lockwood*, 84 U. S., 357.) In *McPheeters v. Hannibal & St. J. R. Co.*, 45 Mo., 22, the court said: "In law there is no difference between negligence and gross negligence, the latter being nothing more than the former with the addition of a vituperative epithet." In *Wells v. New York C. R. Co.*, 24 N. Y., 181, the court said that the supposed distinction between different degrees of negligence should be discarded as illusory and impracticable. In disapproving of the instruction under consideration, we are not laying down a rule in conflict with those cases which permit a plaintiff to recover for an injury inflicted upon him by the negligence of another where he negligently placed himself in danger. Those cases permit an injured party to recover, notwithstanding that he negligently placed himself in a dangerous situation, because the evidence disclosed the failure of the other party to exercise ordinary care after discovering the injured party's danger. Those cases then are in harmony

with the rule that we announce here: That to enable the plaintiff to recover the evidence must show that the proximate cause of his injury was the negligence of the defendant, and that at the time he himself was in the exercise of ordinary care; that is, that his going originally into a position of danger was not the proximate cause of the injury he received. Not only did the district court err in giving the instruction under consideration, but we are constrained to say that we think the instruction was prejudicially erroneous. The judgment of the district court is reversed.

REVERSED AND REMANDED.

HARTFORD LIFE & ANNUITY INSURANCE COMPANY V. JAMES P. CUMMINGS ET AL.

FILED JANUARY 7, 1897. No. 8702.

Interpleader: INSURANCE: GARNISHMENT: INJUNCTION. The beneficiary of a life insurance policy was indebted to a bank domiciled in Douglas county, Nebraska. The bank sued the beneficiary in Connecticut, in the county of the domicile of the insurance company, and caused the latter to be attached as garnishee. An execution issued on the judgment rendered in this action having been returned unsatisfied, the bank instituted there a *scire facias* proceeding against the insurance company. The insurance company made no appearance to either of these proceedings. Before judgment in the *scire facias*, one Cummings, in said Douglas county, sued the insurance company to recover the amount owing by it on said policy, claiming to be the owner of the same as assignee of the beneficiary. The insurance company appeared in this action, and, before answer, filed an affidavit reciting that the action of Cummings was based upon a contract for the recovery of personal property; that the bank, without collusion with it, made claim to the subject-matter of Cummings' action; that it, the insurance company, was ready to pay the money in its hands as the court might direct, and moved the court for an order requiring the bank to interplead in the action and maintain or relinquish its claim against it, the insurance company. Cummings had not appeared in any of the proceedings had in the Connecticut court, nor had that court any jurisdiction over him. *Held*, (1) Construing section 48 of the Code of Civil Procedure, that the insurance company

was entitled to an order requiring the bank to interplead in the action; (2) to an order permitting it to pay the fund in its hands into the custody of the court, and on so doing to be dismissed from the case and discharged of all liability for that fund, both to Cummings and the bank; (3) that if the insurance company saw fit to remain in the case and defend the action of Cummings, it was entitled to an order enjoining the bank from further prosecuting its *scire facias* proceeding pending in the court of Connecticut until the final determination of the action at bar.

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

The opinion contains a statement of the case.

Warren Switzler, for plaintiff in error:

The facts presented make a proper case for statutory interpleader. (3 Pomeroy, Equity Jurisprudence, secs. 1320, 1329; Rood, Garnishment, sec. 331; *Fitch v. Brower*, 42 N. J. Eq., 300; *Bishop v. Holcomb*, 10 Conn., 444; *Vanbuskirk v. Hartford Fire Ins. Co.*, 14 Conn., 140; *Coleman v. Scott*, 27 Neb., 77; *McWhirter v. Halsted*, 24 Fed. Rep., 828; *City of Atlanta v. McDaniel*, 22 S. E. Rep. [Ga.], 896; *Brock v. Southern R. Co.*, 22 S. E. Rep. [S. Car.], 601; *Crane v. McDonald*, 118 N. Y., 648; *Allen v. Buchanan*, 97 Ala., 399.)

The insurance company should have been allowed to pay the money into court and be dismissed, and the bank should have been enjoined from prosecuting its action in Connecticut. (2 Story, Equity Jurisprudence, sec. 900; 3 Pomeroy, Equity Jurisprudence, secs. 1318, 1320; Reno, Non-Residents, sec. 170; *Dehon v. Foster*, 4 Allen [Mass.], 545; *Cole v. Cunningham*, 133 U. S., 107; *Cunningham v. Butler*, 142 Mass., 47; *Green v. Van Buskirk*, 74 U. S., 139.)

W. W. Morsman, for Omaha National Bank.

References: *Crane v. McDonald*, 23 N. E. Rep. [N. Y.], 991; *Chicago, B. & Q. R. Co. v. Moore*, 31 Neb., 629; Greenhood, Public Policy, p. 500; *Burck v. Taylor*, 152 U. S., 646; *Griggs v. Landis*, 19 N. J. Eq., 351; *Matthews v. Smith*, 13 Neb., 178; *Turner v. Sioux City & P. R. Co.*, 19 Neb., 241; *Wright v. Chicago, B. & Q. R. Co.*, 19 Neb., 176; *American*

Central Ins. Co., v. Hettler, 37 Neb., 849; *Taylor v. Taintor*, 16 Wall. [U. S.], 370; *Fitzgerald v. Fitzgerald*, 44 Neb., 463; *Prugh v. Portsmouth Savings Bank*, 48 Neb., 414.

John O. Yeiser, for James P. Cummings.

RAGAN, C.

July 24, 1895, Martin M. Marshall died. His life was insured for $5,000 in the Hartford Life & Annuity Insurance Company, hereinafter called the insurance company. His wife Mary was the beneficiary named in the insurance policy. At the date of her husband's death Mrs. Marshall was indebted to the Omaha National Bank, hereinafter called the bank. August 5, 1895, the bank brought suit in the state of Connecticut, in the county of the domicile of the insurance company, against Mrs. Marshall and caused the insurance company to be attached as garnishee. The insurance company was duly served with process in the attachment and garnishee proceedings, but made no appearance therein. A duly attested copy of the summons and complaint in the proceeding of the bank against Mrs. Marshall was, on August 6, 1895, served on her by leaving the same with the secretary of the insurance company. Mrs. Marshall was not otherwise served with process in the action and made no appearance therein. March 18, 1896, the court in Connecticut rendered judgment that the bank recover of Mrs. Marshall out of the attached money in the hands of the insurance company the sum of $——. An execution was issued on this judgment and returned March 31, 1896, wholly unsatisfied. Thereupon the bank, in pursuance of the provisions of the statute of Connecticut, instituted a *scire facias* proceeding against the insurance company and prayed for a judgment against it for the amount of the bank's claim against Mrs. Marshall to the extent of the money owing by the insurance company on the insurance policy. Prior to the bank's judgment in attachment against Mrs. Marshall, to-wit, November 18, 1895, James

P. Cummings brought this suit in the district court of Douglas county against the insurance company on the policy issued on the life of Martin M. Marshall, claiming to be the owner of said policy and entitled to collect the $5,000 due thereon by virtue of an oral assignment thereof to him August 5, 1895, made by Mrs. Marshall. The insurance company was duly summoned in this action, and November 19, 1895, before answering, its attorney filed in the case an affidavit reciting that he was the duly authorized attorney of the insurance company; that the insurance company was a corporation; that the claim of Cummings was based upon a contract for the recovery of personal property; that the bank was a corporation organized under the laws of the state of Nebraska having its principal place of business in said Douglas county, and that the bank, without collusion with the insurance company, made a claim to the subject-matter of the action; that the insurance company was ready to pay the amount claimed upon order of the court,—and thereupon moved the court for an order on the bank to interplead in the action. On the same day the district court made an order that the bank appear on the 30th of December, 1895, and file its answer maintaining its claim to the said sum, the $5,000 claimed by Cummings from the insurance company, and in default thereof that it relinquish its claim against the insurance company for said sum of money. On the 27th day of November, 1895, the bank appeared in the action and moved the court to require Cummings to give security for costs and on the same date moved the court for an order requiring Cummings to make his petition more definite and certain. April 27, 1896, the bank asked and obtained leave to plead in twenty days. On May 13, 1896, the bank moved the court for an order to suspend further proceedings in the case until the *scire facias* proceedings instituted by it in Connecticut against the insurance company should be finally determined. June 13, 1896, the insurance company moved the court for an order overruling this last

motion made by the bank and for an order, upon its paying the $5,000 in controversy into court, enjoining the bank from further prosecuting its *scire facias* proceeding pending in Connecticut, and a further order that it, the insurance company, might thereupon be discharged from any further liability as to said fund both to the bank and Cummings. At this time the bank amended its motion to suspend proceedings in the case at bar into a motion to vacate the order made by the court requiring the bank to appear and interplead. The court overruled the motion of the insurance company and sustained the amended motion of the bank and entered a judgment dismissing the bank from the case. At the time Cummings brought this suit, and at the time the bank appeared in the cases in obedience to an order of the court for it to interplead, the court in Connecticut had obtained no jurisdiction over him, if it can be said that it has since obtained such jurisdiction. To reverse the judgment of the district court dismissing the bank from the action the insurance company prosecutes a petition in error here.

It will thus be seen that the insurance company has in its hands $5,000, money owing by it on the policy issued to Martin M. Marshall. The bank claims this money by virtue of its judgment proceedings against Mrs. Marshall in the court of Connecticut, while Cummings claims it by virtue of an assignment of the policy to him by Mrs. Marshall, the beneficiary thereof. Section 48 of the Code of Civil Procedure is as follows: "Upon the affidavit of a defendant before answer in an action upon contract, or for the recovery of personal property, that some third party, without collusion with him, has or makes a claim to the subject of the action, and that he is ready to pay or dispose of the same, as the court may direct, the court may make an order for the safe keeping, or for the payment, or deposit in court, or delivery of the subject of the action, to such person as it may direct, and an order requiring such third party to appear in a reasonable time

and maintain or relinquish his claim against the defendant. If such third party, being served with a copy of the order by the sheriff, or such other person as the court may direct, fail to appear, the court may declare him barred of all claim in respect to the subject of the action, against the defendant therein. If such third party appear, he shall be allowed to make himself defendant in the action in lieu of the original defendant, who shall be discharged from all liability to either of the other parties in respect to the subject of the action, upon his compliance with the order of the court for the payment, deposit, or delivery thereof." This statute is a substitute for the chancery rule or remedy of interpleader. The rule was applied on the theory that at law no adequate protection was afforded a defendant sued for a fund or property in his possession and claimed by some person not a party to the suit. But the statute just quoted is broader than the chancery rule. Under the statute a defendant sued for a fund or property in his hands is entitled to an order compelling a third party claiming such fund or property to interplead in the action, even though the defendant might successfully defend the suit, the theory of the statute being to avoid multiplicity of suits, to protect the party holding the fund or property from being put to the costs and expense of defending against claimants for property in his hands which he himself does not claim. Under the chancery rule a party in the possession of a fund or property claimed by two or more parties, before being sued by either of them, might by bill filed for that purpose compel the claimants to come in and set up their claims to the fund or property and on paying the money or delivering the property into the custody of the court be discharged from any further liability to all of said parties for such property or fund. In other words, the fact that the holder of the fund or property was aware of conflicting claims of other parties thereto and was in danger of being sued by said parties enabled such holder to successfully invoke the protection of a court of chan-

cery. (*Newhall v. Kastens*, 70 Ill., 156; *Richards v. Salter*, 6 Johns. Ch. [N. Y.], 445.) In *McWhirter v. Halsted*, 24 Fed. Rep., 828, the court, speaking of the chancery practice as to interpleaders, said: "The best elementary writers say that an interpleader is properly applied where two or more persons severally claim the same thing under different title or in separate interests from another person, who, not claiming any title or interest therein himself and not knowing to which of the claimants he ought of right to render the debt, is either molested by an action brought against him, or fears that he may suffer injury from the conflicting claims of the parties." In the case at bar the insurance company has been sued by Cummings for the fund in its hands in the courts of this state. The bank is also claiming the fund in the hands of the insurance company in a suit pending in the courts of the state of Connecticut, to which suit Cummings is not a party and over whom the Connecticut court has no jurisdiction. In this suit the district court of Douglas county has jurisdiction of all the parties who claim this fund as well as of the holder thereof. If the statute quoted above was not in force, these facts would authorize the order made by the district court for the bank to interplead in this action and set up its claim to the fund in the hands of the insurance company. But this is not all. It appears that the assignment made of the insurance policy by Mrs. Marshall to Cummings was an oral assignment and that no notice of such an assignment was given to the insurance company prior to the time the bank attached the debt owing by the insurance company on the policy. Under such a state of facts the holding of the Connecticut courts is that the attaching creditor acquires a lien upon the fund superior to the lien of the assignee. (*Bishop v. Holcomb*, 10 Conn., 444; *Van Buskirk v. Hartford Fire Ins. Co.*, 14 Conn., 141.) While the rule in this state is that a creditor who attaches a chose in action acquires only a lien upon the interest which the defendant in the attachment suit had therein at the time the chose in action was seized. (*Coleman v. Scott*, 27 Neb., 77.)

It will thus be seen that not only are there rival claimants of the fund in the hands of the insurance company and that it has been sued by two different parties in different jurisdictions for the fund, but that if the bank is allowed to prosecute its *scire facias* proceeding in the courts of Connecticut and not be compelled to interplead in this action, the insurance company is liable to have to pay the debt it owes twice. The insurance company has brought itself within the provisions of section 48 of the Code quoted above, and we think the facts of the case justified the order made by the district court requiring the bank to interplead in this action, and, without quoting the evidence introduced on the hearing of the motion to dismiss the bank from the case, we think the district court erred in making that order. The insurance company was entitled to an order permitting it to pay the fund in its hands into the custody of the court, and upon so doing to be dismissed from the case and to be discharged of all further liability for that fund, both to Cummings and the bank; or if it saw fit to remain in the case and defend the action of Cummings, it was entitled to an order enjoining the bank from further prosecuting its *scire facias* proceeding pending in the courts of Connecticut until the final termination of the action at bar. The judgment of the district court is reversed at the cost of the bank and the cause remanded for further proceeding in accordance with this opinion.

REVERSED AND REMANDED.

JOHN H. JONES V. JOHN WIESEN.

FILED JANUARY 7, 1897. No. 6963.

1. **Negotiable Instruments: BONA FIDE PURCHASERS: INDORSEMENTS.** Where the payee of a negotiable promissory note indorses and delivers the same to his creditor to secure the payment of a debt

owing to him, such creditor becomes an innocent holder of said note and acquires a lien thereon for the amount of his debt, provided he took it before maturity and without notice of any defenses thereto.

2. ———: ———: ———. In such case, if another creditor of the payee, to secure his debt, pays the claim of the indorsee and takes an assignment of the note, he will, by such transaction, acquire the same lien and title to the note which his indorser had, whether the second creditor acquired it before or after maturity, and with or without knowledge of defenses existing against the note.

3. ———: ———: ———. But one who purchases for value a negotiable note, either before or after its maturity, and with knowledge of a defense existing against the same, is entitled to enforce the collection of the entire note, provided his assignor was an innocent purchaser, before due, for value, in the usual course of business.

4. ———: ———: ———. The purchaser of a negotiable promissory note at an execution or attachment sale thereof acquires thereby the interest which the execution or attachment defendant had in said note, and occupies the same relation to the maker of said note as he would had said note been indorsed to him without recourse by the payee.

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

A. H. Briggs, for plaintiff in error.

T. M. Franse, contra.

RAGAN, C.

June 13, 1891, John Wiesen executed and delivered his promissory note for $50 to one F. P. Bellinger. The note was payable to Bellinger or bearer and matured six months after date. In the district court of Cuming county, John H. Jones sued John Wiesen on this note. Jones alleged that he was the owner of the note; that he had purchased it for value in the ordinary course of business, and before its maturity. Wiesen interposed as a defense to the note that it was given to Bellinger in consideration of the latter's promise to furnish him, Wiesen, certain medicine and medical attendance within a certain time; that Bellinger had made default in these promises,

and that Jones had notice that the consideration for said note had failed at the time he became the holder thereof. A jury was waived and the case was tried by the court, which found that the consideration for the note had wholly failed, and that Jones was not a *bona fide* holder thereof without notice, and dismissed his action. To reverse this judgment, Jones prosecutes here a petition in error.

The record shows, without conflict, that Wiesen gave the note to Bellinger in consideration of the latter's promise to furnish him certain medicine and medical attendance within a certain time, and that he had made default in these promises; that before this note matured Bellinger borrowed of a bank at Dodge, Nebraska, the sum of $4 and pledged the note to secure the repayment of the sum borrowed; that the bank took this note without any knowledge of the consideration for which it was given; that Jones, learning that the bank held the note in suit, to secure a debt due to him from Bellinger paid to it its debt and the bank delivered the note to him. Subsequent to that time, Jones caused an execution or attachment to be levied upon this note as Bellinger's and the same to be sold, and purchased it at the sale. The bank having taken this note as collateral security for the loan made by it to Bellinger, in good faith and without notice of Wiesen's defense thereto, became thereby a good-faith holder of the note and had a lien upon it to secure the repayment to it of the $4 loaned to Bellinger, and was entitled to enforce the collection of the note against Wiesen to the amount of its lien. (*Helmer v. Commercial Bank*, 28 Neb., 474; *Koehler v. Dodge*, 31 Neb., 328; *Haas v. Bank of Commerce*, 41 Neb., 754.) Jones having purchased the note of the bank for the amount of its lien against it, took the place of the bank and by such purchase became an innocent holder of the note and entitled to enforce its collection against Wiesen for the amount which he had paid the bank. The fact that Jones knew, at the time the bank sold him the note, that the consid-

eration promised Wiesen for its execution had failed did not make Jones any the less an innocent holder for value before maturity, since one who purchases for value a negotiable instrument, after its maturity or before, with knowledge of a defense existing against the same, is entitled to enforce the collection of the entire note, provided his assignor was an innocent purchaser before due, for value, in the ordinary course of business. (*Koehler v. Dodge*, 31 Neb., 328; *Butterfield v. Town of Ontario*, 32 Fed. Rep., 891; *Bodley v. Emporia Nat. Bank*, 16 Pac. Rep. [Kan.], 88.) This rule rests upon the principle that a second indorsee takes whatever title his indorser had, and since his indorser was entitled to enforce the note against the maker, notwithstanding equities existing in the latter's favor against the original payee, the second indorsee is entitled to the same protection.

In the case at bar the bank of Dodge was an innocent holder before due, for value, in the usual course of business of the note in suit, and entitled to enforce its collection to the extent of the loan made by it to Bellinger, and Jones, by paying Bellinger's debt to the bank and taking up the note, took the same title to it that the bank had. It follows that Jones was entitled to recover upon the note in suit the amount of money he paid to the bank. Jones, by having this note sold on execution or attachment, acquired the legal title thereto, but by that sale he acquired only the interest which Bellinger had in the note, and this interest was subject to the bank's lien upon it for the money loaned to Bellinger and was subject to whatever defense Wiesen had against the same. In other words, where one purchases a negotiable promissory note or other chattel at a sheriff's sale thereof under execution or attachment, such purchaser simply takes whatever interest the execution or attachment defendant had in the note or chattel sold. But such a purchaser of negotiable paper, even before its maturity, is not an innocent holder within the meaning of the law. The title acquired by such a purchaser is precisely what

he would have acquired to such a note had it been indorsed to him without recourse by the payee thereof. The judgment of the district court is reversed.

REVERSED AND REMANDED.

STERLING P. JAMISON, SHERIFF, V. JAMES B. KENT.

FILED JANUARY 7, 1897. No. 6865.

Instructions: REPETITIONS. It is not error for a district court to refuse instructions asked when the propositions of law embraced therein are included in instructions given by the court on its own motion.

ERROR from the district court of Boyd county. Tried below before KINKAID, J. *Affirmed.*

R. R. Dickson and *H. M. Uttley*, for plaintiff in error.

John H. Mosier and *M. F. Harrington*, *contra.*

RAGAN, C.

This is an action of conversion brought in the district court of Boyd county by James B. Kent against Sterling P. Jamison, sheriff of said county, and the Ayers, Weatherwax & Reed Company, a mercantile corporation. The corporation seized the property sued for on attachment as the property of Mlinar and Tazler. Kent claimed the property by purchase from the attachment defendants, and the defense to this action was that the sale from the attachment defendants to Kent was fraudulent. Kent had a verdict and judgment and the defendants below prosecute here a petition in error.

1. The first argument is that the court erred in not giving instructions numbered 1 and 2 requested by the plaintiff in error. This assignment cannot be sustained,

for the reason that every proposition of law involved in the instructions refused was embraced in other instructions given to the jury by the district court on its own motion.

2. The second assignment of error is that the verdict is not sustained by sufficient evidence. We think it is. The judgment of the district court is

AFFIRMED.

NORTHERN ASSURANCE COMPANY OF LONDON v. JOHN R. HAMILTON ET AL.

FILED JANUARY 7, 1897. No. 7009.

Insurance: CANCELLATION BY AGENT: LIABILITY OF AGENT FOR PREMIUMS. A fire insurance agent issued policies on behalf of his principal, the premium of which amounted to $——. Learning that his agency was, or was about to be, revoked, he canceled such policies and issued in lieu thereof others on behalf of insurance companies of which he was also agent. He did not cancel any of said policies at the request of his principal, at the request of the insured, nor because an exigency had arisen which made it necessary for him to cancel them for the protection of his principal's interest. His principal sued him for the premiums collected and he interposed the cancellation of the policies as a defense. *Held*, That the defense was untenable, and that the agent was liable for the premiums of the policies canceled.

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

The facts are stated by the commissioner.

Montgomery & Hall, for plaintiff in error:

The agent's action in attempting to cancel the policies was a flagrant violation of the duties he owed his employer, and should not be sanctioned by the courts. It was entirely inconsistent with the law which governs the relation of principal and agent. (*Davis v. Hamlin*, 108 Ill., 39; *Warren v. Burt*, 58 Fed. Rep., 101; *American Steam*

Boiler Ins. Co. v. Anderson, 29 N. E. Rep. [N. Y.], 231; *Rockford Watch Co. v. Manifold*, 36 Neb., 801; *Jansen v. Williams*, 36 Neb., 869; *Oliver v. Lansing*, 48 Neb., 338; *Edmonstone v. Hartshorn*, 19 N. Y., 9; *United States Fire & Marine Ins. Co. v. Tardy*, 2 Ins. L. J. [Ala.], 672; *Scottish Union & Nat. Ins. Co. v. Dangaix*, 15 So. Rep. [Ala.], 956; *Frazen v. Zimmer*, 90 Hun [N. Y.], 103; *Milwaukee & Wyoming Investment Co. v. Johnston*, 35 Neb., 560; *Ambler v. Phillips*, 19 Atl. Rep. [Pa.], 71; *Hibbard v. Peck*, 44 N. W. Rep. [Wis.], 641; *Globe Milling Co. v. Minneapolis Elevator Co.*, 46 N. W. Rep. [Minn.], 306; *Ulmer v. Farnsworth*, 15 Atl. Rep. [Me.], 65; *Farnsworth v. Hemmer*, 1 Allen [Mass.], 494; *Bowe v. Hyland*, 46 N. W. Rep. [Minn.], 142; *Raisin v. Clark*, 41 Md., 158; *Merchants Ins. Co. of Newark v. Prince*, 52 N. W. Rep. [Minn.], 131.)

Joseph R. Clarkson, contra.

RAGAN, C.

The Northern Assurance Company of London (hereinafter called the company) brought this suit in the district court of Douglas county against John R. Hamilton and the sureties on his bond, as the company's agent, to recover a sum of money which the company alleged Hamilton had collected as premiums for insurance risks placed by him and not accounted for. The defense of Hamilton, so far as the same need be noticed, was that he had liquidated the sum sued for by canceling policies issued by him as agent of the company, the premiums for which policies equaled the sum sued for, and that he made such cancellations in pursuance of a usage and custom existing among insurance men in the city of Omaha, where he resided, and in other parts of the United States. Hamilton had a verdict and judgment and the company brings the case here for review on error.

There is little or no conflict in the evidence, which shows that the company appointed Hamilton its agent in August, 1891, to solicit and write insurance for it in

Omaha and vicinity; to collect the premiums paid; to transact generally on its behalf the business of a local insurance agent; that it revoked his agency on the 25th of November, 1891, and that he owes the company the sum sued for unless he has liquidated it by canceling its policies as pleaded by him. Hamilton's method of liquidating the debt sued for by canceling its policies may be illustrated thus: On behalf of the company, Hamilton issues policies to A, B, and C, the premiums for which amount to $1,000. Deducting Hamilton's commissions, there remain in his hands $700 premiums belonging to the company. He remits to the company $300 of this sum. He then learns that his agency has been, or is about to be, revoked, and without the request of the insured he cancels the policies issued to A, B, and C, and instead of refunding to them the premiums they had paid he places their risks in other insurance companies, of which he is also agent, and when sued for the $400 he sets up as a defense the cancellation of the policies of A, B, and C. This is a novel way of paying a debt. The company made Hamilton its agent for the purpose of building up and extending its business, and for the purpose of taking insurance risks, not for the purpose of destroying it; and the law required of Hamilton that, as the company's agent, he should act in good faith with it and do what he could to extend its business. We do not say that an agent of an insurance company may never cancel a risk issued by him on behalf of his principal, but we do say that he has no right to cancel such a risk without the request of his principal or the request of the insured, unless an exigency has arisen which makes it his duty to cancel the risk in order to subserve the interests of his principal; we do say that he has no right to cancel a risk solely for the purpose of furthering his own ends, and in his own interest and against his principal's interest. Hamilton did not cancel these risks at the request of his principal, nor at the request of the insured, nor did he cancel them because an exigency had arisen

which made it necessary for him to cancel them in order to protect his principal's interest. He canceled them solely because he knew that his agency was revoked, or was about to be revoked, and for the purpose of having these risks carried by companies for whom he was agent. In doing this he was working against the interest of his principal.

Counsel for the insurance company have furnished us a brief and cited numerous authorities to show that Hamilton's conduct in this case was indefensible. We have no doubt the authorities sustain counsel's view; we have not examined them; no authorities are necessary. On the broad principles of common sense and fair dealings, Hamilton cannot be allowed to liquidate his debt to the company in the manner attempted in this case. No evidence was introduced on the trial to sustain the plea of Hamilton that he made these cancellations in pursuance of a custom, and it is not suggested, either by pleading or evidence, that he canceled these risks in good faith for the purpose of protecting his principal, or that he did so at the request of either his principal or the insured. Nor can the judgment be sustained upon the ground of a ratification of Hamilton's acts by the company. The judgment is wrong. It is reversed and the cause remanded.

REVERSED AND REMANDED.

GURDON W. WATTLES, APPELLEE, V. SOUTH OMAHA ICE & COAL COMPANY, APPELLANT.

FILED JANUARY 7, 1897. No. 8810.

1. **Landlord and Tenant:** REPAIRS. An express agreement of a lessee to keep in good repair leased premises, and at the end of the expiration of the term surrender their possession in as good condition as they were when he entered, natural decay, wear and tear ex-

cepted, is not, and does not include, a covenant to rebuild buildings destroyed without his fault.

2. ———: ———. If such was the common law rule of construction of such a covenant, it is not in force in this state.

3. ———: ———: RENT. Where a substantial portion of leased premises is destroyed without the fault of the lessee, he is entitled to an apportionment of the rent covenanted to be paid and accruing thereafter, in the absence of an express assumption by him of the risk of such destruction.

4. ———: ———: ———. The common law rule of construction of such a covenant is not in force in this state.

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

The facts are stated by the commissioner.

Charles Offutt, for appellant:

Appellant is not required to reconstruct the buildings destroyed by the hurricane August 22, 1896. (Taylor, Landlord & Tenant [7th ed.], sec. 358; *Whitaker v. Hawley*, 25 Kan., 692; *Pollard v. Shaaffer*, 1 Dal. [Pa.], 210; 12 Am. & Eng. Ency. Law, 721; *Warner v. Hitchins*, 5 Barb. [N. Y.], 666; *Levey v. Dyess*, 51 Miss., 501; *Miller v. Morris*, 55 Tex., 412; *Wainscott v. Silvers*, 13 Ind., 500; *Warren v. Wagner*, 75 Ala., 188; *Maygort v. Hansbarger*, 8 Leigh [Va.], 536; *Lister v. Lane*, L. R., 2 Q. B. Div. [Eng.], 212; *Howeth v. Anderson*, 25 Tex., 557; *Nave v. Berry*, 22 Ala., 382; *Halloway v. Lacy*, 4 Humph. [Tenn.], 468.)

Appellee Wattles is compelled to reconstruct the buildings as a condition precedent to his right to collect all the rent stipulated in the lease after August 22, 1896. (*Brooks v. Hiatt*, 13 Neb., 503; *Lanning v. Burns*, 36 Neb., 236; *Whitaker v. Hawley*, 25 Kan., 687.)

In the event of appellee's failure to rebuild after reasonable demand, appellant can require an apportionment of the rent from the date the buildings were destroyed to the expiration of the lease. (Taylor, Landlord & Tenant [7th ed.], sec. 520; *Whitaker v. Hawley*, 25 Kan., 692; *Pollard v. Shaaffer*, 1 Dal. [Pa.], 215; *Ripley v. Wightman*,

4 McCord [S. Car.], 447; *Coogan v. Parker*, 2 S. Car., 255; *Doe v. Burt*, 1 Term R. [Eng.], 701; *Richard Le Tavenor's Case*, 1 Dyer [Eng.], 56*a*; *Brown v. Quilter*, Amb. [Eng.], 619; *Cutter v. Powell*, 6 Term R. [Eng.], 320.)

James H. Macomber, contra:

Appellant is bound to repair the buildings before the termination of the term of the lease. (12 Am. & Eng. Ency. Law, 721; *Polack v. Pioche*, 35 Cal., 416, 95 Am. Dec., 121, and note; *Blount v. City of Janesville*, 31 Wis., 654; *Columbus v. Watson*, 26 Ind., 52; *Fisher v. Milliken*, 8 Pa. St., 111; *Workman v. Mifflin*, 30 Pa. St., 369; *United States v. Bostwick*, 94 U. S., 53; 1 Wood, Landlord & Tenant, sec. 373; 1 Taylor, Landlord & Tenant, sec. 357; 1 Washburn, Real Property [4th ed.], 535; 2 Kerr, Real Property, secs. 1232, 1233; *Kling v. Dress*, 5 Robt. [N. Y.], 521; *Stultz v. Locke*, 47 Md., 562; *Gluck v. Mayor of Baltimore*, 81 Md., 315.)

The rent stipulated in the lease must be paid as if the buildings had remained intact. (*Minneapolis Co-Operative Co. v. Williamson*, 38 Am. St. Rep. [Minn.], 482; *Fowler v. Payne*, 49 Miss., 32; *Harrington v. Watson*, 11 Ore., 143; *Womack v. McQuarry*, 28 Ind., 103; *Chamberlain v. Godfrey*, 50 Ala., 533; *Buerger v. Boyd*, 25 Ark., 441; *Harris v. Heackman*, 62 Ia., 411, 12 Am. & Eng. Ency. Law, 741, and cases cited; *Stubbings v. Evanston*, 136 Ill., 37; *Parks v. City of Boston*, 15 Pick. [Mass.], 198; *Foot v. City of Cincinnati*, 11 O., 408; *Turner v. Townsend*, 42 Neb., 376; *Smith v. Kerr*, 108 N. Y., 31; *Salisbury v. Shirley*, 66 Cal., 223; *Lodge v. White*, 30 O. St., 569; *Hicks v. Martin*, 25 Mo. App., 359; *McMillan v. Solomon*, 42 Ala., 356; *Chamberlain v. Godfrey*, 50 Ala., 530; *Kerr v. Merchants Exchange*, 3 Edw. Ch. [N. Y.], 315; *Winton v. Cornish*, 5 O., 477; *Beham v. Ghio*, 75 Tex., 87; *Hilliard v. Gas Coal Co.*, 41 O. St., 662; *Graves v. Berdan*, 26 N. Y., 498; *Stockwell v. Hunter*, 11 Met. [Mass.], 448; *Smith v. McLean*, 123 Ill., 210; *Whitaker v. Hawley*, 25 Kan., 674.)

RAGAN, C.

On the 1st day of November, 1894, Gurdon W. Wattles and F. L. Cotton entered into an agreement in writing in and by which Wattles leased to Cotton for five years from said date the east one-half of the southwest quarter of the northwest quarter of section 1, township 15 north and range thirteen (13) west of the 6th P. M., "together with the buildings situated thereon." A rent of $6,000 was reserved, payable in 60 installments of $100 each. The first installment was paid at the date of the execution of the lease and one installment fell due on the first day of each month thereafter. In the lease, Cotton covenanted as follows: "That at the expiration of the term above granted * * * he will quietly and peaceably yield up possession of said premises * * * in as good condition as the same were when entered upon, ordinary wear or damage by fire excepted. * * * It is understood and agreed that the buildings on the above described property have been placed in good repair by [the lessor] and shall be kept in the same condition by [the lessee] during the term of this lease, natural decay and wear and tear excepted." Cotton assigned his interest in this lease to the South Omaha Ice & Coal Company, hereinafter called lessee, which took possession of the leased premises and began using the same for the purposes for which they were leased; that is to say, for harvesting ice formed on the waters on said leased lands and storing such ice in the buildings thereon. The rent reserved was paid up to the 1st day of September,1896. On the 22d day of August of said year the buildings on the leased premises "were destroyed and rendered entirely valueless by a violent wind storm or hurricane." Notwithstanding the destruction of the ice houses, the lessor claimed that he was entitled to collect the rent reserved in the lease accruing subsequent to the destruction of the buildings; that he was under no obligation to rebuild the destroyed ice houses, but that the lessee was bound to re-

build the same. The lessee denied that he was bound to rebuild the destroyed ice houses and insisted that he was entitled to an apportionment of the rent reserved until such time as the lessor should rebuild the houses destroyed. The parties made up an agreed case under the provisions of sections 567, 568, 569 of the Code of Civil Procedure and submitted it to the district court of Douglas county. The parties filed in the agreed case in the district court a stipulation of the facts. This stipulation recited the execution of the lease between Wattles and Cotton; the assignment of his interest in the lease by Cotton to the South Omaha Ice & Coal Company; the covenants in the lease already mentioned; the taking possession of the leased premises by the lessee; the payment of the rent to September, 1896, and the destruction of the ice houses by a hurricane. The stipulation further recited that the premises had been leased for the sole and exclusive purposes of gathering ice formed on the waters on said lands and storing such ice in the buildings situate thereon; that 15 acres of the demised land were covered with water from which in the winter ice was gathered for storage; that the destroyed buildings were 6 in number, built together, each 100 feet long and 20 feet in width, and had a storage capacity for ice of from 8,000 to 10,000 tons; that there were no other buildings or improvements of any kind on the leased premises at the time they were leased or since; that the fair rental value of the entire premises was $1,200 per year, and that the fair rental value of the premises since the destruction of the ice houses, or without them, was $600 per year. The district court was of opinion that the agreements and promises made in the lease by the lessee amounted to a covenant on his part to rebuild the destroyed ice houses and that he was liable for all the rent reserved in the lease and entered a decree accordingly. The lessee has appealed.

This case should be treated in all respects as though it was an ordinary action at law by the lessor to recover

the rent reserved in the lease and that the lessee had interposed as a defense the destruction, without his fault or the fault of the lessor, of a substantial part of the leased premises, and invoked in his answer, by way of a cross-petition, the equitable power of the court for an apportionment of the rent.

1. The lessee covenanted to keep in repair the leased premises and at the expiration of the term surrender them in as good condition as they were when he entered, ordinary wear and tear and natural decay excepted. Does this covenant include a promise by the lessee to restore the buildings destroyed without his fault? That it does is the first argument urged in support of the decree. It is insisted that such was the rule of construction applied to such a covenant at common law.

The earliest American case which we have been able to find, which supports the contention under consideration, is *Phillips v. Stevens*, 16 Mass., 237, decided in 1819. The lessee covenanted that he "would keep in repair, support and maintain all and singular the fences and buildings, saving and excepting the natural decay of the same, as should be needful, at his own proper cost and charge; and at the end of said term * * * would quietly leave, surrender, and yield up the premises in as good condition as the same were in" at the date of his lease. The buildings on the leased premises were destroyed by fire without the fault of the lessee, and the supreme court of Massachusetts, in construing the covenant in the lease, held it to be a contract binding the lessee to rebuild the burned buildings.

In *Beach v. Crain*, 2 N. Y., 87, the lease provided that the lessor should, at his own cost, erect a gate at the terminus of a road on the leased premises and keep the gate there during his pleasure, and that all repairs necessary to be made to said gate were to be made by the lessee. Some person unknown, but without the fault of the lessee, removed the gate, and the court of appeals of New York held that the covenant of the lessee to repair

the gate included a contract on his part to replace it with a new one.

In *Polack v. Pioche*, 35 Cal., 416, it seems that the lease contained the usual covenant of the lessee to repair and keep in repair the demised premises. The buildings on the leased land were destroyed by the breaking of the embankment of a reservoir, and this was caused by the act of someone, but not by any fault of the lessee. The court held that the covenant of the lessee to repair bound him to restore or rebuild the destroyed buildings; and the court declared that such had been the settled rule of construction of such a covenant since the time of Edward III.

In *Ely v. Ely*, 80 Ill., 532, the lessee covenanted that he had received the leased premises in good order and condition, and that he would keep them in repair at his own expense, and that at the end of the term he would deliver the same up to his lessor in as good order and condition as when they were entered upon. The buildings upon the leased premises were wholly destroyed by fire without the fault of the lessee, and the supreme court of Illinois held that the legal effect of the covenant of the lessee to keep the demised buildings in repair, etc., was that in case the buildings burned he would rebuild the same.

In *David v. Ryan*, 47 Ia., 642, the lessee covenanted that she would keep the leased premises in a good state of repair. They were destroyed by fire and the court held that the covenant of the lessee bound her to restore the buildings.

In 1 Taylor, Landlord & Tenant [8th ed.], sec. 357, the rule is stated as follows: "When a tenant is under an express covenant to repair the premises, he is liable to make good all loss and damage which they may sustain, and must even rebuild in case of casualty by fire or otherwise."

In 12 Am. & Eng. Ency. of Law, p. 721, the authorities in support of the rule under consideration are collated and the rule is thus stated: "The alteration in the ten-

ant's liability for repairs, produced by his executing a lease in which he makes an express covenant to repair, is so marked that he becomes liable to make good all loss and damage the premises may sustain, and must even rebuild in case of casualty by fire or otherwise."

Among the cases cited in the Encyclopedia of Law and by Taylor is the case of *Phillips v. Stevens, supra*, and that case seems to have been relied upon in the cases cited by us from New York, Illinois, California, and Iowa. The court in *Phillips v. Stevens* based its decision upon the principle that when one "by his own contract * * * creates a duty or charge upon himself he is bound to make it good notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract;" and this is the principle upon which the cases from Illinois, Iowa, California, and New York mentioned above were decided.

No one can find fault with the principle that a man should be compelled to perform what he has promised; but, with all due respect to the supreme court of Massachusetts, it seems to us that the court ignored the entire issue. The question there was not whether the lessee was obliged to perform a covenant he had made, but the question was what covenant he had made; that is, whether his covenant to repair and keep in repair the demised premises included within it a contract on his part to rebuild the buildings on the leased premises if they should be destroyed. But in that case, as in the other cases cited, and in every case that we have been able to find which supports the contention of the appellee here, it was taken for granted that the rule at common law was that a covenant by a lessee to repair was equivalent to and involved a covenant to rebuild. Assuming, however, that such was and is the rule of construction at common law, are we bound by that rule?

Section 1, chapter 15, Compiled Statutes of this state, provides that so much of the common law of England as is applicable and not inconsistent with any law passed

or to be passed by the legislature of this state, is adopted and declared to be law within the state. Section 53, chapter 73, Compiled Statutes, provides that "in the construction of every instrument creating or conveying, or authorizing or requiring the creation or conveyance of any real estate, or interest therein, it shall be the duty of the courts of justice to carry into effect the true interest of the parties, so far as such intent can be collected from the whole instrument, and so far as such intent is consistent with the rules of law." If, then, the rule at common law is as is contended by the appellee, it is at most but a rule of construction, and we are not bound to apply that rule of construction to a real estate contract if to do so would result in giving to the contract an effect not within the contemplation or intention of the parties at the time it was made. We do not know why a lease for real estate should not be construed as any other contract,—why we should not apply to it the test universal among all civilized peoples, namely, to look to the subject-matter of the contract, the language of the parties, and ascertain, if we can, what was their intention; on what proposition did the minds of the contracting parties meet; what did they consciously consent to. If we apply this rule of construction to the contract under consideration we have for subject-matter of the contract a small tract of land, fifteen acres of which was covered with water. From this water ice could be harvested in the winter season, and stored in buildings then standing upon the leased premises. The lessee accepted his lease and entered upon these premises to use them solely for the purposes of harvesting and storing ice. When he did so he stipulated that the leased premises were in good repair, in good condition, and he promised that he would keep them in good repair and at the expiration of his lease so surrender them. What did the parties to this contract understand and intend by the terms "repair" and "keep in repair"? These words "repair" and "keep in repair" are not technical words, nor should they be given a technical or strained interpre-

tation. They should receive their ordinary interpretation. To repair, as it is ordinarily used, means to amend, not to make a new thing, but to refit, to make good or restore an existing thing. (See *Todd v. Inhabitants of Rowley*, 8 Allen [Mass.], 51; *Stevens v. Milnor*, 24 N. J. Eq., 358.) When we speak of repairing a thing, the very expression presupposes something in existence to be repaired. If a carpenter contracts to repair a house, or a mason a chimney, the ordinary construction of these contracts would not be that these parties had agreed to build a new house or a new chimney. If the construction of the lessee's covenant contended for by the appellee here be correct, then had this entire tract of land and its buildings been swept away by a flood of the Missouri river, the lessee would be liable for their value to the lessor. Before we can say that a lessee assumed the liability of any such a contingency as that supposed, we must find his assumption of such a risk in the clear and express language of his contract.

In *Pollard v. Shaffer*, 1 Dall. [U. S.], 210, the lessee covenanted to pay rent and deliver up the premises in good repair. The lessor sued for a failure of the covenant to keep in good repair. The lessee pleaded that an alien enemy—the British army—invaded the city of Philadelphia, took possession of the leased premises, and committed the destruction made the subject of the lessor's action. The question was whether the special matter pleaded was a defense. The supreme court of Pennsylvania held that it was. In that case, as in the case at bar, it was insisted that the covenant of the lessee to keep the demised premises in repair bound him to restore the buildings if destroyed. The court said: "I am of opinion that the defendant is excused from his covenant to deliver up the premises in good repair: (1) Because a covenant to do this against an act of God or an enemy ought to be special and express, and so clear that no other meaning could be put upon it; (2) because the defendant had no consideration, no premium for this risk, and it

was not in the contemplation of either party. * * * Suppose when the lease was executed that the lessee had been asked, 'Is it your meaning that in case the buildings shall be destroyed by an act of God or public enemies you are to rebuild or repair them?' His answer would have been, unquestionably, 'No, I never entertained such an idea.' Should the like question have been put to the lessor, his answer would certainly have been 'No, I did not expect anything so unreasonable.'"

In *Levey v. Dyess*, 51 Miss., 501, it was held that in the absence of covenants by the lessee amounting to express covenants to rebuild structures destroyed by casualty, or by proof of negligence by the lessee, the loss is on the landlord.

In *Warren v. Wagner*, 75 Ala., 188, the lessee covenanted that at the expiration of the lease he would surrender the premises in as good order and condition as they were when he accepted them, usual wear and tear excepted, and it was held that this covenant did not include an agreement on the part of the lessee to rebuild the structures on the premises destroyed by fire. To the same effect see *Howeth v. Anderson*, 25 Tex., 557. In that case the court said: "Leases are construed like other written agreements, so as to give effect to the intention of the parties." To the same effect *Warner v. Hitchins*, 5 Barb. [N. Y.], 666. In that case the covenant of the lessee was to surrender possession of the leased premises at the expiration of the term in the same condition they were in at the commencement of the lease, natural wear and tear excepted. The leased buildings were destroyed by fire and it was insisted in behalf of the lessor that the covenants of the lessee included a covenant to rebuild. But the court said that in order to hold the lessee liable for the value of the destroyed buildings he must have expressly agreed to rebuild them or restore them.

In *Wainscott v. Silvers*, 13 Ind., 497, the covenant of the lessee was, at the expiration of the term, to surrender the leased premises in as good condition as when they

were received. The court said: "The law as between landlord and tenant we understand to be that the tenant is not responsible for buildings accidentally burned down during his tenancy, unless he has expressly covenanted or agreed to repair. It is not sufficient to charge him that he agreed * * * to surrender the premises at the end of his term in the same repair or condition they were in at the time of the contract."

We reach the conclusion that an express agreement of a lessee to keep in good repair leased premises, and at the expiration of the term surrender their possession in as good condition as they were when he entered, natural decay, wear, and tear excepted, is not, and does not include, a covenant to rebuild buildings destroyed without his fault.

2. The lessor in this case is under no obligation to rebuild the destroyed buildings during the term, for the simple reason that he has not contracted so to do. (*Turner v. Townsend*, 42 Neb., 376.)

3. By the lease under consideration the premises were let to the lessee for a specified term, in consideration of which he covenanted to pay to the lessor a specific sum as rent, payable in installments on certain dates during the term. The lease contained no provision binding the lessor to rebuild. The lease contained no provision for any abatement of the rent promised, for any reason whatsoever. The question presented is: A substantial part of the leased premises having been destroyed without the fault of either lessor or lessee, is the latter entitled to an apportionment of the rent accruing thereafter? The common law construction of such a covenant as this would not relieve the tenant from payment of the entire rent reserved. The old English case of *Paradine v. Jane*, Aleyn [Eng.], 26, was a suit on a covenant to pay rent. The lessee defended the action on the ground that during the civil wars of England Prince Rupert, an alien born, with a hostile army, had driven him out of possession of the premises. But the court decided that although the whole

army had been alien born enemies, the lessee was still bound to pay the entire rent reserved, because he had expressly covenanted so to do. This construction of the covenant to pay rent has been very generally followed in the United States. (See the rule stated and the authorities collated in 12 Am. & Eng. Ency. of Law, p. 741.) In 1787 the question was presented to the supreme court of Pennsylvania in *Pollard v. Shaffer*, 1 Dall. [U. S.], 210. In that case the lessee defended against an action for rent upon the ground that he had been deprived of the use of the premises by an alien enemy, namely, the British army. But the court followed the common law rule announced in *Paradine v. Jane*, *supra*, and held the lessee liable for the entire rent reserved. The principle upon which the court based its decision was (1) that the covenant to pay the rent was express, and (2) that since, by the lease, the lessee was to have the advantage of casual profits of the leased premises, he should run the hazard of casual losses during the term. The question was presented to the supreme court of Massachusetts in 1809, in *Fowler v. Bott*, 6 Mass., 62. The lease in that case was for a mill and it was destroyed by fire during the term. The court followed the common law rule and held that the lessee was liable for the entire rent reserved. In that case the court seems to have based its decision upon the ground that the lease amounted to a bargain and sale of the leased premises for the term. The common law rule of construction quoted above was also followed in *Fowler v. Payne*, 49 Miss., 42, *Harrington v. Watson*, 11 Ore., 143, *Womack v. McQuarry*, 28 Ind., 103, *Lanpher v. Glenn*, 33 N. W. Rep. [Minn.], 10, and in many other cases not necessary to cite here. Chancellor Kent, discussing the question under consideration, says: "It is well settled that upon an express contract to pay rent the loss of the premises by fire or inundation, or external violence, will not exempt the party from his obligation." (3 Kent, Commentaries [13th ed.], sec. 466.) The rule announced in *Paradine v. Jane* has been abolished by statute in the

state of New York, and perhaps some other states, and the courts of last resort in the states of Kansas and South Carolina have declined to follow the rule, but, with these exceptions, we think it may be safely said that in every other state where the rule has been presented for consideration to the court of last resort it has been followed. In 1832 the supreme court of Ohio announced an exception to this rule. In that case the leased premises consisted of a cellar or basement in a building several stories high. The entire building was destroyed by fire, without the fault of the lessee, and the lease contained no covenant on the part of the lessor to rebuild, and the court held that the destruction of the leased premises terminated the relation of landlord and tenant. This case was followed and the exception sustained in *Stockwell v. Hunter*, 11 Met. [Mass.], 448; *Graves v. Berdan*, 26 N. Y., 498; *Harrington v. Watson*, 11 Ore., 143; *Ainsworth v. Ritt*, 38 Cal., 89; *McMillan v. Solomon*, 42 Ala., 356. Indeed, the exception to the rule seems to be about as well established in the United States as the rule itself. In some of the cases following the rule the reasons for its existence are said to be that it is only equitable that the lessee should pay the entire rent notwithstanding a destruction of a part of the leased premises, since the lessor must bear the loss of the destroyed property; and that the enforcement of the rule tends to diminish the carelessness and increase the vigilance of a lessee. We do not know what reason led to the formulation of this rule, but if the one quoted above is the correct one, it is of no force at the present time, because the lessor may protect his interest in the property while in the hands of the lessee by insurance. The reason given for the formulation of the exception to the rule is that by a lease of a room or basement in a building no interest in the soil passes to the lessee, and that when the basement or room is destroyed the leased estate is gone and the relation of landlord and tenant terminated. But it seems to us that another principle underlies and controls the excep-

tion, and that is this: That the leased room or building having been destroyed without the fault of the lessee, the consideration for his promise to pay the rent accruing thereafter failed. The common law rule announced in *Paradine v. Jane* is merely a rule of construction of a real estate contract.

We have already seen to what extent the common law is in force in this state and have noted the command of the legislature to the courts of this state in construing real estate contracts to look to the subject-matter of the contract, the language employed by the contracting parties, and to ascertain if possible, and give effect to, the intention of the contracting parties. A lease for real estate is not a bargain and sale for a given time of the lessor's interest in the leased premises. It is rather a hiring or letting of property for a certain time and for a named consideration; and when a lessee covenants to pay rent for a term the consideration for that covenant is his right to the use and occupancy of the thing leased. In the covenant of a lessee to pay at stated times certain sums of money for the rent—that is, for the privilege or the right to use and occupy the leased premises—is involved the condition that such leased property shall be in existence and be capable of being used and enjoyed by the lessee. The promise to pay a stated sum of money as rent for leased premises for a certain term is based upon the presumption that the leased premises shall exist for the term. In the case at bar, if the lessee had been evicted from part of the demised premises by the holder of a title paramount to that of the lessor's, the lessee would be entitled to an apportionment of the rent. (Taylor, Landlord & Tenant, sec. 387, and cases there cited.) Under the exception established to the rule, had the entire leased premises been washed away by a flood, the relation of landlord and tenant existing between the parties to this suit would have from that moment ceased. This relation would not have been terminated by the act of the parties, but by operation of law, and the lessee would have been

relieved from the payment of rent accruing thereafter, upon the principle that the consideration for his promise to pay such rent had failed. If we look to the subject-matter of the lease under consideration and the language employed by the parties in making the contract, we cannot say that either of these parties, at the time they made this lease, had in contemplation the fact that the leased premises, or any part thereof, might be destroyed by a hurricane. They did not contract with reference to such a casualty. To use the language of McKean, C. J., in *Pollard v. Shaffer*, *supra*, had the lessor been asked at the time this lease was made, "Is it your intention to hold the lessee liable for the entire rent reserved in case the leased buildings shall be destroyed by cyclone?" he doubtless would have answered that he had never considered that contingency. If the question had been asked the lessee whether it was his intention to pay the entire $6,000 rent even if one-half of the leased property should be destroyed before the expiration of the term, it is very probable that he would have said that he had no such an intention. Yet in construing this contract we must, if possible, give effect to the intention of the parties, notwithstanding the common law rule of construction. To us it seems that the lessor, in effect, said to the lessee: "I own this tract of land and these ice houses; they are in good repair; they are fit for the purposes of harvesting and storing ice; I will hire them to you for five years if you will pay me $1,200 per year and keep the premises in good repair." To this the lessee assented. This was an offer and a promise upon the part of the lessor to furnish for the entire time the hired property; it was a promise and a covenant upon the part of the lessee to pay the monthly installments of rent for the right to use and occupy the hired property if it existed. But it was not a proposition on the part of the lessor to quitclaim his right to the use and occupancy of the leased premises to the lessee for five years in consideration of $6,000 paid, or to be paid, by the latter. This rule of construction of the

common law is a harsh and a technical one. We do not certainly know the conditions that existed when it was formulated, nor do we know in what reasons it had its origin, but we do know that since the decision of *Paradine v. Jane* the conditions of the race have changed; its conscience and intellect have been quickened, and this rule, however meritorious it may have been at the time and place of its origin, is opposed to the genius and spirit of the present age and in conflict with its judgment and conscience. In one or two instances, in states where its effect has not been even limited by statute, its applicability to real estate contracts in this country has been questioned. Such was the case of *Ripley v. Wightman*, 4 McCord [S. Car.], 447, where it was held that the fact that a house had been rendered untenantable by a hurricane afforded the lessee a defense to the action for the rent. In *Whitaker v. Hawley*, 25 Kan., 674, the buildings upon the leased premises were wholly destroyed by fire without the fault of the lessee, and the court held that because of the accidental destruction by fire of the buildings upon the leased premises the lessee was entitled to an apportionment of the rent. In that case Brewer, J., speaking for the court, said: "And right here it may be remarked that a lease is in one sense a running rather than a completed contract. It is an agreement for a continuous interchange of values between landlord and tenant rather than a purchase single and completed of a term or estate in lands." We are aware that this case stands practically alone, and in a foot-note to *McMillan v. Solomon*, 94 Am. Dec., 654, its isolation is pointed out with a remark by the editor that it is supported by "much charity and some logic." We approve of the opinion because we think it is good law as well as good sense. We approve of it also because it is a magnificent protest against slavish devotion to antiquated rules; and we approve of it because it breathes the spirit of humanity and equity and is based on a thought of the nineteenth century. We reach the conclusion that the common law rule

of construction under consideration is not in force in this state and formulate the rule as follows: Where a substantial portion of leased premises is destroyed without the fault of the lessee, he is entitled to an apportionment of the rent covenanted to be paid and accruing thereafter, in the absence of an express assumption by him of the risk of such destruction. The decree appealed from is reversed and the cause remanded with instructions to the district court to enter a decree in accordance with this opinion.

REVERSED AND REMANDED.

IRVINE, C., dissenting.

The case resolves itself into three general questions: First, is the defendant obligated to rebuild the ice houses; second, if not, is the plaintiff so obligated; and third, if neither party is obligated to rebuild, by what rule is the right to rent to be determined? On the first question we need do no more than express our entire approval of the reasoning and conclusions contained in the opinion of Commissioner RAGAN. We think a general covenant to repair cannot be reasonably construed as a covenant to restore buildings after their total destruction by the act of God, and that those cases which give that effect to such a covenant are sustained neither by reason nor well founded authority, as demonstrated in the opinion of Commissioner RAGAN. The cases supporting that view have been based on a misconception of the common law. We think, also, that in the absence of a covenant for that purpose the lessor is not obligated to rebuild. On the third question our conclusion is that under the facts stipulated the lessee, if it remain in possession, is bound to pay the rent reserved, without apportionment, for the whole term. We concede that there is much natural justice in the doctrine that on the destruction, without fault of the parties, of a substantial portion of the leased premises, the rent should be abated in proportion to the loss so sustained. The opinion of Commissioner RAGAN in

support of that view is as able an exposition as could well be made, but we think he fails to show a sound legal basis for his conclusion. It is admitted that with the exception of *Whitaker v. Hawley*, 25 Kan., 674, all the adjudicated cases are contrary to that view. We need not, therefore, review the authorities. *Whitaker v. Hawley* does substantially support the opinion expressed by Commissioner RAGAN. Still, that case is, to a certain extent, distinguishable from the one at bar. The lease there involved was of real estate and personal property. It was accepted as the established rule that the destruction by accident of personal property terminates the lease, and the court held that the mere fact that rent had been reserved in gross for both classes of property would not prevent the operation of this rule. This, we think, was the consideration really governing the case. The argument goes rather to justify a surrender of the lease than an apportionment of the rent, leaving the lease otherwise in force. We think it will be conceded that a doctrine established by a long line of authorities, unbroken, except, partially, by a single case, should not be abandoned without substantial and controlling reasons. The reasons for its abandonment, as stated in Commissioner RAGAN'S opinion, we take it, are these: That a lease does not operate as a bargain and sale, but merely as a hiring of the use of the premises; that under section 53 of chapter 73, Compiled Statutes, the lease is to be construed according to the intent, without regard to technical rules of law; that the reasons given for the prevailing rule have failed because the landlord may now insure his interest; that the rule is unjust and contrary to the enlightened spirit of the nineteenth century. In the first place, we cannot agree that the effect of the lease is merely to pass to the lessee the use of the premises, without creating an estate. From time immemorial it has been considered that a lease passes the estate for the term, leaving in the lessor the reversion and rent issuing out of the demised term. We do not think that the statute referred to

changes this rule. It doubtless makes it competent for the parties, by appropriate language, to contract differently, but the statute is in this respect merely declaratory of the common law. As said by Lord Ashurst in *Doe v. Burt*, 1 Term R. [Eng.], 701: "The construction of all deeds must be made with reference to their subject-matter, and it may be necessary to put a different construction on leases made in populous cities from that on those made in the country." To give the statute as broad a construction as claimed would abrogate the rule in Shelley's case and many other settled principles of real estate law. It would make every mortgage a conveyance of the legal title, subject to strict foreclosure, and would render all bonds and penalties enforceable according to their terms. It is hardly too much to say that it would destroy nearly all general principles of contract law, and leave in force only those rules whereby the intention of the parties is to be determined. As to the argument that the landlord may insure, and that, therefore, there exists no longer the reason given for the prevailing rule, that it is but fair that the lessee should bear part of the loss, the answer is double. In the first place, the reason given can hardly be accepted as the true reason for the prevailing rule, and in the second place, while the landlord may insure, his insurance extends only to his reversionary interest, while the tenant has also an insurable interest and may protect himself against such a loss by insuring his term. Finally, it is not for the court to abrogate or to reform contracts because of apparent inequity or injustice in their provisions. If the nineteenth century has advanced in civilization so far as to require the disregard of established legal principles merely because they are antiquated, this modern enlightenment must certainly have extended so far as to justify a presumption that the parties to a contract have sufficient intelligence to anticipate probable disasters and provide therefor if they so desire. We think the reasons alleged are entirely insufficient to justify an innovation on established legal

principles. As we said before, rules settled by a long and uniform course of judicial decisions should not be lightly disregarded. This lease is couched in technical language which has uniformly been considered as creating an estate in the lessee for the term demised, and when the parties have resorted to such technical language it is to be presumed that it was intended in its technical sense. It is not the business of the courts to make new contracts for the parties, and we cannot see how we can enter here a judgment or decree continuing the lease at a rent different from that therein reserved without, in effect, making for the parties a new contract, different from that which they made for themselves. The lessee might have protected itself by a suitable provision against such a catastrophe. If insurance has anything to do with the case, it might have protected itself by insuring its term. There is technically no difference between the present case and the case of an outstanding estate for life, with a remainder or reversion over. In such case the destruction of improvements is a loss to be borne both by the particular tenant and the remainderman. The lessor cannot protect himself and secure his rent by rebuilding, because in the absence of a covenant he could not re-enter for that purpose without eviction. So that to hold that there should be an apportionment where the tenant is unwilling to permit a rebuilding would arbitrarily deny to the landlord any right to his whole rent. We think the law is exactly stated in a very exhaustive opinion by Willard, J., in *Coogan v. Parker*, 2 S. Car., 255, to the effect that where there is a substantial destruction of the subject-matter of the lease by act of God or the public enemy, the tenant may elect to rescind, and on surrendering shall be discharged from the payment of the rent; but unless he elect to rescind by surrender, or offer to surrender, he must pay the rent according to his covenant, and that in determining what amounts to a substantial destruction of the subject-matter the nature of the premises and the use which the

parties intended should be made thereof are to be considered. This doctrine reconciles cases supporting the general rule announced with those holding that where a room in a building is let, and the building is destroyed, the rent is extinguished, because in such a case there has been a complete eviction or surrender. Where, however, there has been only a partial destruction, and the lessee sees fit to continue the lease and remain in possession, he must so do according to its terms and pay the rent reserved.

POST, C. J., and RYAN, C., concur in the foregoing dissenting opinion.

W. NISSEN V. J. E. TURNER.

FILED JANUARY 7, 1897. No. 6970.

Landlord and Tenant: RENT: TO WHOM PAYABLE. To an action for rent the defendant pleaded that he had been induced to enter into the lease by the plaintiff's falsely and fraudulently representing to him that he was the owner of the demised premises, whereas in fact he was not the owner and had no authority to lease the same; that thereafter the defendant had accepted a lease from and paid rent to the true owner. *Held,* Not to state a defense, there being no averment that the lessee had not entered into possession, or that he had been kept out of possession or evicted by the holder of the paramount title, or that he had surrendered the lease.

ERROR from the district court of Thurston county. Tried below before NORRIS, J. *Affirmed.*

Jay & Beck and *Guy T. Graves*, for plaintiff in error.

J. M. Curry, contra.

IRVINE, C.

Turner sued Nissen to recover on two promissory notes executed by Nissen to T. C. Cabney and Francis Cabney

respectively, and alleged to have been indorsed by the Cabneys to Turner before maturity and for value. An amended answer filed by Nissen admitted the execution of the notes and averred that before their execution the Cabneys, intending to cheat and defraud Nissen, falsely represented to him that they were the owners of certain land in Thurston county, and had good right and lawful authority to lease the same; that Nissen, relying on said representations, leased said land for one year from and after January 19, 1892, and in consideration for said lease executed and delivered the notes sued on; that the Cabneys were not the owners of the land; had no authority to lease it, and that the land was in fact unallotted tribal land belonging to the Omaha Indians, and under the control of their council and the federal agent; that on the 24th day of June, 1892, the agent of said tribe, with the consent of its council, leased said land to Nissen and collected the rent in full; that the notes were therefore without consideration, and that Turner had full knowledge of the facts. To this answer a general demurrer was sustained and the defendant electing to stand on his amended answer, judgment was entered for the plaintiff. The defendant prosecutes error.

The judgment of the district court was right. It is no defense to an action for rent that the lessor was not the owner of the demised premises; and one who accepts a lease and enters into possession may not voluntarily attorn to an adverse claimant. It is true that if he be evicted under title paramount, he may defend on that ground against rent accruing after the eviction, and under certain circumstances he may surrender, but in order to discharge him from rent there must be either an eviction or an actual surrender. On the other hand, it is probably true that one who has entered into a lease with another may, in an action for the rent reserved, allege that he was prevented from entering by an adverse claimant in possession; or possibly, after having executed the lease, he may defend against the rent on the ground that before

entry as the tenant of the lessor he learned of the existence of a superior title whereunder entry might be prevented or he might be evicted in case he entered. But this answer does not allege that Nissen did not enter under his lease. Nor does it allege that he had been evicted by the holder of the paramount title, nor that he had surrendered. We cannot supply the place of these averments by intendment. They are essential to complete the defense. The answer not containing them the demurrer was properly sustained.

AFFIRMED.

CHARLES CUMMINGS V. STATE OF NEBRASKA.

FILED JANUARY 7, 1897. No. 8681.

1. **Criminal Law: INTENT: EVIDENCE.** In a criminal case where the intention of the accused is a material fact, and he takes the stand on his own behalf, he may be asked directly what was his intention with regard to the act complained of.
2. **———: INSTRUCTIONS.** An instruction in a criminal prosecution that if the jury should find the facts essential to establish guilt they should acquit, but if such facts had not been proven they should convict, is erroneous and ground for reversal, although it may be apparent to this court that the trial court unintentionally transposed the words "convict" and "acquit."

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

Mahoney & Smyth, for plaintiff in error.

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

IRVINE, C.

The plaintiff in error was informed against for murder in the second degree. He was convicted of man-

slaughter and brings the case here through writ of error. The plaintiff in error was an employe in a drinking saloon and billiard room. The deceased, with several companions, was in the room and became involved in an altercation with the plaintiff in error, which resulted in the plaintiff in error's striking the deceased upon the head with a billiard cue, producing death. There was evidence tending to show that the blow was provoked by an attack made upon the plaintiff in error by the deceased. The plaintiff in error was sworn on his own behalf and was asked: "What intention did you have in striking back that blow at that time?" An objection to this question was sustained and the offer was made "to prove by the witness that he had the intention, and only the intention, of warding off the blow which was made at him, and to prevent what he believed to be a threatened repetition of it." The court then sustained the objection, saying: "The defendant can introduce all the facts tending to show the reason why he used that billiard cue, but he cannot give any secret thoughts he may have had in his mind as to the intent." This ruling is assigned as error.

In *Campbell v. Holland*, 22 Neb., 587, the action involved the issue as to whether a certain conveyance had been made to defraud creditors, and the court held that in such a case it is competent to inquire of the vendor whether, in making the transfer, he intended to delay or defraud creditors. *Jonasen v. Kennedy*, 39 Neb., 313, was an action for malicious prosecution, and it was held that it was competent to ask the defendant whether, in making the complaint, he acted with any malice toward the plaintiff. These cases were followed in *Laing v. Nelson*, 40 Neb., 252. If in a civil case where the intent of a party is material, it is competent to inquire directly of him as a witness in regard to such intent, we cannot see why it is not proper in a criminal prosecution. The defense here interposed was self-defense, and the intent and purpose of the plaintiff in error were material inquiries.

Where such evidence is rejected, it is because it is hearsay or because it involves an inference which should be for the jury, and not the witness, to draw. Were it a generally accepted fact of science that a third person might, by his own senses, and not merely by the acts or words of another, ascertain the thoughts of that other, as we know by his senses he may ascertain his acts, it would certainly be competent to ask that third person to state the thoughts of the one under investigation, as he now details his acts. The statute making the defendant in a criminal prosecution a competent witness, there is certainly no reason why he may not testify to his own intent. That is on his part a matter of personal knowledge as much as the things he perceives through his organs of sense. Of course, on account of his interest in the result and the impossibility of contradicting him, such testimony may be entitled to very little weight, but this is a question for the jury. The evidence is admissible for whatever it may be worth.

The court gave the following instruction: "The facts necessary for the state to prove beyond a reasonable doubt to warrant a conviction of the crime charged, are, that Jed Vance once lived; that he is now dead; that at and within the county of Douglas and state of Nebraska, and at some time prior to the commencement of this prosecution, the defendant purposely, maliciously, and feloniously caused the death of the said Jed Vance by striking him on the head with a billiard cue; and that at sometime within a year and a day thereafter said Jed Vance died from the effect of such blow. If these facts have been proven beyond a reasonable doubt you should acquit the defendant of the crime charged. If these facts have not been established by the evidence beyond a reasonable doubt, you should convict him of the crime charged." By this instruction the jury was told that it should acquit if the crime was proved and convict if it was not proved beyond a reasonable doubt. It is quite clear to us that the court, in giving this instruction, committed

merely a clerical error in writing it out, and unintentionally transposed the words "convict" and "acquit." But we can hardly presume, especially in a criminal case, that the jury could not thereby have been misled. Whatever the intent of the court was, the instruction as given to the jury was wrong.

For the errors indicated the judgment must be reversed.

REVERSED AND REMANDED.

TECUMSEH NATIONAL BANK, APPELLEE, V. JAMES D. RUSSELL ET AL., APPELLANTS.

FILED JANUARY 7, 1897. No. 6948.

1. **Constructive Trust:** BANK STOCK. The cashier of a bank used the bank's funds to purchase stock in another bank. *Held*, That a court of equity would charge the stock with a trust in favor of the bank whose funds were wrongfully used to purchase it.
2. ———: ———: BONA FIDE PURCHASER. A third person claimed the stock by purchase from the cashier. Evidence set out in opinion *held* not to show that he was an innocent purchaser for value.
3. **Corporations:** STOCK: COLLATERAL SECURITY: CONTRACTS: CANCELLATION. Stock in a bank was issued to A, who pledged it as collateral security to a loan procured from another bank. The bank issuing the stock accepted a surrender of the certificate and issued a new one in its place to the cashier of the bank. *Held*, That it thereby waived any right it might have had to rescind its contract with the original holder and cancel the stock on the ground of fraud in its procurement.

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

T. Appelget, J. Hall Hitchcock, and *Reese & Gilkeson*, for appellants.

John H. Ames and *S. P. Davidson*, for appellee.

IRVINE, C.

The First National Bank of Sterling had issued to James D. Russell its certificate for fifty shares of its capital stock of the par value of $5,000. Russell had been a member of the firm of Russell & Holmes, bankers at Tecumseh. The plaintiff, the First National Bank of Tecumseh, had succeeded to some extent to the business of Russell & Holmes, but the last named firm remained in existence for the purpose, at least, of closing out its late business. Russell & Holmes obtained a loan of $5,000 from the Schuster-Hax National Bank of St. Joseph, Missouri, and pledged as security Russell's stock in the Sterling bank. The pledge was made by Russell's signing a blank assignment indorsed on the certificate and delivering it to the Schuster-Hax bank. The Schuster-Hax bank sent the certificate to the Sterling bank, caused the transfer to be entered, and the Sterling bank issued a new certificate in the name of S. A. Walker, who was cashier of the Schuster-Hax bank. The Russell & Holmes note to the Schuster-Hax bank was paid in installments, the last payment having been made February 15, 1892. This suit was begun by the Tecumseh National Bank, which alleged in its petition substantially the foregoing facts; and further, that the Russell & Holmes note to the Schuster-Hax bank had been paid out of the money of the Tecumseh National Bank by Russell & Holmes and by George D. Bennett, the cashier of the Tecumseh National Bank, at the request of Russell, and that the moneys of the Tecumseh National Bank had been wrongfully appropriated for that purpose without the consent or knowledge of its directors. The Tecumseh National Bank on these averments prayed for an order requiring the surrender of the certificate to the Tecumseh National Bank and for its sale in payment of the amount so used. Russell & Holmes answered alleging that their debt to the Schuster-Hax National Bank had been paid by Bennett at their request, and that in consideration of his pay-

ment of that debt they had sold to him the certificate. Bennett answered that he had paid the debt by drafts drawn by him as cashier on the funds of the Tecumseh National Bank, but that on the following day he repaid said sum; that Russell & Holmes had sold him the stock certificate and that he had thereafter, for a valuable consideration, sold the same to D. R. Bush. Bush intervened, and alleged, among other things, that he had purchased for value said certificate, and prayed that he be decreed to be the owner thereof. The First National Bank of Sterling answered alleging that Russell had procured the original certificate to be issued to him by false and fraudulent representations, and asked that it be surrendered for cancellation. The court found for the plaintiff and adjudged the ownership of the stock to be in the Tecumseh National Bank. It will be observed that three claims were asserted to the stock: First, that of the plaintiff derived through the alleged wrongful use of its funds by Bennett, its cashier, to pay the debt to the Schuster-Hax bank, to secure which Russell & Holmes had pledged the stock; second, the claim of Bush derived through an alleged purchase from Bennett, it being claimed that Bennett had derived title by purchase from Russell in consideration of his paying the Schuster-Hax note; third, the claim of the bank of Sterling, which issued the stock, that it was obtained in the first place fraudulently, and should therefore be canceled.

The general principles of equity jurisprudence discussed in the briefs, are, for the most part, well settled and call for no extended discussion. Such difficulty as lies in the case arises in the application of established principles to the somewhat complicated state of facts presented by the record. The theory of the plaintiff seems to be that by virtue of the payment of the Schuster-Hax notes out of its funds, it became entitled to be subrogated to the rights of the Schuster-Hax bank derived from the pledge of the stock to it. It is contended by Bush that no right to subrogation is established, because

courts of equity only apply the doctrine of subrogation in two cases: First, in pursuance of an agreement of the parties to that effect; second, where the person paying the debt is legally obligated therefor, or where he is compelled to pay it to protect his own rights. It may be conceded that these propositions are correct, but Bush claims through Bennett, and Bennett claims through a contract of purchase whereby he became entitled to the stock in consideration of his paying the Schuster-Hax note. It is proved beyond controversy that Bennett, at this time, was the cashier of the Tecumseh bank and that he paid the note by means of checks and drafts drawn by him as cashier against the funds of that bank. The bank alleges that such funds were wrongfully and without its consent used for that purpose. This allegation stands practically admitted. It is met merely by the claim that Bennett replaced the money so drawn the following day. To state the evidence on this issue would unnecessarily complicate the case. Suffice it to say that we are satisfied that the finding of the trial court in favor of the plaintiff on this issue is sustained by the evidence, and it must be accepted not only that the Schuster-Hax note was paid from funds of the Tecumseh National Bank, but that that bank has not received repayment thereof. This branch of the case may then be simplified as follows: Bennett, the cashier, and in a sense the trustee of the Tecumseh bank, uses its funds for the purpose of purchasing Russell's stock in the Sterling bank. The legal title to the stock thereby passed to Bennett, but it having been purchased by a trustee with trust funds unlawfully used for that purpose, the *cestui que trust* may follow its funds. A court of equity, as long as they can be followed, will continue the trust. In opposition to this view Bush cites 1 Morse, Banking, sec. 173*a*, where it is said: "If the cashier embezzles funds of the bank and invests them, a court of chancery has no power to fasten a trust upon the investment, and to declare the cashier to be a trustee, holding what he has purchased in trust for the bank.

The mere fact that the cashier obtained the means of purchasing by a theft from the corporate funds, provided that he actually made the purchase in his own name and on his own account, does not create such a case of implied or resulting trust as to give jurisdiction to a court of equity for the purpose of taking possession of the purchased property and ordering that indemnification be made from it to the bank." The sole authority cited in support of that statement is *Pascoag Bank v. Hunt*, 3 Edw. Ch. [N. Y.], 583. While that case fairly supports the statement, it is directly contrary to the ruling of the same vice chancellor in *Bank of America v. Pollock*, 4 Edw. Ch. [N. Y.], 215, and we may add that we deem it directly opposed to the well settled principles governing similar cases. That the cashier of a bank is a trustee of its funds in his possession and by virtue of his office will hardly be contested, and that when a trustee uses trust funds to purchase other property the *cestui que trust* may, upon tracing the fund into that property, charge the trust upon the property so purchased, is now an equitable truism. We think, therefore, that the plaintiff made out such a case as to justify the finding in its favor, and to justify the decree rendered, unless one of the other parties showed a superior right.

Bush claimed to be a purchaser for value without notice of any rights on the part of the Tecumseh bank. But we do not think that he established this by proof. For reasons not necessary here to detail, the Schuster-Hax bank had refused to surrender the certificate at the time Bennett paid the note. Bush claims that he was the owner of a certificate of deposit in the former bank of Russell & Holmes; that in January, 1892, he made a contract with Russell whereby he was to surrender this certificate and accept in lieu thereof the stock certificate in controversy together with other collateral. He was then informed that the stock certificate had been pledged to the Schuster-Hax bank. He has not surrendered his certificate of deposit, so that he has parted with no portion

of the consideration of this agreement and is not a purchaser for value. Nor do we think he is a purchaser without notice. He now claims ownership by virtue of a written assignment, dated February 16, 1892, from Russell to Bennett, and one dated the following September, from Bennett to Bush. His transaction was with Russell. He knew the stock certificate was then held in pledge by the Schuster-Hax bank. The fact that he had to derive title through Bennett was sufficient at least to arouse suspicion, and in addition to this, the certificate was not produced, and both written assignments recited that the Schuster-Hax bank was still holding it, notwithstanding that the debt for which it had been pledged had been paid. We think these circumstances were sufficient to put him on inquiry which, if made, would have disclosed the controversy as to the ownership of the certificate. For these reasons his claim is not superior to that of Russell himself.

The case of the First National Bank of Sterling is based on the theory that Russell had been a stockholder in a bank whose assets the Sterling bank had bought and whose liabilities it had assumed; that among the assets so acquired was a note made by Russell; that the understanding was that should the assets of the former bank prove sufficient, stock would be issued to its stockholders by the bank of Sterling to represent the excess of assets so acquired; that the Sterling bank had issued the stock to Russell in consideration of his pledging collateral notes to secure his note held by that bank; that he had misrepresented the value of the collateral. Whether or not this is true we need not inquire, because the Sterling bank had recognized Russell's transfer of the stock to the Schuster-Hax bank by accepting a surrender of the certificate and issuing a new certificate to the cashier of the Schuster-Hax bank. It would also appear that the Sterling bank had elected to ratify the transaction by reducing its claim against Russell to a personal judgment. It had certainly waived any right to rescind the

contract and cancel the stock. The decree of the district court is in all things

AFFIRMED.

CAMPBELL PRINTING PRESS & MANUFACTURING COMPANY, APPELLEE, V. MARDER, LUSE & COMPANY, APPELLANT, ET AL.

FILED JANUARY 7, 1897. No. 6937.

1. Summons: IMPEACHMENT OF RETURN. In this state it is the settled law that extrinsic evidence is admissible to impeach the return of an officer as to service of process.
2. Judgment: SERVICE OF SUMMONS. Where there is an attempt at service reaching the defendant, but there is a defect in the manner of service or form of the return, this is a mere irregularity, and a judgment founded on such service is not open to collateral attack. But where the attempted service does not reach the defendant at all, a judgment founded thereon is absolutely void.
3. Corporations: SERVICE OF SUMMONS. Where attempt is made to serve a summons upon a corporation, and the persons served are not at the time officers of, or connected with, the corporation, the case is one of total absence of service, and a judgment founded thereon is void.
4. Judgments: ENFORCEMENT: AVOIDANCE. The rule whereby a party seeking affirmative aid of a court of equity to relieve him against a void judgment is required to disclose a meritorious defense to the cause of action does not apply in a case where the plaintiff is himself seeking affirmatively to enforce such judgment.
5. Corporations: CREDITORS: ENFORCEMENT OF CLAIMS. One corporation having acquired all the stock of another, and then, through its officers, having procured that other to execute to it a bill of sale of all its assets to secure an existing indebtedness, and there remaining as a consequence of such acts no officers or place of business or tangible assets of such second corporation, *semble*, that another creditor of the second corporation need not procure judgment against it preliminary to an action against the first for the purpose of enforcing its claim against the second.

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

The facts are stated by the commissioner.

Connell & Ives, for appellant:

A judgment may be impeached on the ground of a lack of jurisdiction over the defendant by any one whose interests are adversely affected thereby, be he stranger or party defendant to the suit. (*Atkins v. Atkins*, 9 Neb., 191; *Frazier v. Miles*, 10 Neb., 113; *Murphy v. Lyons*, 19 Neb., 691; *Holliday v. Brown*, 33 Neb., 657; *Wilson v. Shipman*, 34 Neb., 573.)

To gain jurisdiction over a corporation the initial process must be served upon the identical persons and in the exact manner prescribed by the statute. (*Fee v. Big Sand Iron Co.*, 13 O. St., 563; *Miller v. Norfolk & W. R. Co.*, 41 Fed. Rep., 431; *St. Louis, V. & T. H. R. Co. v. Dawson*, 3 Ill. App., 120; *Great Western M. Co. v. Woodmas of A. M. Co.*, 12 Colo., 47; *Chambers v. King W. I. Bridge Mfg. Co.*, 16 Kan., 270; *O'Brien v. Shaw's Flat & T. C. Co.*, 10 Cal., 343.)

Breckenridge & Breckenridge and *L. F. Crofoot, contra:*

There was service of valid process by which the court acquired jurisdiction. (Van Fleet, Collateral Attack, secs. 61, 62, 526; Black, Judgments, sec. 287; Freeman, Judgments [4th ed.], 130; *Gandy v. Jolly*, 35 Neb., 711; *Schneitman v. Noble*, 75 Ia., 120; *Rotch v. Humboldt College*, 56 N. W. Rep. [Ia.], 658.)

Defective service of process does not render void a judgment based thereon. (*Isaacs v. Price*, 2 Dillon [U. S.], 351; *Hendrick v. Whittemore*, 105 Mass., 27; *Dutton v. Hobson*, 7 Kan., 196; *Campbell v. Hays*, 41 Miss., 561; *Christian v. O'Neal*, 46 Miss., 669; *Cole v. Butler*, 43 Me., 401; *Fahs v. Taylor*, 10 O., 105; *Ballinger v. Tarbell*, 16 Ia., 492; *Webster v. Daniel*, 47 Ark., 131; *Righter v. Thornton*, 30 W. L. Bull [Pa.], 32; *Jackson v. State*, 104 Ind., 516; *Essig v. Lower*, 120 Ind., 239; *Leonard v. Sparks*, 22 S. W. Rep. [Mo.], 899; *Janes v. Howell*, 37 Neb., 320; *Schoeder v. Wilcox*, 39 Neb., 136.)

Appellant, who is a stranger to the record of the judg-

ments, cannot attack them collaterally. (*Wilcher v. Robertson*, 78 Va., 602; *Vose v. Morton*, 4 Cush. [Mass.], 27; *Eureka Iron & Steel Works v. Bresnahan*, 66 Mich., 489; *Gilmore v. Ham*, 10 N. Y. Supp., 48; *Martin v. Bowie*, 37 S. Car., 102; *Connelly v. Edgerton*, 22 Neb., 82.)

IRVINE, C.

The Campbell Printing Press & Manufacturing Company, a New York corporation, brought this action against Marder, Luse & Co, which seems to be an Illinois corporation, and the Omaha Type Foundry, a Nebraska corporation, alleging in its petition the recovery by the plaintiff against the Omaha Type Foundry of four judgments before a justice of the peace, and one in the county court of Douglas county; and that executions issued on these judgments had been returned unsatisfied; that such judgments were upon promissory notes made by strangers to the type foundry and by it indorsed to the plaintiff; that at the time of the indorsement of said notes the type foundry had in its possession and was the owner of a large amount of property; that Marder, Luse & Co. was then the owner of a large portion of the capital stock of the type foundry, and thereafter became the owner of the rest of the stock, and thereupon took possession and appropriated to its own use all the property of the type foundry. The prayer was for a disclosure of the property of the type foundry and that it be applied to the payment of plaintiff's judgments and for judgment against Marder, Luse & Co. Marder, Luse & Co. answered denying the material averments of the petition and alleging that the type foundry, in February, 1891, became unable to continue its business because of inability to pay debts, and sold its property to Marder, Luse & Co., the latter paying full consideration therefor. The court found for the plaintiff, taking the view that the plaintiff was entitled to share *pro rata* with other creditors in the property of the type foundry, and rendered judgment against Marder, Luse & Co. for that proportion of its judgments

corresponding to the ratio which the value of the property bore to the total indebtedness of the company. From this decree Marder, Luse & Co. appeals.

The evidence, without contradiction, discloses that prior to December, 1890, the type foundry was doing business in Omaha with a capital stock of $25,000, $23,000 of which was owned by Marder, Luse & Co., $1,000 by Mr. Pickering, and $1,000 by H. P. Hallock. Mr. Hallock was vice president of the company, Mr. Marder, of Marder, Luse & Co., being its president. In December, 1890, Marder, Luse & Co. purchased the stock of Messrs. Pickering and Hallock, and thus became the sole owner of the stock of the type foundry. Mr. Dresser appeared then as the agent of Marder, Luse & Co. and took possession of the property of the type foundry. It appears quite clearly that he held no official position in the type foundry corporation and exercised no authority derived therefrom. The type foundry had about this time executed a bill of sale to Marder, Luse & Co. of all its property in payment of an indebtedness previously incurred. This bill of sale was authorized at a meeting of the stockholders of the type foundry, the minutes disclosing that Mr. Marder was alone present representing all the stock. From that time, to-wit, early in February, 1891, the property was in the possession of Dresser as agent for Marder, Luse & Co. under the bill of sale. The judgments were all rendered in actions begun in 1892, long after the transactions referred to. To their introduction in evidence the defendant objected, on the ground of want of jurisdiction appearing on the face of the record, and also by extrinsic evidence. The court received the judgments and found in the decree that they were valid. We think they were shown beyond dispute to be void. It is unnecessary to consider some of the questions argued as to the validity of service upon certain officers of the corporation. Where the returns show by name the person upon whom service was made, it appears in each case to be Mr. Hallock or Mr. Dresser. At the time of service Mr. Hallock had no

connection whatever with the corporation, and Mr. Dresser never had any connection therewith. One record discloses service by leaving a copy at the usual place of business of the corporation. But the action was before a justice of the peace. The general provision of the Code of Civil Procedure is (sec. 73), that a summons against a corporation may be served upon certain officers named, "or if none of the aforesaid officers can be found, by a copy left at the office or last usual place of business of such corporation." But section 912 of the Code is a special provision relating to service upon corporations in actions before justices of the peace, and such special provision prevails as against the general provision of section 73. By section 912 it is provided that a summons may be served upon certain officers, "or if none of the aforesaid officers can be found, by a copy left at the office or usual place of business of such corporation with the person having charge thereof." Now, at the time this summons was served, the type foundry had no usual place of business, and no person was in charge thereof. The section governing the case differs from section 73 in requiring service at the usual place of business instead of last usual place of business, and in requiring a copy to be left with the person having charge thereof. While it was held in *Johnson v. Jones*, 2 Neb., 126, that the return of an officer cannot be impeached collaterally, it has since been several times distinctly held to the contrary. (*Holliday v. Brown*, 33 Neb., 657, 34 Neb., 232; *Wilson v. Shipman*, 34 Neb., 573.) In many other cases the court, by considering the sufficiency of evidence to impeach the return, has impliedly held to the same effect, and it now must be accepted as the established law of this state that extrinsic evidence is admissible in a collateral proceeding for the purpose of impeaching an officer's return. We call attention to this rule for the purpose of showing the inapplicability of certain authorities from states holding otherwise, which authorities are relied on by the appellee.

The appellee contends, however, that although it be

found that the service was defective, the judgments are not void, and not open to collateral attack. In support of this argument reliance is placed largely on *Gandy v. Jolly*, 35 Neb., 711. In that case the defect was that the service had been by reading the summons instead of delivering a copy. This was a mere irregularity in the manner of service and the court properly held that it did not rendered the judgment void. A paragraph from Black on Judgments, was, however, cited with approval in the opinion, distinguishing between such irregularities in the manner of service and a total want of service which renders the judgment void, and as illustrations of cases where there is a total want of service there is mentioned service by delivering a copy to a third person not a resident of the house of defendant's abode, and service upon a stranger, although he is the authorized agent of the defendant. The distinction is in fact clear. If an attempt at service is made, and actually reaches the defendant, although it be not made or returned in the form and manner required by law, there is presented a case where jurisdiction attaches so far as to render a judgment good against collateral attack. But where the attempted service does not reach the defendant at all there is no service and the proceedings are void. We consider this a case of the latter class. Service was not made upon any person having any connection whatever with the corporation. Indeed, at the time the suit was begun, the corporation was practically extinct. It had no officers, no place of business, and a solitary stockholder which was itself a corporation of a distant state. We therefore think the court erred in finding the judgments valid. Attention is called to *Janes v. Howell*, 37 Neb., 320. But that case is not applicable. It belongs to that class in which the court has frequently held that one seeking the affirmative relief of a court of equity against a void judgment must disclose that he has a meritorious defense to the cause of action on which the judgment was based. These cases are not applicable to cases like the present, where the party claiming under

the judgment is seeking affirmatively to enforce it. This he cannot do if the judgment is void.

The plaintiff, both in its petition and in its evidence, rested its case entirely on the judgments. While the pleading of the judgments was perhaps an implied pleading of an indebtedness, there was in the evidence no proof of an indebtedness to the plaintiff outside of the records of the void judgments. Therefore, the plaintiff failing to establish its judgments, failed entirely to establish its relationship as creditor of the type foundry. We mention this particularly for the purpose of guarding against any inference that the plaintiff is entitled to no relief if it be in fact a creditor. The bill of sale to Marder, Luse & Co. was clearly void as against other creditors. It has been held that a corporation may not prefer a debt owing to its own directors, or a debt for which such directors are sureties. (*Ingwersen v. Edgecombe*, 42 Neb., 740; *Tillson v. Downing*, 45 Neb., 549.) The principle which governs these cases applies to such a case as this, where, if we concede that one corporation may become the owner of all the stock of another, the officers of the former, acting in its behalf and also on behalf of the latter, prefer a debt from the latter to the former, especially when such preference absorbs all the assets of the debtor corporation. It may be that the situation at the time was such that the plaintiff could not maintain any action against the type foundry because of the disappearance of its whole organization and of all its assets through the wrongful act of the defendant. If so, it is very probable that this action might be maintained against Marder, Luse & Co. without its being sustained by judgments against the type foundry. As the record does not, at this time, present these questions, they are not decided. We merely desire to clearly indicate that they are not here being determined adversely to the plaintiff. Under the circumstances, we think the proper course is to remand the action to the district court for a new trial.

REVERSED AND REMANDED.

WILLIAM M. CLARK V. WILLIAM J. TURNER ET AL.

FILED JANUARY 7, 1897. No. 6857.

1. Wills: PROOF OF CONTENTS. The contents of a lost will cannot be proved solely by the declarations of the testator.
2. ———: ———. The testimony of a witness as to the contents of a will, his knowledge being derived from the testator's reading the will to him, and not from having himself inspected it, is in effect only testimony as to the testator's declarations.
3. ———: ———. Such declarations, it seems, are admissible to corroborate more direct evidence.
4. ———: CONTEST: ATTORNEYS' FEES. Attorneys' fees cannot be allowed in the contest proceedings to unsuccessful proponents of a will. If such proponents are entitled to reimbursement out of the estate, it must be had in the course of administration, and after administration granted.

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

See opinion for statement of the case.

J. W. Dewcese, F. M. Hall, and *G. M. Lambertson,* for plaintiff in error:

Proponents had a right, after having shown that a will was left by testator and that it had been lost, stolen, or destroyed, to prove its contents by offering what purports to be a copy, to show that it is a copy, and to have the same probated. (*In re Page,* 118 Ill., 576; 1 Redfield, Wills, 349; *Davis v. Sigourney,* 8 Met. [Mass.], 487; *Crowley v. Crowley,* 80 Ill., 469; *Jackson v. Vickory,* 1 Wend. [N. Y.], 406; *Dan v. Brown,* 4 Cow. [N. Y.], 483; *Doran v. Mullen,* 78 Ill., 342; *Thornton v. Thornton,* 39 Vt., 122; *Sugden v. Lord St. Leonards,* 34 L. T. Rep. [Eng.], 372; *Southworth v. Adams,* 11 Biss. [U. S.], 257.)

The presumption that a will is revoked because not found in the place where it was deposited by the testator may be rebutted. (*Gaines v. Hennen,* 24 How. [U. S.], 553.)

The presumption of revocation does not arise when no immediate search was made for the will in the place where it was last seen and deposited, and this is especially true where those interested in its loss or destruction took the receptacle in which it was deposited into their exclusive possession and custody, against the known wishes of the testator, and prevented the executors, legatees, and devisees in the will from examining it until its contents were rifled and destroyed by an alleged burglar. In such a case the burden of proof is on the contestant, who took possession of the receptacle, to show that the will was not in it at the time he took the receptacle into his custody. (*Finch v. Finch*, 16 L. T. Rep. [Eng.], 268; *Podmore v. Whatton*, 3 Sn. & Tr. [Eng.], 449; *Sugden v. Lord St. Leonards*, 34 L. T. Rep. [Eng.], 372; *In re Page*, 118 Ill., 576; *Gaines v. Hennen*, 24 How. [U. S.], 553.)

Fees of proponent's attorneys, as well as costs of court, ought to be paid out of the estate. (*Seebrock v. Fedawa*, 33 Neb., 413; *Mathis v. Pitman*, 32 Neb., 191; *Bradford v. Boudinot*, 3 Wash. [U. S. C. C.], 122; *Compton v. Barnes*, 4 Gill [Md.], 55; *Henderson v. Simmons*, 33 Ala., 291.)

Sawyer, Snell & Frost, and *Charles O. Whedon, contra:*

There was no competent testimony as to the contents of the will alleged to have been made by Dr. Turner. (*Edington v. Mutual Life Ins. Co.*, 67 N. Y., 185; *Feeney v. Long Island R. Co.*, 5 L. R. A. [N. Y.], 544; *Pennsylvania R. Co. v. Marien*, 7 L. R. A. [Ind.], 687; *Heuston v. Simpson*, 115 Ind., 62; *Westover v. Ætna Ins. Co.*, 99 N. Y., 56; *Loder v. Whelpley*, 111 N. Y., 239; *Parker v. Carter*, 6 Am. Dec. [Va.], 513; *Morris v. Cain*, 1 So. Rep. [La.], 797; *Bacon v. Frisbie*, 80 N. Y., 394; *Root v. Wright*, 84 N. Y., 72; *Koontz v. Owens*, 18 S. W. Rep. [Mo.], 928; *Ransom v. Schmela*, 13 Neb., 73.)

The contents of the alleged will could not be shown by the declarations of testator. (*Chrisholm v. Ben*, 7 B. Mon. [Ky.], 412; *Colligan v. McKernan*, 2 Dem. [N. Y.], 421; *Mercer v. Mackin*, 14 Bush [Ky.], 442; *Clark v. Morton*, 28

Am. Dec. [Pa.], 670; *Gay v. Gay*, 14 N. W. Rep. [Ia.], 238; *Waterman v. Whitney*, 11 N. Y., 157; *Boynlan v. Meeker*, 28 N. J. Law, 274; *Behrens v. Behrens*, 25 N. E. Rep. [O.], 209; *Morgan v. Burrows*, 45 Wis., 211; *Woodward v. Goulstone*, 11 App. Cas. [Eng.], 478; *Hunter v. Gardenhire*, 13 B. J. Lea [Tenn.], 662.)

The contents of the alleged will was not shown by that positive testimony required by law. (*Southworth v. Adams*, 11 Biss. [U. S.], 260; *Davis v. Sigourney*, 8 Met. [Mass.], 487; *In re Johnson's Will*, 40 Conn., 589; *Bauskett v. Keitt*, 22 S. Car., 187.)

The ruling in disallowing fees for attorneys was correct. (*Mumper's Appeal*, 3 Watts & S. [Pa.], 441; *Royer's Appeal*, 13 Pa. St., 569; *Andrews v. Administrators*, 7 O. St., 152; *Collyer v. Collyer*, 4 Dem. [N. Y.], 53; *Brown v. Vinyard*, 1 Bailey's Eq. [S. Car.], 460.)

IRVINE, C.

John J. Turner was an elderly citizen of the city of Lincoln, blessed with a pious disposition and a considerable quantity of this world's goods. He died March 1, 1890, leaving him surviving two sons, William J. Turner and R. Morris Turner. Some time after his death William M. Clark and Nahum S. Scott propounded for probate what purported to be a copy of John J. Turner's last will and testament, it being alleged that said will had been deposited in a valise belonging to the testator, which, after his death, had been delivered to his sons, and that thereafter it was claimed that the house in which the valise had been kept was burglariously entered, the valise cut open, and its contents extracted. The probate was contested by the two sons. The result of the proceedings in the county court does not appear from the record. The case was, however, appealed to the district court, where, as a result of what appears to have been a third trial there, a verdict was rendered in favor of the contestants. Judgment was rendered denying probate and the proponent Clark, the proponent Scott hav-

ing died pending the proceedings, prosecutes to this court proceedings in error to reverse that judgment.

The copy of the will, as propounded, is as follows:

"I, John J. Turner, of Lincoln, Nebraska, being of sound and disposing mind and memory, aged ——, do hereby declare this to be my last will and testament, as follows:

"First—I will that my debts and reasonable funeral charges be paid.

"Second—I give and bequeath to the Board of Missions for Freedmen of the Presbyterian Church of the United States of America the value of the note of R. Morris Turner for four thousand five hundred dollars, secured by mortgage on lot three (3) in block one hundred and twenty-nine (129), city of Lincoln, Lancaster county, Nebraska, less two thousand dollars borrowed at the First National Bank of Lincoln, Nebraska, and paid over to said board.

"Third—I give and bequeath to the Board of Foreign Missions of the Presbyterian Church in the United States of America the value of a note made by William J. Turner to me for the sum of five thousand seven hundred dollars, less the amount necessary to pay my note of $2,000 at the First National Bank of Lincoln, Nebraska, for which this note of $5,700 dollars is pledged as collateral security.

"Fourth—I give and bequeath to Karen Rootham the entire use of my double house on North Twelfth street, east of the university, during her natural life, and in case the house shall be destroyed she may use the entire amount of the insurance to rebuild the same, or she may receive one-half of the amount of the insurance and release her interest and claim upon the property. She may assign and dispose of her entire interest in rents and use of said house at any time, and at her death the said property shall go to my two sons, William J. Turner and R. Morris Turner.

"Fifth—I give, grant, and bequeath to my son, R. Mor-

ris Turner, the house and lot where I now reside, with all the furniture and family library therein; also any balance of the note of R. Morris Turner not bequeathed or paid at the time of my death.

"Sixth—I give and bequeath to my son, William J. Turner, all my medical books, instruments, and medicines, books of account, and accounts belonging to me at the time of my death.

"I hereby constitute and appoint Captain N. S. Scott and William M. Clark to be the executors of this my last will and testament, hereby revoking all former wills by me made.

"Witness my hand and seal this —— day of ——, 1888.

"JOHN J. TURNER.

"FRED SCHMIDT.

"GEO. A. HAGENSICK.

"The foregoing instrument was on the day of the date thereof signed, sealed, published, and declared by the testator therein named, John J. Turner, as and for his last will and testament, in the presence of us, who, at his request and in his presence, and in the presence of each other, have hereunto subscribed our names this —— day of ——, 1888. FRED SCHMIDT.

"GEO. A. HAGENSICK.

"CODICIL TO MY LAST WILL AND TESTAMENT.

"I, John J. Turner, hereby will and direct that my executors shall pay to my brother, living in ——, out of the interest of William J. Turner's note the sum of three hundred and fifty dollars, to be used by him as a loan for the term of five years, without interest. At the expiration of five years to be collected and paid over to the Board of Foreign Missions of the Presbyterian Church in the United States of America. JOHN J. TURNER.

"Dated December ——, 1889.

"Witness:

"SARAH TURNER.

"KAREN ROOTHAM."

A few remarks in regard to the subject-matter of the testator's property may not be inappropriate, preliminary to the statement of other facts in the case. The alleged testator, John J. Turner, referred to usually in the evidence as Dr. Turner, by which term we shall hereafter designate him, was, at the time of his death, and at the time it is claimed this will was executed, seized of the land described in the will, and also of another lot in the city of Lincoln, not thereby disposed of. He had previously owned two other lots in the city of Lincoln, one of which he had conveyed to his son, R. Morris Turner, receiving in consideration for the conveyance the latter's note for $4,500, secured by mortgage on the lot. The other lot he had, at about the same time, conveyed to his son, William J. Turner, receiving in return the latter's note for $5,700. It appears from the evidence that the object of both these conveyances was to provide annuities by virtue of an arrangement entered into between Dr. Turner and his sons, whereby, in order to relieve the doctor of the burden of caring for the property, the conveyances were made to his sons, they to pay interest on the notes during the doctor's lifetime. They contend that upon his death interest was to cease, and the principal of the notes was not to be paid. These are the notes referred to in the second and third paragraphs of the will propounded. Dr. Turner's wife died in 1883. Soon thereafter one Karen Rootham, or, as she herself signs her name, Karenhappech Rootham, a maiden of mature years, became installed in Dr. Turner's home as his housekeeper. It is to her that the fourth paragraph of the alleged will relates. Mr. Clark and Mr. Scott, who are named as executors, were prominent members of the Presbyterian church, of which Dr. Turner was also a member. Captain Scott was a lawyer and seems to have been Dr. Turner's legal adviser. Dr. Turner seems to have acquired somewhat of a habit of making wills, as there is evidence, chiefly from entries in his diary, of his having executed several such instruments in the last

decade of his life. There is a little evidence of this character tending to show the execution by him of a will later than the one here in controversy, but this evidence would not be of such a character as to justify the rejection of this will were this one satisfactorily established. It is claimed that the will propounded was executed in the summer of 1888, and it quite satisfactorily appears that Dr. Turner during that summer did execute a will, which was witnessed by Fred Schmidt and George A. Hagensick. Neither witness pretends to have been informed as to the contents of the will. There is evidence to the effect that on one occasion, and perhaps on three occasions, between the time when this will was executed and Dr. Turner's death, the doctor exhibited to Miss Rootham an envelope, and also, without displaying its contents, a paper enclosed in that envelope, telling Miss Rootham that it was his will and calling her attention to the fact that he deposited it in a certain valise, which he hung in a closet in his house. He also placed the key to the valise in a drawer and called her attention to that fact. He left with her an envelope marked "Miss Karen Rootham (after my death). J. J. Turner." This envelope when opened contained a direction to Miss Rootham "To give my valise key to Mr. William Clark, who can take the note case, which contains all valuable papers, also any money in my old book, and the key of the house to my son, R. Morris Turner." Mr. Clark was unfortunately absent from Lincoln at the time of Dr. Turner's death. Immediately after his funeral the two sons of Dr. Turner found Miss Rootham in possession of the valise. At their solicitation she, exhibiting some reluctance, delivered the valise to William J. Turner, both sons giving her a written receipt therefor. The valise was placed in William J. Turner's house. Early in May it was announced that this house had been entered by burglars and a number of articles abstracted. The account of this affair as given by William J. Turner, and corroborated in most particulars by his wife and brother, is that with his

family he made an evening call upon his brother and returned home about half past ten. During his absence the house had been entered through a basement window; some jewels had been stolen; this valise had been cut open and papers, evidently abstracted therefrom, were found scattered about the floor; no will was found among these papers. From the foregoing facts we think the proponents raised a strong presumption, if they did not make conclusive proof, that a will by Dr. Turner had been executed; that it was placed in the valise, and that it was there at the time of his death. Without desiring to cast any unfavorable reflection upon any of the parties concerned, we may be, perhaps, permitted the remark that the unusual conduct of the burglar in seeking out this valise from an upstairs closet, cutting it open, and scattering its contents over the floor, does not tend in our minds to raise any inference that no will was among the papers so abstracted, although it does not appear that any paper belonging to Dr. Turner, and known to be in existence, was actually carried away by the felon. In addition to the foregoing, there appeared certain declarations of Dr. Turner extending to a short time before his death, from which it would appear that the will had not been revoked. Such declarations we think admissible for this purpose, as will be hereinafter indicated.

The difficulty lies in the proof which was offered as to the contents of the will. It does not appear that any person ever read the will, or was aware of any portion of its contents except through statements made by Dr. Turner. The strongest evidence is that of Captain Scott, to the effect that Dr. Turner came to his office declaring that he had made his will, and then read it to Captain Scott, asking him whether it was in legal form. Captain Scott was blind and therefore did not see the will himself, so that his testimony amounts to nothing more than a repetition of Dr. Turner's declarations as to its contents. In addition to this there is evidence of a few declarations made to others subsequently as to the effect of different

provisions contained in the will. Dr. Turner told Mr. Clark that he and Captain Scott were named as executors. He told Karen Rootham that he had provided for her; he told his pastor, Dr. Curtis, something in regard to the bequests to the two missionary boards; beyond this there is no evidence as to the contents of the will. Mr. Clark had, about the time the will was executed, obtained copies of the two notes referred to. Just before the will was propounded for probate he obtained from the records a description of the property covered by the Morris Turner mortgage. The copy propounded was made up by Captain Scott's dictating to Mr. Clark from recollection of Dr. Turner's declarations, and Mr. Clark's filling in the description of the notes and mortgage from the memoranda in his possession. The attestation clause was copied from a form book. We do not think that this was sufficient evidence of the contents of the will, and from this it follows that the verdict was the only one which could properly be returned upon the evidence. It becomes, therefore, unnecessary for us to consider any special assignments of error relating to other branches of the case.

The precise question does not seem to have often arisen. We think all the cases hold that the declarations of a testator may be received in evidence to prove the existence of a will and in proof of issues relating to the testator's competency or to undue influence, but it has been doubted whether such declarations may be received to establish a revocation. It follows that in all proceedings to probate a lost will, such declarations are admissible in evidence because the existence of the will must necessarily be established by some such indirect method. The declarations having been admitted for that purpose their sufficiency to establish the contents of the will is another question.

In England, prior to the leading case of *Sugden v. Lord St. Leonards*, L. R., 1 P. D., 154, it was considered that the declarations were not admissible as tending to

prove the contents. *Doe v. Palmer*, 16 Q. B. [Eng.], 747, turned upon the question whether an interlineation had been made before or after the execution of the will, and it was held that the testator's declarations as to his intentions made before the execution of the will were admissible, but the declarations made after its execution were not. *Quick v. Quick*, 3 Swab. & T. [Eng.], 442, was a case startlingly like that at bar in some points. The sole evidence of the contents of the will was the testator's declaration. There was the same fact of the will being kept in a bag and of its being taken by burglars. The court held that there was a failure of proof, holding also that the declarations were incompetent. The court of appeals, however, in *Sugden v. Lord St. Leonards*, overruled *Quick v. Quick* and distinctly held such declarations admissible. The will in question was, however, proved by much other evidence; Miss Sugden, the testator's daughter, had not only heard the will read but she had herself read it a number of times and was able to testify in much detail as to its contents from such personal inspection; moreover, not less than eight codicils were found, the terms of these all tending to corroborate her as to the contents of the original will. In addition to this proof there was the evidence of the testator's declarations as to the will's contents. The long and exhaustive opinions are directed only incidentally to the admissibility of the declarations. The crucial question having been whether all the evidence was sufficient to establish the will, the case, therefore, falls far short of holding that the contents of a lost will may be proved solely by the declarations of the testator. Its effect is merely that such declarations are admissible to corroborate more direct evidence. This is the construction given the case by the house of lords in *Woodward v. Goulstone*, 11 App. Cas. [Eng.], 469, where the declarations of the testator were held insufficient alone to establish the will. An intimation was given that *Sugden v. Lord St. Leonards* was not considered free from doubt and the question there

presented left open. The importance of interests involved in probate cases in England is such that the decisions of English courts on such subjects are entitled to great weight, and we may safely say that the result of the English cases is that the contents of a lost will cannot be established solely by the declarations of the testator, although such declarations are now deemed admissible for the purpose of corroboration.

The American cases relied on to suport proponents' theory are, when examined, in strict accordance with the English rule. *In re Page*, 118 Ill., 576, expressly follows *Sugden v. Lord St. Leonards*, and comes within the true doctrine of that case, because the declarations in that case merely went to corroborate the testimony of the lawyer who drew the will and who produced a copy thereof. *Southworth v. Adams*, 11 Biss. [U. S.], 256, *In re Hope*, 48 Mich., 518, and *In re Lambie*, 97 Mich., 49, are cases of the same character, the declarations being corroborative merely, and not relied on in themselves to establish the will. In *Colligan v. McKernan*, 2 Dem. [N. Y.], 421, a will had been propounded for probate. It was contended that there was a subsequent will revoking the former one, but the subsequent will was lost. The evidence offered to establish the second will consisted in the testimony of a clerk in a lawyer's office, who heard the scrivener read it in the presence of the testator at the time of its execution. The court distinctly held that this testimony was merely hearsay, relating, in fact, to the scrivener's declarations, and was not equivalent to testimony by one who had himself read the will. In *Clark v. Morton*, 5 Rawle [Pa.], 235, the supreme court of Pennsylvania held that the contents of a will cannot be established by declarations of the testator, in the absence of the *corpus* of the will and of all evidence that the witness had himself seen it. The court said that to permit a will to be so established would defeat the object of the statutes requiring wills to be written. In *Chisholm's Heirs v. Ben*, 7 B. Mon. [Ky.], 408, the testimony was of the same

character as in this case. The will had been read by the testator to the witness, and there were subsequent declarations by him as to its contents. The court rejected this evidence as insufficient. *Mercer's Administrators v. Mackin*, 14 Bush [Ky.], 434, reaffirms *Chisholm v. Ben.* The argument has been frequently advanced that such declarations are admissible as self-disserving declarations of a decedent. *Mercer v. Mackin* and *Clark v. Morton* discuss this proposition, but demonstrate that such declarations are not admissible on that ground. *Chisholm v. Ben, supra*, intimated that on adequate proof that the will had been fraudulently suppressed by the heirs, the evidence referred to might be sufficient by virtue of the maxim *"Omnia præsumuntur contra spoliatorem."* This maxim is not easy to apply. It has sometimes been held to justify the production of slighter proof than would otherwise be required. Its most frequent application is for the purpose of allowing secondary evidence. It would certainly be very dangerous to extend it so far as to relieve a party charged with proving the contents of a written instrument from all obligation to produce some evidence of a competent character; but this phase of the case was not submitted to the jury by any instruction given or asked, at least so far as the contents of the will are concerned. The general verdict for the contestants precludes us from examining the evidence on this point on the theory that spoliation by the contestants was established. The policy of the statute of wills, like the statute of frauds, is that it is better that occasional injustice should be done, in exceptional cases, through a failure of legal proof, than that transactions within the statutes should in all cases be left to the uncertainties of parol evidence. So the courts in giving effect to the statutes should pursue the same policy, and should avoid meeting hard cases by adopting rules which, generally applied, would defeat the object of the legislature. On no subject, perhaps, are statutes so strict in requiring a writing executed and attested in certain forms as in

the case of wills, and while it is firmly established that a lost will may be proved by secondary evidence, the courts have always required such evidence to be direct, clear, and convincing. As said by the supreme court of the United States in *Lea v. Polk County Copper Co.*, 21 How., 493: "Courts of justice lend a very unwilling ear to statements of what dead men have said." Such evidence is always considered dangerous, and subject to the closest scrutiny. We think it would be in the highest degree dangerous, and would be violative of the object and spirit of the statute, should we hold that the existence and contents of an alleged will might be established solely by testimony of the testator's declarations. Notwithstanding *Sugden v. Lord St. Leonards* and the other cases in that line, we believe the language of the court of appeals of Kentucky in *Chisholm v. Ben* remains true: "The books of reports contain many cases in which wills lost or destroyed have been offered for probate upon parol or other secondary evidence of their contents, and many in which such wills were established, but in an examination of these cases, as extensive as opportunity would allow, we have found none in which there does not seem to have been the evidence of witnesses who knew, or might be presumed to have known, the contents of the will from their own inspection; none in which the declarations or even professed reading of the decedent have been held to be alone sufficient on this point; and none which would sanction their admission upon the question of the contents of the will with any other effect than as merely corroborative of the more direct evidence." As already indicated, this view leads to affirmation of the judgment, because the verdict was the only one warranted by the evidence.

An application was made for the allowance of attorneys' fees to the proponents. This application the district court denied, and the ruling is assigned as error. In two cases such an allowance has been made on behalf of defeated contestants when the will was admitted to

probate. In *Seebrock v. Fedawa*, 33 Neb., 413, the allowance seems to have been made on the ground that there were reasonable grounds for contesting the will. In *Mathis v. Pitman*, 32 Neb., 191, the allowance was based on the construction of sections 42 and 44 of chapter 20, Compiled Statutes, the latter section providing that in appeals in probate matters, if it shall appear that the appeal was taken vexatiously or for delay, the court shall adjudge the appellants to pay the costs, including an attorney's fee to the adverse party. It seems to have been the opinion of the court that this language involved the alternative that if the appeal be not taken vexatiously or for delay, the costs shall be taxed to the estate. The record before us does not show which party appealed to the district court. In *McClary v. Stull*, 44 Neb., 175, such an application was denied, the court remarking, however, that "courts of equity have frequently assumed, when dealing with funds brought directly within their control, to order payment therefrom of fees to counsel for the adverse party." Both in *Mathis v. Pitman* and in *Seebrock v. Fedawa* the will, as a result of the proceeding, was admitted to probate and administration established, the parties charged with administering the estate being before the court, so that the fund may be said to have been "brought directly within the control" of the court, according to the statement in *McClary v. Stull*. This feature appears in all the cases from other states cited by the proponents. Thus, *Henderson v. Simmons*, 33 Ala., 291, was decided on the final accounting of an administrator, the question arising in the administration of the estate and not in the proceeding leading to the probate of the will. In *Compton v. Barnes*, 4 Gill [Md.], 55, the will had been probated and letters testamentary granted to the executors. The contest was by means of a caveat thereafter filed, and the holding of the court was that the will having been probated and letters testamentary granted, it became the duty of the executors to defend the will, under which they were already acting, and that they

were, therefore, entitled to compensation. In *Bradford v. Boudinot*, 3 Wash. [U. S. C. C.], 122, the facts were the same and the proceeding was by original bill, after the will had been defeated, for an accounting against the executor, who had qualified in pursuance of its probate. The court held that he was not an executor *de son tort*, and was, consequently, entitled to reimbursement for his expenses in defending the will. We can find no instance where no administration had been granted and unsuccessful proponents of a will have been allowed counsel fees out of the estate in the contest proceedings. Inasmuch as the statute (Compiled Statutes, ch. 23, secs. 137 and 138) makes it the duty of persons named as executors to propound the will for probate, and provides a penalty for neglecting to do so, it seems reasonable that they should not be compelled to perform this duty at the peril of incurring the expense thereof against themselves should probate be denied, at least where they have acted in good faith. But we are satisfied that in this case no allowance can be made. The judgment simply denies probate. No administration is granted and we have not before us any person now charged with the duties or powers of a personal representative of the deceased, nor has by this proceeding the estate itself been impounded. If such application be proper, it should be made in the county court after administration shall have been granted.

JUDGMENT AFFIRMED.

A. J. BEHRENDS V. FREDERICK BEYSCHLAG.

FILED JANUARY 8, 1897. No. 6917.

1. Instructions: ASSIGNMENTS OF ERROR. Alleged errors in giving instructions must be specifically assigned in the motion for a new trial. Where made in gross and any one of the instructions is determined to be without error, the whole assignment will be overruled

2. ———: REPETITIONS. It is not error to refuse to give an instruction where its subject-matter has been embraced in the charge to the jury.

3. Sales: DELIVERY: PAYMENT. A contract of sale of corn stated the price and also the time and place of delivery, but did not provide specifically time, place, or manner of payment. *Held*, That delivery and payment were to be concurrent acts, and the vendor could insist on payment in cash or money, in the strict sense of the term "current funds."

4. ———: ———: ———. *Held further*, That it was not necessary for the vendee to have had, at any one time or on any one day of the time assigned for the delivery of the corn, sufficient money at the place of delivery to pay for all the corn, the subject of the contract. It was sufficient if, during the whole of such time, he was able, willing and ready to pay for the corn in the manner contemplated by the contract, if delivered.

5. Bill of Exceptions: STIPULATION FOR ALLOWANCE. A stipulation in the terms, "It is hereby agreed that the clerk of the district court sign this bill of exceptions, instead of the judge who presided at the trial of this case," *held* sufficient to authorize the party therein designated to sign and settle the bill of exceptions; that the words "this bill of exceptions," in such stipulation, were equivalent to an agreement that the document to which the stipulation was attached was a true bill of exceptions.

6. ———: AUTHENTICATION. To entitle a bill of exceptions to consideration in this court it must be authenticated by the certificate of the clerk of the trial court identifying it as the bill of exceptions.

ERROR from the district court of Nemaha county. Tried below before BABCOCK, J. *Affirmed.*

E. W. Thomas and *A. J. Burnham*, for plaintiff in error.

John S. Stull, contra.

HARRISON, J.

The defendant in error commenced this action in the district court of Nemaha county to recover of plaintiff in error the amount which he claimed had become his due as damages by reason of an alleged breach of a contract of sale of some corn, by the failure, on the part of plaintiff in error, to deliver the corn. The contract of sale, as pleaded, was as follows:

"NEMAHA CITY, NEB., March 23, 1891.

"This is to certify that I have this day sold to F. Beyschlag, to be delivered at Johnson, Nebraska, three or four thousand bushels of good merchantable white corn, at fifty-two cents per bushel, to be delivered within fifteen days from date, March 23, 1891.

"(Signed) A. J. BEHRENDS."

An answer was filed for plaintiff in error which contained a general denial, and certain affirmative statements of matters in regard to transactions alleged to have occurred in respect to the sale of the corn, between the plaintiff in error and an agent of defendant in error, and of other facts relied on as constituting defenses to the cause of action pleaded in the petition, but which need not be quoted or stated in substance. A reply was presented for defendant in error, and as a result of a trial the defendant in error was awarded a verdict and judgment. Of the proceedings during the trial the plaintiff in error now asks a review.

The first alleged error to which attention is directed in the brief filed for plaintiff in error is that instruction numbered 9, prepared and requested by defendant in error and read to the jury, was incorrect and should not have been given. The portion of the motion for a new trial in which complaint in relation to this instruction was contained reads as follows: "Because the court erred in giving the following instructions requested by plaintiff, to-wit: Instruction No. 1, instruction No. 4, instruction No. 5, instruction No. 6, instruction No. 7, instruction No. 8, instruction No. 9, instruction No. 10." The instruction numbered 1, to which reference was made in the branch of the motion for new trial which we have just quoted, was correct, as were some others in the list set out. As the assignment was not separate and specific but *en masse*, and one or more of the instructions referred to have been determined to be without error, the assignment is unavailing and is overruled.

It is urged that the court erred in refusing to give in its charge to the jury instructions numbered 2 and 6 prepared and presented in behalf of plaintiff in error. The instructions last mentioned were as follows:

"2. The jury are instructed that Behrends was not bound to deliver the corn at the time and place named in the contract unless he received the pay therefor in money and in cash. He was under no obligation to take therefor a check, or draft, or anything that was not legal tender money. He was entitled to receive such pay immediately on delivering the corn."

"6. The court instructs the jury that if you find from the evidence that plaintiff was not ready, and willing, and able to pay for 3,000 bushels of corn at Johnson at the time fixed for the delivery thereof by the contract, then defendant was not bound to deliver the corn at that place, and in that event your verdict should be for defendant."

Of the one of these instructions numbered 6, suffice it to say that the matter embraced in its terms had been fully and completely covered in other instructions given in the charge of the court to the jury, hence there was no error in the refusal to read it. (*Beavers v. Missouri P. R. Co.*, 47 Neb., 762.) By the instruction numbered 2 requested to be given for the plaintiff in error, and refused by the court, it was sought to impress upon the minds of the jury the idea that no delivery of the corn as contracted was necessary unless payment for it was made in money, in the strict meaning of the term, or would follow its delivery. The same proposition was embraced in an instruction prepared and presented on the part of the plaintiff in error, and read by the court to the jury, as a portion of the charge. By it the information was conveyed that if the evidence disclosed that in the event plaintiff in error had taken the corn to the place and at the time designated for delivery, and the vendee was not able, willing, and ready at such time and place to pay

therefor "in cash," the verdict should be for plaintiff in error. The word cash, used in the connection in which it appears in the instruction thus given, could have or be given no other meaning than that of coin, or current money as opposed to payment in any other manner, as by check or draft, etc. The contract of sale of the corn did not in terms provide for payment in any particular manner or medium, nor when nor where payment was to be made, and it must be construed that delivery of the corn, and payment therefor, were to be concurrent acts, and doubtless the plaintiff in error, had he delivered the corn, would have been entitled to receive payment for it in cash, or currency, money in the strict meaning of the term, and not by either check or draft, unless he chose to do so. (*Walters v. Reed*, 34 Neb., 544.) But it was not obligatory upon the defendant in error to have had, during all the days assigned by the contract for the delivery of the corn, or any one of such days, an amount of money in Johnson, the place of delivery, necessary to pay in full for all the corn of which the sale to him was contemplated by the contract. "It was sufficient * * * that he was able and ready to make payment if the corn had been delivered." (*Mount v. Lyon*, 49 N. Y., 552.) The court having given instructions on the subject of payment, and in what it should be made, if, by delivery of the corn, payment had become the vendor's due, it did not err in its refusal to read to the jury the instruction numbered 2, proffered by plaintiff in error.

It is contended by counsel for defendant in error that there is no bill of exceptions in this case; that what purports to be such bill was not signed and settled by the judge who presided at the trial of the cause, but was signed by the clerk of the district court, he being without authority for such action. What appears in the record as a bill of exceptions was not signed by a judge, but was signed by a clerk of the district court, presumably pursuant to the following stipulation:

"It is hereby agreed that the clerk of the district court sign this bill of exceptions instead of the judge, who presided at the trial of this case.

"Dated this 5th day of March, 1894.

"A. J. BURNHAM AND
"E. W. THOMAS.
"Attorneys for Defendant.
"JOHN S. STULL,
"Of Counsel for Plaintiff."

Counsel for both parties having signed the foregoing stipulation, must be held to have adopted and approved the fair construction of its terms, and we think it not a strained meaning, but the fair import, of the phrase "this bill of exceptions" to be that the document to which it had reference was in fact what it was designated, the bill of exceptions; that this was in fact an agreement that it was the bill of exceptions; that this was sufficient, viewed as an agreement, to bring it within the requirements of section 311 of the Code of Civil Procedure, wherein it is stated: "Where the parties interested shall agree upon the bill of exceptions (and shall have attached a written stipulation to that effect to the bill), it shall be the duty of the clerk to settle and sign the bill." (*Fire Ass'n of Philadelphia v. Ruby*, 49 Neb., 584.)

It is further contended in this connection that the bill of exceptions was not authenticated by the certificate of the clerk of the district court as required by law, and hence is not entitled to consideration. The certificate of the clerk of the court, attached to the record, is as follows: I, Ed. Juel, clerk of the district court in and for said county and state, do hereby certify that the foregoing is a true and compared copy of the complete record in the case of Frederick Beyschlag v. A. J. Behrends, as the same appears of record in Complete Record 15, pages 586 to 596, inclusive, and also of the instructions given and instructions refused (they being inserted in the transcript in their proper order), as the same appears

on file in my office." There is no reference in the certificate, of which the foregoing is a copy, to the bill of exceptions, as it is no part of the complete record in a case in the district court. (See Code of Civil Procedure, sec. 446.) The bill of exceptions was not authenticated and thus identified by the clerk of the district court, hence was not entitled to be considered in this court. (*Felber v. Gooding*, 47 Neb., 38; *Romberg v. Fokken*, 47 Neb., 198; *Romberg v. Hediger*, 47 Neb., 201; *Wood Mowing & Reaping Machine Co. v. Gerhold*, 47 Neb., 397.) It follows that the judgment of the district court must be

AFFIRMED.

JOHN O. YEISER V. HUGH LOWE.

FILED JANUARY 8, 1897. No. 6909.

1. **Divorce:** ACTION FOR ATTORNEYS' FEES. Under section 12, chapter 25. Compiled Statutes, the allowance of attorney's fees to the counsel of the wife is ancillary to or an incident of the action for divorce, and a separate suit cannot be maintained against the husband by such attorney to recover for his professional services therein rendered to the wife.
2. **Attorneys' Liens:** ENFORCEMENT. An attorney's lien cannot be enforced where there is not anything to which such lien can attach.

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

John O. Yeiser, pro se.

Osborn & O'Hanlon, contra.

NORVAL, J.

John O. Yeiser is an attorney at law, and as such he was employed, in 1891, to commence and prosecute a suit for divorce and alimony in the district court of Burt county by Eliza Jane Lowe against her husband, the

defendant herein. Mr. Yeiser instituted such suit for the wife on August 6, 1891, and on the 17th day of the same month the defendant filed an answer denying each and every allegation of the petition, except the marriage of the parties. On August 28, 1891, Mr. Yeiser filed in the case a claim for lien for services in the sum of $1,000, but the defendant had no notice thereof until more than a year afterwards. Application was made in the cause for alimony *pendente lite*, which was overruled. Subsequently, on September 10, 1891, Mr. Yeiser, at the request of his client, drew an unconditional dismissal of the case, which was filed in court and the action dismissed. Plaintiff brought this action against the husband to recover for his legal services rendered in the divorce proceeding. From a judgment for the defendant, plaintiff prosecutes error.

The record shows that the defendant never employed plaintiff or agreed to pay him for his services; that the dismissal of the divorce suit was not the result of any settlement between the husband and wife, or collusion between them. She received nothing from her husband as a condition of withdrawing the action, nor did he ever promise to give her anything therefor. It does not appear that the grounds stated in the petition for divorce were true. The main question in the case is whether, under the facts disclosed by this record, defendant is liable in an action at law to an attorney for services rendered to the wife of the former in prosecuting the action for divorce. We do not think that he is. In an action for divorce, under section 12, chapter 25, Compiled Statutes, it is competent for the court to "require the husband to pay any sum necessary to enable the wife to carry on or defend the suit during its pendency * * * and award execution for the same." This section of the statute was construed in *Burnham v. Tizard*, 31 Neb., 781, and it was held that the allowance of attorney's fees to the wife's counsel is only ancillary to or an incident of an action for divorce, and a separate suit cannot be main-

tained therefor by the attorney; in other words, that the remedy given by statute is exclusive. This principle is sustained by the weight of authority. (Schouler, Domestic Relations, sec. 91; Bishop, Marriage & Divorce [4th ed.], sec. 391; *Williams v. Monroe*, 18 B. Mon. [Ky.], 518; *Clarke v. Burke*, 65 Wis., 359; *Wing v. Hurlburt*, 15 Vt., 614; *Shelton v. Pendleton*, 18 Conn., 417; *McCullogh v. Robinson*, 2 Ind., 630; *Coffin v. Dunham*, 8 Cush. [Mass.], 404; *Morrison v. Holt*, 42 N. H., 478; *Ray v. Adden*, 50 N. H., 82; *Dow v. Eyster*, 79 Ill., 256; *Pearson v. Darrington*, 32 Ala., 229.) There are some cases holding that such an action may be maintained, but most of them were not decided under statutes like ours, and we refuse to follow their lead. As to whether an attorney who commences an action for a divorce for a wife against her husband can maintain a separate suit against the husband for his services in case the divorce proceedings are dismissed by collusion of the husband, we are not called upon to express an opinion, as no such question is presented by the record.

It is strenuously insisted by the plaintiff that at common law a husband is liable for necessaries furnished his wife, and that the common law of England is in force in this state; hence the law implies a promise on the part of the husband to pay plaintiff for the legal services rendered to the wife. The fallacy of this argument is in the conclusion drawn from the premises stated. True, a husband, while the marriage relation exists, is liable for necessaries provided the wife; but the professional services of plaintiff were not "necessaries" within the common-law meaning of that term. As said by the supreme court of Connecticut in *Shelton v. Pendleton*, 18 Conn., 417, a case like the one at bar: "The common law defines 'necessaries' to consist only of necessary food, drink, clothing, washing, physic, instruction, and a competent place of residence." This definition is not broad enough to include counsel fees, such as were sought to be here recovered. (See cases heretofore cited in this opinion.)

The next contention is that the defendant is liable to plaintiff for the amount of his claim against the wife by reason of the filing in the divorce case the notice of lien already mentioned. Section 8, chapter 7, Compiled Statutes, declares: "An attorney has a lien for a general balance of compensation upon any papers of his client which have come into his possession in the course of his professional employment, upon money in his hands belonging to his client, and in the hands of the adverse party in an action or proceeding in which the attorney was employed from the time of giving notice of the lien to that party." This statute, on compliance with its provisions as to notice, gives an attorney a lien upon the papers and funds in his possession belonging to his client, and upon moneys of his client in the possession of the adverse party in a cause in which the attorney was professionally employed. There was not anything to which an attorney's lien could here attach. Plaintiff held no papers or money belonging to Mrs. Lowe, nor was any money due his client in the hands of Mr. Lowe. Had the court in the divorce case made an order requiring the defendant to pay a sum as temporary alimony and attorney's fees, and before the payment therefor, but after notice of Mr. Yeiser's claim for lien, the divorce proceedings, by collusion between the parties, had been dismissed, *Aspinwall v. Sabin*, 22 Neb., 74, might apply. The question there involved does not arise here.

The views which we have stated make it unnecesary to discuss the alleged errors in the giving and refusing of instructions, since in no view of the case can the action be maintained. The judgment is

AFFIRMED.

OMAHA FIRE INSURANCE COMPANY V. ELIAS CRIGHTON.

FILED JANUARY 8, 1897. No. 7011.

1. **Trial:** MEMORANDA BY JURORS: REVIEW. In a suit on a fire insurance policy to recover the value of a large number of insured articles destroyed the court permitted jurors, during the trial, to make memoranda of such articles and the value placed thereon by the evidence. *Held*, That the court did not abuse its discretion.
2. **Insurance:** MISREPRESENTATIONS: EVIDENCE. The insured was unable to read and write, and the representations made by him to obtain the insurance were reduced to writing by the agent of the insurance company. *Held*, (1) Whether the insured made the representations written in the policy was a question of fact for the jury; (2) that the insured was not bound by any representation written in the application which he did not make.
3. ———: ———: ———. Evidence examined, and *held* to sustain the finding of the jury (1) that the insured did not represent that his household goods were, at the date of his application for insurance, in the building mentioned in said application; (2) that there was no representation in the written application that said goods were at said time in said building.

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

W. H. Thompson and *Jacob Fawcett*, for plaintiff in error.

W. A. Prince, contra.

RAGAN, C.

This is an action on a fire insurance policy, brought in the district court of Hall county by Elias Crighton against the Omaha Fire Insurance Company, hereinafter called the insurance company. Crighton had a verdict and judgment and the insurance company prosecutes here a petition in error.

1. Of the errors assigned by the insurance company we notice the following: On the trial of the case, at the request of counsel for Crighton, the court permitted the jurors to make memoranda of the various articles testi-

fied to have been destroyed by the fire. This is the first assignment argued which we notice. We cannot say that this action of the court was prejudicial to the insurance company. A large number of articles were testified about. The number of these articles and the values placed upon them it would be almost impossible for the average man to remember without a memorandum, and we think that it was a matter resting in the discretion of the trial court to permit or not the jurors in this case to make the memoranda complained of. We are aware that in *Cheek v. State*, 35 Ind., 492, it was held that a juryman must register the evidence on the tablets of his memory, and not otherwise; but that was a murder trial, and during its progress two of the jurors made notes of the evidence. To this the defendant on trial objected at the time, and the jurors were instructed by the court to desist from making notes. This they refused to do, and the supreme court said that their conduct was sufficient to entitle Cheek to a new trial; but the case was not reversed because of this conduct of the jurors. But in *Indianapolis & St. L. R. Co. v. Miller*, 71 Ill., 463, it was said that a juror of his own motion might make memoranda of evidence or of points in the argument, but the court said that a juror should not do this at the instance of counsel. We do not lay down any rule upon the subject, but content ourselves with holding that in this case the district court did not abuse its discretion in permitting jurors to make memoranda of articles testified about during the progress of the trial.

2. Crighton made a written application to the insurance company for the policy issued. This application, so far as material here, was as follows: "Application of Elias Crighton * * * for insurance against loss or damage by fire or lightning, * * * according to the specifications below, for the term of five years from the 23d of May, 1893: On one-story shingle roof frame building occupied by insured as dwelling, nothing; household furniture while in said dwelling, $300; farm machinery

while on farm, $480; horses and mules, wherever they be, $600; hay and grain on cultivated land, $25; hay press and horse-power on premises, $175; * * * situate on the southwest quarter of section nine (9), township ten (10), range eleven (11)." As a defense to the action the insurance company pleaded that by this application Crighton represented to it that he was the owner of the one-story frame shingle roof building situate on the land described, and that the household goods insured were then in said building; that such representations were false, made by Crighton for the purpose of deceiving the insurance company, and were believed in and relied upon by it. The reply of Crighton met this defense by denying that he represented that he was the owner of the building situate on the property described; and denied that he represented to the company that the household goods were then in said building, but alleged that he was illiterate and unable to read and write; that the agent of the insurance company wrote the application and that he, Crighton, told him at the time that the household goods were then in some tents, but that in a few days he intended to move them into the house on the piece of land mentioned. On this issue the court instructed the jury to the effect that since the oral statements of the application for insurance were reduced to writing by the agent of the insurer, parol evidence was admissible to show that the application did not correctly recite the oral representations made. The giving of this instruction is the second assignment of error argued here. The court did not err in giving this instruction. In *State Ins. Co. v. Jordan*, 29 Neb., 514, it was held that where the insured was unable to read and write, and the application was made out by the agent of the insurance company, that if the agent wrote in the application statements different from those made by the insured, the latter was not bound thereby.

3. A third assignment is that the court erred in giving paragraph No. 6 of its instructions. The substance of

that instruction was that if the insurance company's agent had knowingly written in the application statements not made by the insured, and was now insisting upon these representations as a defense to the policy, that the insurer's conduct amounted to an attempted fraud, and that it was a question of fact for the jury to determine, from all the facts and circumstances in evidence, whether the application contained the representations made by the insured. The criticism made upon this instruction is that there was no evidence in the case to which it could be applied; but this is a mistake of counsel. The evidence is undisputed that the insured was unable to read and write; that he made his representations and statements orally to the agent of the insurance company, and that such agent made out the application already alluded to, and the insured testified positively that he told the insurance agent that the household goods insured were at that time in tents, and not in the building mentioned in the application, but that he intended in a few days to remove such household goods into that building. The evidence further shows that he did remove his household goods into that building, and that they were there long before the fire occurred, and the application shows on its face that the insured did not ask or obtain any insurance on the building, and it would require a strained construction to make the application a representation of the insured that he owned that building or that the household goods were then in it. The language of the application is that the insured desires insurance upon the household goods while they are contained in the building, but there is in the entire application no express representation either that the insured owned the building or that the goods were then in it.

4. Another argument is that the verdict of the jury is contrary to instruction No. 1 given by the court at the request of the insurance company. There is no merit whatever in this contention. By that instruction the court told the jury, in substance, that if they found from

the evidence that the insured, in his application, represented to the insurance company that his household goods and furniture were then in the building, that the building was then occupied by him, and that he made these representations for the purpose of obtaining the insurance on the household goods and other insured property; that the insurance company believed in and relied upon these representations, and that they were false, then they should find for the insurance company. By its verdict the jury found that the insured did not represent in his application that he was the owner of the building, did not represent that the household goods were then in the building, and the evidence supports this finding. The instruction properly submitted the issue to the jury, and its finding is not contrary either to the evidence or the instruction.

5. The insurance company requested the court to instruct the jury as follows: "You are instructed that the application and policy introduced in evidence should be considered together as forming the contract sued on in this case." The court modified it as follows: "And should be both considered together, in arriving at your verdict, in connection with all the other evidence in the case," and as thus modified gave the instruction. This action of the court is assigned for error. We do not think it was. If the court had given the instruction without the modification it would have been error, as it would, in effect, have told the jury that they should determine what contract existed between the insured and the insurer by considering only the policy and the written application, whereas one of the issues in the case was whether the application signed by the insured was the one he made; whether the representations in that application were the representations he made.

6. Another argument is that the court erred in instructing the jury as follows: "To constitute fraud a knowledge of the misrepresentations must rest with the party making it, and the representations must be made with the intention that the other party shall act upon it, and it

must also appear that the other party did act upon it to his injury." The criticism upon this instruction is directed to the last three words in it, to-wit, "to his injury." We think the criticism without merit. In order for the representation to be actionable, it must have been made with reference to an existing fact; it must have been false; the party must have relied and acted upon it. The words "to his injury" add nothing to the instruction as applied to the facts in this case. If the representations made by the insured in this case were false, if they were relied and acted upon by the insurance company, they were acted upon to its injury, because by acting upon them it issued the policy, which it would not have issued had it been aware of the falsity of the representations.

7. Finally, it is insisted that the verdict is not supported by sufficient evidence. We think it is, and we further think that the entire defense to this action is technical in the highest degree. The whole defense is predicated upon the fact that at the time the policy was issued the household goods insured were not at that moment or that day in the dwelling mentioned in the application. The evidence shows that these household goods were not destroyed by fire. They are not the subject-matter of this action, and long before the fire occurred the household goods insured were placed in the house mentioned in the application, and the literal interpretation of the application and the policy is that the insurance company insured these household goods only while in the building. The judgment of the district court is right and is

AFFIRMED.

MARYOTT & MCHURRON V. LEVI F. GARDNER.

FILED JANUARY 8, 1897. No. 6969.

1. **Judgment Without Finding.** A judgment that is not based on a finding, either general or special, is erroneous, though not for that reason void.

2. **Review: RETAINING CASE FOR TRIAL.** Where a judgment of a county court is reversed by a district court in a proceeding in error, the district court may retain such cause for trial.

ERROR from the district court of Thurston county. Tried below before NORRIS, J. *Affirmed.*

Guy T. Graves and *Jay & Beck*, for plaintiffs in error.

John T. Cathers and *J. M. Curry, contra.*

RAGAN, C.

Maryott & McHurron recovered judgment in the county court of Thurston county against Levi F. Gardner. From this judgment Gardner prosecuted an error proceeding to the district court, where the judgment of the county court was reversed. To reverse the judgment of the district court Maryott & McHurron prosecute a petition in error here.

1. Gardner, in his petition in error filed in the district court, alleged that the judgment of the county court was erroneous for several reasons,—among others, that no finding of fact was made by the county court or a jury on which the judgment of said court was based. We shall assume that the district court reversed the judgment of the county court on this ground and proceed to the consideration of the question whether it erred in so doing. The transcript of the proceedings had in the county court, certified to the district court, contained the following: "1 o'clock P. M. Case called. Plaintiff appeared and waived a jury. Defendant refuses to appear further. Said case was submitted to the court. H. L.

Maryott was sworn in behalf of the plaintiff and testified that there is due the plaintiff, and wholly unpaid, the sum of $790.47. It is therefore considered by me that the plaintiff have and recover of the defendant the sum of $790.47, with interest from July 1, 1893, and costs of suit, taxed at $13.40." Section 297 of the Code of Civil Procedure provides: "Upon the trial of questions of fact by the court, it shall not be necessary for the court to state its finding except generally for the plaintiff or defendant," etc. It will be seen that the county court made no finding in favor of the plaintiffs in whose favor it awarded a judgment; and a judgment that is not based on a finding, either general or special, is erroneous. (*Sprick v. Washington County*, 3 Neb., 253.) In *Ransdell v. Putnam*, 15 Neb., 642, it was held: "When an action at law is tried to a court without a jury, the finding of fact by such court is a substitute for, and stands in lieu of, a verdict of a jury, and need be no more specific than the verdict of a jury upon the same pleadings and evidence." In *Foster v. Devinney*, 28 Neb., 416, it was held that a finding of the facts put in issue must be made by the trier thereof in order to sustain a judgment rendered in favor of one of the parties. To the same effect see *Rhodes v. Rhodes*, 31 Neb., 848.

Counsel for plaintiff in error insist that notwithstanding the failure of the county court to make either a general or special finding, its judgment was not void. We entirely agree with that contention. (*McNamara v. Cabon*, 21 Neb., 589; *Black v. Cabon*, 24 Neb., 248; *Coad v. Read*, 48 Neb., 40.) The judgment of the county court under consideration is not void, but it is erroneous, and therefore voidable in this, a direct proceeding to set it aside. We must not be understood as holding that a judgment that is not based on a finding is void and would not be given full effect in a collateral proceeding. It must also be remembered that we are not reviewing the judgment of the county court, but the judgment of the district court reversing the judgment of the county

court because not based upon a finding, and we simply hold that in so doing the district court was right.

2. The judgment of the district court was as follows: "It is therefore considered by the court that said judgment be, and the same is hereby, reversed at the costs to the present time of defendants in error, and it is ordered that said cause be retained for trial and judgment; pleadings to be filed as in case of appeal." It is now argued that this judgment of the district court is erroneous, as it is insisted that the jurisdiction of the district court went no further than to reverse the judgment of the county court and remand the cause to that court for further proceedings. Section 601 of the Code of Civil Procedure is as follows: "When the proceedings of a justice of the peace are taken on error to the district court, * * * and the judgment of such justice shall be reversed or set aside, the court shall render judgment of reversal, and for the costs that have accrued up to that time, in favor of the plaintiff in error, and award execution therefor; and the cause shall be retained by the court for trial and final judgment as in cases of appeal." The statute does not expressly provide that in case an error proceeding is prosecuted to a district court from a county court and the judgment of the latter reversed, the district court may retain the case for trial; nor is there any provision of the statute requiring such case to be remanded; but section 26, chapter 20, Compiled Statutes, provides: "In civil actions brought under the provisions of this chapter [probate courts] either party may appeal from the judgment of the probate court or prosecute a petition in error, in the same manner as provided by law in cases tried and determined by justices of the peace." Construing these two statutes together, we think that where a judgment of a county court is reversed by a district court in a proceeding in error the district court may retain such cause for trial. There is no error in the record and the judgment of the district court is

AFFIRMED.

GARDNER W. CLOSSON V. CHARLES J. ROHMAN.

FILED JANUARY 8, 1897. No. 8047.

Review: AGREED ABSTRACT. In a case submitted under rule 2, on an agreed printed abstract, the court will not look beyond the abstract; and, in order to a reversal of the judgment below, error must affirmatively appear from the abstract itself.

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

William B. Price, for plaintiff in error.

A. G. Greenlee, contra.

IRVINE, C.

This case was submitted under that portion of rule 2, which provides that a cause may be submitted at any time upon a written stipulation of the parties on printed briefs accompanied by, or containing, an agreed printed abstract of the record and evidence upon which the case is to be determined. On examination it is found that the parties have complied with the rule only by printing in one of the briefs the agreed statement of facts upon which the case was determined in the district court. This statement refers to a chattel mortgage in controversy, which was evidently before the district court as part of the evidence, but this mortgage is not preserved in the abstract. The correctness of the judgment may, and probably does, depend upon the terms of this mortgage, and as we cannot, in a case submitted under this rule, look beyond the printed abstract, we must presume the missing evidence was such as to justify the judgment.

AFFIRMED.

NEBRASKA LOAN & TRUST COMPANY, APPELLEE, V. GEORGE H. BARNES ET AL., APPELLANTS.

FILED JANUARY 8, 1897. No. 6975.

Confirmation of a foreclosure sale was resisted on the ground that a copy of the appraisement had not been filed before the sale was advertised. The date of the appraisement and of the copy, the clerk's filing mark, and the return of the sheriff showed that the appraisement was made and filed before the advertisement. *Held*, That the fact that the certificates of incumbrances bore a later date was not alone sufficient to establish falsity of the record in other respects.

APPEAL from the district court of Phelps county. Heard below before BEALL, J. *Affirmed.*

F. G. Hamer, for appellants.

John A. Casto and *J. B. Cessna, contra.*

IRVINE, C.

This is an appeal from an order confirming a sale pursuant to a decree foreclosing a mortgage. The only reason urged in the brief of the appellants against the confirmation of the sale is that a copy of the appraisement was not filed until after the sale was advertised. The only evidence in support of this contention is that the certificates of incumbrances in the record are dated subsequent to the advertisement. As against this evidence we have the appraisement itself dated prior to the advertisement, and the copy of the appraisement dated prior thereto, and bearing a filing mark by the clerk showing that it was filed on the day of its date. There is also the return of the sheriff to the order of sale wherein he states that on the 31st day of August, 1893 (which was prior to the advertisement), the appraisement was made and that he forthwith deposited a copy thereof with the clerk of the district court, and thereupon advertised the

sale. The order of the court confirming the sale must be taken as a finding in favor of the appellee. The only evidence being the dates on the papers, we cannot say that the dates appearing in the certificates of incumbrances are correct and that those appearing on the appraisement itself, the sheriff's return, and the clerk's filing mark, are wrong.

AFFIRMED

JOSEPH H. NASH V. JAMES A. COSTELLO.

FILED JANUARY 19, 1897. No. 7784.

1. **Bill of Exceptions**: MOTION TO QUASH: LACHES. A motion to quash a bill of exceptions on the ground that it was not presented to the adverse party or his attorney for examination and amendment within the statutory period should be made within a reasonable time after the bill is filed in the appellate court, and where not made for nearly eighteen months after the filing of the transcript, and after briefs upon the merits have been printed and served by the respective parties, such objection will be considered waived.

2. ———. *Horbach v. City of Omaha*, 49 Neb., 851, distinguished.

MOTION by defendant to quash bill of exceptions. *Motion overruled.*

W. A. Prince, for the motion.

Abbott & Caldwell and *W. T. Thompson*, *contra.*

PER CURIAM.

This cause is submitted to the court on a motion of defendant to quash the bill of exceptions, because not presented to him either within the time fixed by law or the order of the court. A trial in this case was had at the May term, 1894, of the district court of Hall county, and judgment rendered in favor of the defendant. On the 5th day of August, 1894, the court adjourned *sine die*, and

eighty days in all were given to reduce the exceptions to writing. The draft of the proposed bill of exceptions was submitted to the defendant's attorney for correction on January 22, 1895, who made thereon the indorsement, "Atty's for defendant refuse to consider same, because not presented and submitted within statutory time," and signed the same and returned the proposed bill to plaintiff's attorneys. This objection was overruled by the trial judge, and the bill was allowed on a showing that the delay in presenting the bill to defendant resulted solely from the failure of the official court reporter to make a transcript of the evidence until said date.

The contention of counsel for defendant is that the decision on the motion is controlled by *Horbach v. City of Omaha*, 49 Neb., 851. In that case it was ruled that the delay in presenting a bill of exceptions to the adverse party, caused solely by the fault of the official stenographic reporter in preparing the transcript of the evidence, will not authorize the submission of the bill after the expiration of the time limited by the statute or fixed by the order of the trial judge. The doctrine is sound and has been followed in *Trumble v. Trumble*, 50 Neb., 332. It does not follow that the motion to quash the bill in this case should be sustained, or that *Horbach v. City of Omaha* controls the decision herein. In that case the motion to quash was made in this court within a few days after the appeal was docketed, and before either party had filed briefs upon the merits of the controversy. Not so in the case before us. The transcript and petition in error were filed with the clerk of this court June 3, 1895. Two days later the brief of plaintiff was filed. On September 11, 1895, defendant's brief on the merits was served upon adverse counsel, and the first objection made to the bill of exceptions in this court was by the motion to quash, which was filed December 31, 1896, or nearly a year and a half after the proceedings in error were commenced and the briefs of the respective parties upon the issues presented by the petition in error were printed and

filed. These facts constitute a waiver of the objection that the bill of exceptions was not submitted to the defendant for examination and amendment within the time fixed by law, if such objection can be waived, and we entertain no doubt of it. This court has repeatedly so held. (*Omaha & N. N. R. Co. v. Redick*, 14 Neb., 55; *Cattle v. Haddox*, 14 Neb., 59, 527; *Chency v. Cooper*, 14 Neb., 413; *Smith v. Kaiser*, 17 Neb., 184; *Yates v. Kinney*, 23 Neb., 648; *Warren v. Brown*, 31 Neb., 10; *Crane Bros. Mfg. Co. v. Keck*, 35 Neb., 683.) In *Yates v. Kinney, supra*, there was a motion to quash the bill of exceptions on the ground, among others, that it was not presented to the judge within the time required by law, which motion was filed more than a year after the docketing of the cause in this court, and after the plaintiff in error had prepared and presented his briefs on the main issues. The court held said objection was thereby waived, and in doing so used this language: "In a number of cases decided by this court it has been held that objections to a bill of exceptions must be made at the earliest opportunity, otherwise they will be waived. * * * Where, however, a party intends to raise objections to some matter of form connected with the preparation of a bill, he should file his objection within a reasonable time, and before the adverse party has been permitted to incur the expense of preparing and printing a brief relating to the merits of the controversy. Good faith requires this, and that objections to the form of the bill not thus raised shall be considered as waived. The objections to the preparations and signing of the bill, not having been made until more than a year from the date of filing the transcript in this court, and after the case was set down for hearing and the plaintiff in error had prepared and printed his briefs, come too late and are, therefore, waived." To this same effect is the decision in *Crane Bros. Mfg. Co. v. Keck, supra.*

It is true, as already suggested, the objection that the proposed bill was not presented for examination in time was made before the same was signed by the judge. This

step was indispensable to save the objection for the consideration of this court, in case it was afterwards insisted upon. The objection not having been seasonably renewed in this court, it must be treated as waived. This holding does not in the least conflict with the cases in which this court, of its own accord, has refused to consider bills of exceptions allowed by the clerk of the district court without a proper stipulation, signed by the parties, authorizing him to do so, or bills which have not been authenticated by the clerk of the trial court, notwithstanding no objection to the same was raised by either party. The failure to submit the bill of exceptions for examination in time is not a jurisdictional defect; hence, it may be waived, while if a proposed bill is signed and allowed by the clerk in a case where the statute does not authorize him to do so, his act of signing and settling is a nullity and the bill does not become a part of the record, even though the parties make no objection to it on that ground. So, too, the omission of the clerk's certificate authenticating a bill of exceptions cannot be waived by the parties, because the statute requires it to be thus authenticated; and to the transcript of the record of the trial court, duly certified, alone we must look for the purpose of ascertaining the proceedings had and taken in such court. (*Union P. R. Co. v. Kinney*, 47 Neb., 393, and cases there cited.) The motion to quash must be overruled.

MOTION OVERRULED.

EFFIE E. THOMPSON, ADMINISTRATRIX, V. MISSOURI PACIFIC RAILWAY COMPANY.*
ART ELIZA ALEXANDER V. JOHN OVERTON ET AL.
JAMES A. HAKE ET AL. V. SAMUEL WOOLNER.
JESSE S. MAPES ET AL. V. VILLAGE OF SYRACUSE.
HATTIE W. BROWN V. EPHRAIM P. HARTMAN.

FILED JANUARY 19, 1897. Nos. 7256, 8125, 8163, 8286, 8581.

1. **Bill of Exceptions**: OBJECTIONS TO ALLOWANCE: REVIEW. Objection to a bill of exceptions that it was not presented for examination and amendment within the statutory period, not made before the bill was signed and allowed by the trial judge, but raised for the first time in the supreme court, will not be considered.
2. ———: WAIVER OF OBJECTIONS: REVIEW. Where a bill is served upon the adverse party after the time therefor had expired, and the parties stipulated in writing that the trial judge should sign and allow the bill, it is a waiver of the objection that the bill was not presented within the time fixed by law or the order of the court.

MOTIONS by defendants to quash the bills of exceptions. *Motions overruled.*

B. P. Waggener, James W. Orr, John C. Watson, John W. Dixon, and *A. N. Sullivan,* for the motions.

Matthew Gering, C. W. Seymour, Hall, McCulloch & Clarkson, E. F. Warren, M. L. Hayward, F. E. Brown, and *Paul Jessen, contra.*

PER CURIAM.

Each of these causes was submitted upon a motion to quash the bill of exceptions. The grounds therefor, and the facts connected therewith, are similar to those stated in *Nash v. Costello,* 50 Neb., 325, the only difference in the facts being that in none of the cases was any objection to the proposed bill made before the same was signed and

*Motion for rehearing overruled. See *post,* p. 330.

allowed by the trial judge, while in the case of Hake v. Woolner, after the statutory period for serving the bill had elapsed, the attorneys for the respective parties stipulated, in writing indorsed thereon, that the bill of exceptions should be allowed and signed by the judge. In each case the draft of the proposed bill was served upon opposing counsel out of time, and the motion to quash was not filed until months after the cause had been docketed in this court, and the briefs of plaintiff in error on the merits had been printed, served, and filed. In all the cases but two, the defendants' counsel had filed their briefs before any objection to the bill of exceptions was raised in this court. The determination of the several motions is controlled by the decision in *Nash v. Costello, supra*, and cases there cited. The objection now urged against the bill of exceptions has been waived, and the motions to quash are denied.

MOTIONS OVERRULED.

EFFIE E. THOMPSON, ADMINISTRATRIX, v. MISSOURI PACIFIC RAILWAY COMPANY.

FILED MARCH 3, 1897. No. 7256.

Bill of Exceptions: MOTION TO QUASH: LACHES. A motion to quash a bill of exceptions, which has been duly allowed by the trial judge and properly authenticated, made more than a year after the filing of the same and the transcript in this court, and after the service of briefs on the merits, comes too late.

MOTION by Missouri Pacific Railway Company for rehearing of preceding case, 50 Neb., 329. *Rehearing denied.*

B. P. Waggener, James W. Orr, and *A. N. Sullivan*, for the motion.

NORVAL, J.

Defendant asks for a rehearing of its motion to quash the bill of exceptions herein, which motion was based upon two grounds, not considered in the former opinion: (1) That no notice of the settlement of the bill of exceptions was served upon the defendant; (2) that the proposed bill was not presented to the trial judge within the time required by law. The term of court at which the judgment was rendered adjourned *sine die* on May 1, 1894, and forty days from the rising of the court was given to reduce the exceptions to writing. Subsequently the time was extended for an additional forty days. On July 17, 1894, the draft of the proposed bill of exceptions was served upon counsel for defendant, which was returned to plaintiff, with certain proposed amendments, eleven days thereafter. The bill and the amendments suggested were submitted to the trial judge for allowance without notice to the defendant. Judge Chapman makes affidavit that it was not presented to him for allowance until September 6, while Mr. Gering, in his affidavit, explicitly states that the bill and proposed amendments were delivered to the trial judge for settlement and allowance prior to August 1, 1894. The transcript and bill were filed in this court on the 20th day of October, 1894. The briefs upon the merits were filed August 15, 1895, by both parties, and the motion to quash was not filed until nearly a year and a half thereafter.

The question of veracity between Judge Chapman and Mr. Gering we shall not attempt to decide, but shall assume that the bill was presented for allowance as required by law, since the judge signed the bill without raising any objection as to time, and the defendant retained the proposed bill more than ten days after service upon it. Moreover, this objection to the bill was waived by the filing of briefs on the merits and the inexcusable delay in raising it in this court. (*Yates v. Kinney*, 23 Neb., 648.)

The other ground of the motion to quash would have been available had it been timely presented, since it was the duty of the plaintiff to have given notice to the adverse party of the time of the presentation of the bill for settlement, as amendments to the bill were suggested. It is too late now to insist upon the lack of notice. (*Nash v. Costello*, 50 Neb., 325, and cases there cited.

MOTION OVERRULED.

HENRY E. TRUMBLE ET AL. V. WALTER TRUMBLE ET AL.

FILED JANUARY 19, 1897. No. 8943.

Bill of Exceptions: LACHES. A party seeking a bill of exceptions presented his proposed bill to the adverse party or his attorney for amendment subsequent to the expiration of the time fixed by law and the order of the trial judge, and objection to the allowance of the bill, on that ground, was distinctly made to the trial judge before the same was settled and allowed, which objection was renewed at the earliest opportunity in the appellate court, and prior to the briefing of the cause on the merits. *Held*, That the bill should be quashed. *Horbach v. City of Omaha*, 49 Neb., 851, followed.

MOTION by defendants in error to quash the bill of exceptions. *Motion sustained.*

Halleck F. Rose, for the motion.

Gilkeson, Comstock & Reese, contra.

PER CURIAM.

This cause was tried and determined in the district court of Lancaster county at the September, 1895, term thereof, and forty days from the rising of the court was granted plaintiffs in error to present the bill of exceptions to the adverse party. Subsequently the trial judge allowed forty days additional time for that purpose, but the proposed bill of exceptions was not submitted to the

defendants in error until April 20, 1896, which was more than eight days after the adjournment of the term at which the decree in question was entered. The next day the draft of the bill of exceptions was returned to plaintiffs in error, with the following indorsement thereon:

"MARTHA TRUMBLE
v.
WALTER N. TRUMBLE ET AL. } April 21, 1896.

"To Henrietta M. Goodel and Henry E. Trumble, Mess. Gilkeson, Comstock & Reese, Their Attorneys: We return the within draft of proposed bill of exceptions in the above entitled case, and object to its consideration or allowance as a bill by the judge who heard the case for the reason that the same was not prepared nor served upon us within the time limited by law, nor till long after the limitation provided by law for preparation and service thereof had expired, and the court and judge who heard the cause is without jurisdiction to consider, allow, and settle a bill of exceptions in said cause.

"WEBSTER, ROSE & FISHERDICK,
"Atty's for Plaintiff, and for Defendants Walter Trumble and Charles Trumble."

Notwithstanding said objection, the trial judge allowed the bill, without notice, and counsel for defendants in error moved, within twelve days after the docketing of the cause in this court, to quash the bill of exceptions, upon the ground, among others, that the same was not presented to them or their clients for examination and amendment within the time limited by the statute. The question of practice presented by said motion was considered and determined in *Horbach v. City of Omaha*, 49 Neb., 851. Objection to the proposed bill on the ground that it was served out of time was made before the settlement of the bill, and it was renewed in this court at the earliest opportunity, before briefs had been prepared and served by either party on the merits, and, under the precedent above mentioned, the motion to quash the bill is sustained.

MOTION SUSTAINED.

FRANK B. GRIFFING V. SAMUEL S. CURTIS ET AL.

FILED JANUARY 19, 1897. No. 6960.

Replevin: PLEADING: SPECIAL OWNERSHIP. In replevin, where plaintiff bases his right to the possession of the property upon a special ownership therein, he must in his petition plead the facts which create such special ownership, else the pleading will be fatally defective.

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

Smith & Sheean, for plaintiff in error.

Saunders & Macfarland, contra.

POST, C. J.

Samuel S. Curtis and Fred Sackett brought replevin in the court below against Frank B. Griffing, to recover possession of a horse, carriage, buggy, and set of harness. The trial resulted in a verdict and judgment for the plaintiffs below for the horse, and the remainder of the property was awarded the defendant, who prosecutes error to this court.

The petition in error contains seven assignments, the first of which is that the petition does not state sufficient facts to constitute a cause of action. The petition, omitting the caption, prayer, and verification, is in the following language:

"1. The plaintiffs complain of the defendant for that, the plaintiffs have a special ownership in and are entitled to the immediate possession of the following described goods and chattels, viz: One bay horse, eight years old, weighing 1,000 pounds; a certain end-spring, canopy-top, two-seated carriage; a certain end-spring open buggy, painted red, and one set of single harness, and the value of said ownership is $106.90.

"2. The defendant wrongfully detains said goods from the possession of the plaintiffs, and has wrongfully detained the same for one day, to plaintiffs' damage in the sum of $5."

The plaintiffs base their right to possession alone upon a special ownership in the property, and the facts in relation thereto are not set out in the petition. The averment in the pleading of special ownership is a mere conclusion of law from particular facts which are not alleged. To constitute a good petition it should have set out the facts constituting plaintiffs' special ownership or interest in the property replevied. (*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; *Strahle v. First Nat. Bank of Stanton*, 47 Neb., 319; *Garber v. Palmer*, 47 Neb., 704.)

Having reached the conclusion that the petition does not state a cause of action, it is not necessary to notice the other assignments of error.

REVERSED AND REMANDED.

CITY OF ORD V. ANN E. NASH.

FILED JANUARY 19, 1897. No. 6992.

1. **Municipal Corporations:** SIDEWALKS. The term "sidewalk" is a comprehensive one, and in its broadest sense denotes that portion of the public highway set apart, by dedication, ordinance, or otherwise, for the use of persons traveling on foot.

2. ———: LIABILITY FOR FAILURE TO REPAIR STREET. Where a city or other municipality grades or otherwise improves any portion of a street for the purpose, and with the result, of inducing public travel thereon, there is a resulting duty to keep such portion of the street in repair and a consequent liability for the failure to do so.

3. ———: DUTY TO REPAIR STREETS: INSTRUCTIONS. It is not error to charge that a city is required to keep its streets and sidewalks in a reasonably safe condition for travel by night as well as by day.

4. ———: ———: ———: CONTRIBUTORY NEGLIGENCE. An instruction

that it is the duty of a city to keep its streets in a reasonably safe condition for travel by all persons is not objectionable on the ground that it excludes from the jury the question of alleged contributory negligence by the plaintiff.

5. **Evidence:** WITNESSES: TESTIMONY AT FORMER TRIAL. Where a witness is shown to be absent from the state, his testimony given at a former trial of the same cause is admissible if otherwise unobjectionable.

6. ———: ———: ———. Nor, in the absence of a showing upon the subject, is the fact that such witness has also testified at a second trial of the cause, which has intervened between the taking of such testimony and the one at which it is offered, a sufficient objection to its introduction in evidence.

7. ———: EXPERIMENTS. Some discretion is conferred upon the trial court in receiving evidence of experiments for the purpose of contradicting or corroborating other witnesses, and in order to authorize the reversal of a judgment on account of the admission or rejection of such evidence there must have been a clear abuse of discretion.

ERROR from the district court of Valley county. Tried below before HARRISON, J. *Affirmed.*

A. Norman, A. M. Robbins, and *Coffin & Stone,* for plaintiff in error.

Munn & Staple and *Clements Bros., contra.*

POST, C. J.

This was a suit by the defendant in error, Ann E. Nash, in the district court for Valley county, against the plaintiff in error, the city of Ord, the cause of action alleged being the negligence of the defendant city in causing and continuing a deep and dangerous excavation or trench at the intersection of two streets within said city, and within a few inches of the path or footway in common use by the public in passing along said streets. There was a trial below, resulting in a verdict and judgment in favor of the plaintiff therein, and which it is sought to reverse by means of this proceeding.

It is alleged in the petition below that the plaintiff therein, after dark, on the 7th day of November, 1890,

while passing along said streets, and without fault or negligence on her part, fell into the aforesaid excavation or trench, thereby receiving serious and permanent injuries, to her damage, etc., and which allegations are put in issue by the answer of the defendant city.

It is contended, first, that the trial court erred in giving instructions Nos. 2, 4, 8, and 9 on its own motion. It is not deemed necessary to set out at length the paragraphs assailed, since the particular objection now urged is that the jury were warranted in inferring therefrom that it was the duty of the city to construct and maintain a sidewalk at the place where the injury was received, and that its failure in that regard constituted actionable negligence. The instructions, it is true, state the general proposition, that a city is bound to keep its streets and sidewalks in reasonably good repair for the safe and convenient use of the traveling public, and close with the following cautionary statement: "The city of Ord is not an insurer of the condition of its streets and sidewalks; nor is every defect therein, though it may cause the injury sued for, actionable. It is sufficient to relieve it from liability if the streets and sidewalks were in a reasonably safe condition for foot travel by night. If in this case it is shown by the evidence that at the place where the plaintiff claims she met with her injury the street or sidewalk was in a reasonably safe condition for foot travelers, your verdict should be for the defendant." The term "sidewalks," although, perhaps, not the most precise or accurate which, under the circumstances of the case, might have been employed, could not, we think, have misled the jury or diverted their minds from the real issue presented by the pleadings and proofs. The alleged negligence, as we have seen, was the causing and continuing of a dangerous trench in the public street within a few inches of the path or footway in common use by the public. We are aware of no rule requiring the construction of artificial sidewalks as a condition precedent to the right of foot passengers to the safe and

convenient use of streets actually opened and dedicated to public uses. The term "sidewalk" is a comprehensive one, and in its broadest sense denotes that portion of the public highway which is set apart by dedication, ordinance, or otherwise for the use of pedestrians. (See Elliott, Streets & Roads, p. 17.) In *James v. City of Portage*, 48 Wis., 677, a case strongly in point, it is said: "If a street in a city is adopted or laid out and opened as a highway for all kinds of travel thereon, and, without any direction or interference of the city or its authorities, a portion thereof alongside of the part used for teams and carriages is used by the people who travel on foot as a footway or sidewalk, that part so used becomes as much a part of such street as that used for the passage of teams and carriages." And, in general, where a city or other municipality grades or improves any portion of a street for the purpose, and with the result of inducing public travel thereon, there is a resulting duty to keep such portion in repair and the consequent liability for a failure to do so. (*Lindholm v. City of St. Paul*, 19 Minn., 245; *Triese v. City of St. Paul*, 36 Minn., 526; *City of Lincoln v. Gillilan*, 18 Neb., 114; *City of South Omaha v. Cunningham*, 31 Neb., 316.) The streets in question had been graded and improved by authority of the city, and the trench described in the petition was made some time previous to the accident, in order to facilitate the repairing of water mains laid the year previous. The plaintiff below was, at the time of the accident, returning to her home from the house of a neighbor along a path extending east and west, commonly used by pedestrians, and which, at the intersection of said streets, was within a few inches of the trench above described. The instructions complained of could not, therefore, have misled the jury to the prejudice of the defendant city, which had, by inducing public travel at the point in question, assumed the burden of keeping the streets in repair.

An additional objection to instruction No. 4 is on account of the statement therein that a city is required to

keep its streets and sidewalks in a reasonably safe condition for travel "by night as well as by day." It is argued that the duty thus imposed would require the lighting by the city of all streets within its limits. But the objection is, we think, without force. The rule stated is elementary and has been recognized as sound by all writers who have had occasion to comment upon the subject. (See Dillon, Municipal Corporations, sec. 1019; Elliott, Roads & Streets, p. 448; *Tritz v. City of Kansas City*, 84 Mo., 632.)

Exception is taken to instruction No. 8 given at the request of the plaintiff below, to the effect that it is the duty of a city to keep its streets in a reasonably safe condition for travel by all persons. The particular criticism of this instruction is directed to the word "all," which, it is contended, excludes from the jury the question of contributory negligence; but in the same sentence it is expressly stated that the plaintiff, in order to recover, must prove that the injury complained of was received without fault on her part, and in other paragraphs the law of contributory negligence is correctly stated and applied. The use of the word "all," if erroneous, is accordingly error without prejudice.

Another assignment is the admission in evidence, over the objection of the defendant city, of the testimony of Mrs. Way given on a former trial. It appears from the admissions of counsel that there were two trials of the cause previous to that resulting in the judgment now before us for review, at each of which Mrs. Way testified in behalf of the plaintiff therein. It is also shown and not disputed, that the witness named is now a resident of the state of California and was not within the jurisdiction of the district court at the date of the third trial. From the testimony of Mr. Henderson, the stenographer who reported the proceedings of the second trial, it appears that the notes taken by him have been destroyed and the testimony then given cannot be reproduced. Upon that showing the plaintiff was permitted to read in evidence the testimony of said witness on the first trial. It has

been held in this state that where a witness is shown to be absent from the state, his testimony given at a former trial of the same cause is admissible in evidence if otherwise unobjectionable. (*City of Omaha v. Jansen*, 35 Neb., 68; *Omaha Street R. Co. v. Elkins*, 39 Neb., 480.) It is contended that the rule there recognized is not applicable to the facts of this case, since it would, in the language of counsel, "be manifestly unfair to allow the plaintiff to select the testimony first given by the witness for the reason that the same was more favorable to her side of the case." There is, however, no ground for that contention. In the first place, it cannot be inferred that the testimony of the witness at the first trial was more favorable to the plaintiff below than that subsequently given by her; and, secondly, the reason for the admission of such evidence is applicable to each of several trials at which testimony was given by the witness touching the issue involved. (1 Greenleaf, Evidence, sec. 163.) It is unnecessary to examine the cases cited by the city. It is sufficient that they in nowise conflict with the views here expressed.

Finally, it is argued that the trial court erred in rejecting as evidence the result of certain experiments made a year or more subsequent to the accident. The witnesses named were, according to the offer in the record, on a cloudy night, with the assistance of a light in an adjoining house, similarly situated to one burning at the time of the accident, able to plainly see the footpath and also the surface of the ground, for a radius of several feet from the point where the injury was received. There is, as all agree, some room for the exercise of discretion by the trial court in the receiving and rejecting of evidence of this character, and we are unable to say that there has, in this instance, been an abuse of such discretion. We must not be understood as intimating that it would have been reversible error to receive the evidence offered; but the rejecting of evidence tending to prove that the condition of the premises was, at a sub-

sequent time, discernible by witnesses whose attention was specially directed to the subject, and under circumstances in some respect at least materially different from those surrounding the plaintiff below at the time of the accident, affords no ground of complaint by the city.

There is no prejudicial error disclosed by the record, and the judgment is

AFFIRMED.

HARRISON, J., not sitting.

CREIGHTON UNIVERSITY, APPELLEE, V. JAMES E. RILEY ET AL., APPELLANTS.

FILED JANUARY 19, 1897. No. 6950.

1. **Review**: JUDICIAL SALES: OBJECTIONS. Grounds for setting aside a judicial sale are unavailing on review unless they were presented in the court below.
2. ———: ———: CONFLICTING EVIDENCE. The rule that this court will not disturb the finding of a trial court made upon conflicting testimony applies to orders confirming judicial sales.

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

E. C. Page, for appellants.

Frank T. Ransom, contra.

POST, C. J.

This is an appeal from an order confirming a sale of real estate. The grounds relied upon for a reversal are: (1.) The officer conducting the sale made no announcement of the property about to be sold. (2.) The sale was not opened at the advertised time.

The first objection not having been raised in the court below in the motion to set aside the sale, is not available

on review in this court. (*Ecklund v. Willis*, 44 Neb., 129; *Hooper v. Castetter*, 45 Neb., 67.) Moreover, there is ample testimony in the record tending to prove that the officer did announce the property to be sold prior to the sale. The sale was advertised to take place on October 31, 1893, at 10 o'clock A. M. Whether the sale was actually opened at the precise hour named, the testimony is conflicting. The sheriff's return to the order of sale discloses that the property was offered at the time stated, and the testimony in support of the return is sufficient to show that the sale was opened at 10 o'clock in the morning of said day, and remained open for one hour thereafter. The testimony adduced by the defendant is to the effect that the property was not offered for sale before 11:10 A. M. Even if this were true it was not shown that there was any person present at the place of sale between 10 o'clock and that hour who desired to make a bid upon the property, or that the defendants were in any manner prejudiced by the omission of the officer to proceed with the sale at the appointed hour, if he did so fail. There is sufficient evidence in the record to sustain the finding of the court below that the sale was held at the appointed time, and the order of confirmation is accordingly

AFFIRMED.

OMAHA LOAN & TRUST COMPANY SAVINGS BANK, APPELLEE, V. BENJAMIN P. KNIGHT ET AL., APPELLANTS.

FILED JANUARY 19, 1897. No. 7001.

1. **Review**: LACHES. A judgment or decree from which no appeal has been taken within the statutory time will not be reviewed by the appellate court.

2. **Appearance**: WAIVER OF DEFECTS. A general appearance by a defendant in a cause is a waiver of all defects in the issuance and service of the summons, and gives the court jurisdiction.

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

John L. Carr, for appellants.

Francis A. Brogan, contra.

POST, C. J.

On the 5th day of November, 1892, a decree of foreclosure of a real estate mortgage was entered in the cause in the court below, it finding that there was due the plaintiff from Benjamin P. Knight and Adeline F. Knight the sum of $2,671.86, and directing that the mortgaged premises be sold to satisfy the same unless said sum should be paid within twenty days from that date, and "that if there be any balance remaining due the plaintiff after said sale, a judgment shall be rendered in favor of the plaintiff, and against the defendants Benjamin P. Knight and Adeline F. Knight, for the amount thereof." Subsequently an order of sale was issued, and the property sold thereunder, which sale was duly confirmed by the court. Thereafter, on April 4, 1893, plaintiff filed a motion for a deficiency judgment, and notice of the time and place of the hearing thereof was served upon the defendants by delivering to Benjamin P. Knight personally a true and certified copy of the notice and motion, and by leaving a like copy of each for Adeline F. Knight at her usual place of residence in Douglas county. Pending the hearing of this motion Mrs. Knight filed a petition to modify the said decree of foreclosure so far as it found that she was liable for a judgment for any deficiency there should be after the sale of the property. A deficiency judgment was rendered against Benjamin P. Knight on April 27, 1893, and the motion for a deficiency judgment against Mrs. Knight was continued to await the hearing of her application to modify the decree. At the September, 1893, term of the court, to-wit, on November 23, 1893, the petition to modify the decree was denied,

and a deficiency judgment was rendered against Adeline F. Knight for $920.08. Afterwards, and at the February, 1894, term, a motion was filed by her to set aside the deficiency judgment rendered at the preceding term, which motion was denied on March 27, 1894. The transcript on appeal was filed in this court on the 6th day of June, 1894.

Most of the questions argued in the brief of appellants are based upon alleged errors in the cause preceding the entry of either the original decree or the deficiency judgments, which were rendered against Mrs. Knight, and cannot now be reviewed, inasmuch as the decree of foreclosure was rendered more than two years, and the last deficiency judgment was entered more than six months, prior to the docketing of the appeal in this court. No appeal having been taken from such judgments or decree within the statutory limit, there is no jurisdiction to review either of them. (*Renard v. Thomas*, 50 Neb., 398, and cases there cited.) Neither of the appellants is in a situation to take advantage of the errors of the court in entering the decree or deficiency judgment, if errors were committed.

The sole matter before the court for determination is the correctness of the decision denying the motion to set aside the deficiency judgment rendered against Mrs. Knight, as that was the only order from which an appeal has been prosecuted in time. The ground of the motion is that the deficiency judgment was irregularly obtained, in that the summons served on Mrs. Knight did not apprise her that plaintiff claimed a deficiency judgment. The summons contained this indorsement: "Amount claimed of defendant by the plaintiff is $——, and foreclosure of mortgage." Whether this was sufficient to authorize the entry of a personal judgment in the case against Mrs. Knight is wholly immaterial, for two reasons: First, notice of the application for the deficiency judgment was duly served upon her. In the next place, she appeared and resisted the application, and subsequently moved to set aside the

judgment for deficiency. This constituted a waiver of the defects, if any there were, in the indorsement on the summons. (*Cropsey v. Wiggenhorn*, 3 Neb., 108; *Orr v. Seaton*, 1 Neb., 105; *Crowell v. Calloway*, 3 Neb., 215; *White v. Merriam*, 16 Neb., 96; *Warren v. Dick*, 17 Neb., 241; *Tootle v. Jones*, 19 Neb., 588.) No error was committed in refusing to vacate the deficiency judgment, and the order is accordingly

AFFIRMED.

MODERN WOODMEN ACCIDENT ASSOCIATION V. ALBERT M. KLINE.

FILED JANUARY 19, 1897. No. 6890.

1. **Insurance:** AMBIGUITY IN POLICY: PAROL EVIDENCE. Where, by reason of omission or ambiguity, in a written policy of insurance the time when such instrument becomes operative is left in doubt, parol evidence is admissible for the purpose of supplying such omissions.
2. ———: CONTRACT: PAYMENT OF ASSESSMENTS. The parties to a contract of insurance may stipulate that such contract will not become operative as an indemnity until payment in full by the insured of all charges and assessments required by the constitution, rules, and regulations of the insurer.
3. ———: ———: ———: WAIVER. *Held*, From an examination of the evidence, that the receipt of payment by the defendant association, subsequent to the injury claimed for, applied to future indemnity only, and was not a waiver of payment in full as condition to the taking effect of the certificate or policy of insurance.

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

The opinion contains a statement of the case.

A. R. Talbot, for plaintiff in error:

The court erred in not receiving and giving weight to the parol testimony of the defendant showing the truth

and conditions upon which the certificate was issued and the agreement as to when it should be in force. (*Morse v. Rice*, 36 Neb., 212; *Luce v. Foster*, 42 Neb., 818; *Barnett v. Pratt*, 37 Neb., 349; *Lyon v. Supreme Assembly*, 26 N. E. Rep. [Mass.], 236; *McAlpin v. Cassidy*, 17 Tex., 462; *Sheldon v. Atlantic Ins. Co.*, 26 N. Y., 460; *Bradley v. Potomac Ins. Co.*, 32 Md., 108; *Pitt v. Berkshire Life Ins. Co.*, 100 Mass., 504; *Bergson v. Builders' Ins. Co.*, 38 Cal., 545; *Burke v. Dulaney*, 153 U. S., 228; *Ware v. Allen*, 128 U. S., 591; *Pym v. Campbell*, 6 El. & Bl. [Eng.], 370; *Davies v. Jones*, 17 C. B. [Eng.], 625; *Wallis v. Littell*, 11 C. B., n. s. [Eng.], 369; *Wilson v. Powers*, 130 Mass., 127; *Pawling v. United States*, 4 Cranch [U. S.], 219; *Perrine v. Cheeseman*, 19 Am. Dec. [N. J.], 388; *Reynolds v. Robinson*, 110 N. Y., 654; *Simonton v. Steele*, 1 Ala., 357; *Roberts v. Austin*, 5 Whart. [Pa.], 313; *Benton v. Martin*, 52 N. Y., 570; *Sweet v. Stevens*, 7 R. I., 375; *Stevens v. Parker*, 7 Allen [Mass.], 361; *Curry v. Cotton State Life Ins. Co.*, 51 Ga., 624; *Todd v. Piedmont Life Ins. Co.*, 34 La. Ann., 63; *Baile v. St. Joseph Fire & Marine Ins. Co.*, 73 Mo., 371; *Garlich v. Mississippi Ins. Co.*, 44 Ia., 553; *How v. Union Mutual Life Ins. Co.*, 80 N. Y., 32; *Ormond v. Fidelity Life Ass'n*, 96 N. Car., 158; *Worthington v. Charter Oak Life Ins. Co.*, 41 Conn., 401.)

Plaintiff in error did not waive its right to insist upon the certificate not being in force at the time of the accident by accepting Kline as a member of the association after the injury. (*Lyon v. Supreme Assembly*, 26 N. E. Rep. [Mass.], 236; *McCoy v. Roman Catholic Mutual Ins. Co.*, 152 Mass., 272; *Hale v. Mechanics Mutual Ins. Co.*, 6 Gray [Mass.], 169; *Sweet v. Citizens Mutual Relief Society*, 78 Me., 541; *Miller v. Hillsborough Fire Ins. Ass'n*, 7 Atl. Rep. [N. J.], 895; *Fairfield Savings Bank v. Chase*, 72 Me., 226.)

Walter J. Lamb and *H. W. Quaintance, contra:*

An acknowledgment of the receipt of the money, which is the consideration for the making of the policy, cannot be contradicted in a suit brought upon that policy. (*Con-*

solidated Real Estate & Fire Ins. Co. v. Cashow, 41 Md., 59; *Basch v. Humboldt Mutual Fire & Marine Ins. Co.*, 35 N. J. Law, 429; *Baum v. Parkhurst*, 26 Ill. App., 128; *Illinois Central Ins. Co. v. Wolf*, 37 Ill., 355; *Teutonia Life Ins. Co. v. Anderson*, 77 Ill., 386; *Provident Life Ins. Co. v. Fennell*, 49 Ill., 180.)

Testimony of a prior parol agreement that the policy should not be in force until paid for is inadmissible. (*Baum v. Parkhurst*, 26 Ill. App., 130; *Thomas v. Scutt*, 127 N. Y., 138; *Wurtzbarger v. Anniston Rolling Mills*, 10 So. Rep. [Ala.], 129; *Haworth v. Norris*, 10 So. Rep. [Fla.], 18; *Casselberry v. Warren*, 40 Ill. App., 626; *Dodge v. Kiene*, 28 Neb., 221; *Bushaw v. Women's Mutual Ins. & Accident Co.*, 8 N. Y. S., 423.)

The insurer waived the forfeiture, if any, and became liable for the injury sustained by Kline from the date of the policy, by receiving the consideration money therefor. (*Schoneman v. Western Horse & Cattle Ins. Co.*, 16 Neb., 404; *Bevin v. Connecticut Mutual Life Ins. Co.*, 23 Conn., 244; *Hodson v. Guardian Life Ins. Co.*, 97 Mass., 144; *Ellis v. State Ins. Co.*, 27 N. W. Rep. [Ia.], 762; *Phœnix Ins. Co. v. Tomlinson*, 25 N. E. Rep. [Ind.], 126; *Phœnix Ins. Co. v. Lansing*, 15 Neb., 494; *Nebraska & Iowa Ins. Co. v. Christiensen*, 29 Neb., 572; *Palmer v. Phenix Mutual Life Ins. Co.*, 84 N. Y., 63; *McAllister v. New England Mutual Ins. Co.*, 101 Mass., 558.)

It was not necessary that the insurer, by its secretary, should expressly waive the prepayment of the membership fee. It is sufficient as an estoppel that the company led plaintiff below to believe that it would do so. (*Odd Fellows' Mutual Aid Association v. Sweetser*, 19 N. E. Rep. [Ind.], 722; *Michigan Mutual Life Ins. Co. v. Custer*, 27 N. E. Rep. [Ind.], 124.)

POST, C. J.

The defendant in error, Albert M. Kline, recovered judgment in the district court for Lancaster county upon a contract of indemnity issued by the defendant in error,

the Modern Woodmen Accident Association, a Nebraska corporation, hereafter called the "association." The certificate of membership, which is made a part of the petition below, recites that "in consideration of the warranties in the application for this certificate, and the agreement on the part of the certificate holder to accept the conditions contained in his application and this certificate, as the basis of this contract, and in consideration of three dollars ($3) paid by Albert M. Kline, of Lincoln, Lancaster county, Nebraska, the receipt whereof is hereby acknowledged, does hereby constitute the said applicant a certificate holder of said association, and agrees to pay the said certificate holder upon the following conditions, the following sums of money. Provided, however, * * * First, that the certificate holder shall be bound by the rules and regulations of this association; Second, that the certificate holder shall pay all assessments levied or assessed upon him by this association, and this certificate shall not take effect until all assessments as aforesaid, and payable prior to the accident for which indemnity or benefit is claimed, are received by the association previous to such accident, and a failure to pay such assessments on or before such assessments are due and payable, shall render this certificate void, and all moneys paid by the holder thereof on account of this certificate shall be forfeited to this association."

Section 4, article 8, of the constitution of the association, provides that "assessments for the payment of benefits will be made in sums of $2 and $3 each, and as far as possible at the beginning of the quarter, and shall be used for no other purpose except as herein specified." It is by section 6 of the same article further provided that "any one desiring indemnity from the date of his application must forward to the secretary therewith an amount equal to 15 or 25 cents per week until the next quarterly assessment." Mr. Kline, according to his own testimony, visited the office of the association on the 16th day of November, 1891, where, after some conversation

relating to the subject of insurance, he remarked to Mr. Hicks, the secretary, that he would like a certificate, or "policy" as it is called by him, but would not be prepared to pay the charges therefor before the 28th day of the same month, and that in reply thereto Mr. Hicks said, "'All right; that don't make any difference. * * * You can hand it to me the first of the month.' * * * I asked how much it would be. He said: 'The fee is $3. We charge $2 a quarter at the rate of 15 cents a week.' I said, 'How much will that be?' He said, '90 cents on the first day of January.'" An application was at said time signed by the insured, presumably in the usual form, except that the words "Insurance in force from date of certificate" appeared to have been erased, and the certificate issued thereon, bearing date of November 17, was received by the insured on the 18th. On the following day, to-wit, November 19, the insured received the injury for which he claims in this action, and on November 30 he paid to Mr. Hicks for the certificate so issued the sum of $3.75, taking the latter's receipt therefor as secretary of the association. He further testified, referring to the transaction on the day last mentioned, as follows:

"I went round as I said to pay him $3.90. I handed him $5. He took out $3.75 and gave me a receipt. * * * I said, 'I thought it was $3.90.' He said, '$3.75.' I told him what I heard him say, and he said, 'I know.' * * * He said, 'that does not cover your late accident.'"

Q. Did he (Hicks) tell you when the policy took effect?

A. Yes, sir.

Q. When did he tell you that?

A. He told me that day when I paid him.

Q. When did he tell you it took effect?

A. The 30th day of the month, when it took effect.

Q. He did not tell you when you made the application?

A. No. He said, "Come on the first day of the month and I will give you the policy."

It is argued in support of the judgment that the recital of the certificate, acknowledging receipt of the premium

or membership fee, cannot be controverted in an action on such certificate, and that the defendant association is thereby estopped from averring nonpayment as a defense thereto. But the evidence, even of the insured himself, instead of contradicting the certificate, merely tends to establish that which is left in doubt by the recitals thereof, viz., the date when such certificate became effective as a contract of indemnity. There is, it will be observed, a marked difference between the terms of the agreement here involved and those contracts of insurance which are in terms or by implication made effective for a definite period, or from a specified date. The certificate, as we have seen, provides that it shall not take effect until after payment in full by the insured of all assessments levied against him, while by the terms of the constitution, and also according to the understanding of the insured, he was chargeable with the assessment for the unexpired portion of the current quarter. The regulation in that regard transgresses no rule of law or morals, since the burden thereby imposed upon new members is in exact proportion to that borne by those holding certificates in the association at the beginning of the quarter. We are, by counsel for the defendant in error, referred to decisions of this court declaring that stipulations for the forfeiture of policies of insurance on account of the nonpayment of premium notes is for the benefit of the insurer and will be waived by an acceptance of the premium subsequent to the default. Such is the holding in *Phœnix Ins. Co. v. Lansing*, 15 Neb., 494, *Schoneman v. Western Horse & Cattle Ins. Co.*, 16 Neb., 404, *Nebraska & Iowa Ins. Co. v. Christiensen*, 29 Neb., 572, and *Phenix Ins. Co. v. Bachelder*, 32 Neb., 490. But in the cases above mentioned, and we believe in each of those cited by counsel, the insurance was for a definite period, and the waiver operated merely to prevent a forfeiture of a policy which had by its terms become operative as a contract. In this case, however, there was, so far as the record discloses, no agreement, written or otherwise, to the effect that the

certificate should become operative previous to the payment in full of the membership fee and assessment prescribed by the constitution. The sum paid by defendant in error to Mr. Hicks on November 30, 1891, was the precise amount essential to constitute the former a member of the association from and after that date, and was received with the statement that the indemnity provided for did not include the injury previously received by the insured. The reasons which controlled the cases cited are here entirely wanting, since, as we have seen, the real question at issue is the time when the certificate took effect as a contract of insurance, and there is certainly nothing inequitable in the proposition, abundantly sustained by the record, that the payment of $3.75 was made and accepted in consideration of future indemnity. It follows that there was no waiver of the terms and conditions of the contract with respect to payment by the insured. The judgment is accordingly reversed and the cause remanded for further proceedings in the district court.

REVERSED.

JOHN FANTON V. STATE OF NEBRASKA.

FILED JANUARY 19, 1897. No. 8498.

1. **Criminal Law:** CONTINUANCE: ADMISSION AS TO TESTIMONY OF ABSENT WITNESS. On a motion for continuance being presented in a criminal case, if it appears that the witness or witnesses to obtain the testimony of whom the continuance is sought is or are without the jurisdiction of the court, and not within reach of its process, and the attorney for the adverse party will admit that the witness or witnesses, if present or their depositions taken, would testify as stated in the affidavit accompanying the motion for continuance, and agree that such statement shall be introduced during the trial, as might be the testimony if taken and offered in regular form, the motion may be overruled. Whether it shall be overruled or not is a matter resting within the discretion of the trial court, and if no abuse of such discretion is disclosed by the

record the action on the motion will not be disturbed in error proceedings in this court.

2. Larceny: VERDICT, AGAINST ACCUSED. The evidence *held* sufficient to sustain the verdict.

3. Jurors. All other questions raised and discussed in the error proceedings to this court fall directly within and are governed by the rules announced in the opinion in the case of *Barney v. State*, 49 Neb., 515, and need not be again discussed at this time.

ERROR to the district court for Holt county. Tried below before WESTOVER, J. *Affirmed.*

R. R. Dickson, for plaintiff in error.

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

HARRISON, J.

An information was filed in the district court of Holt county, in which plaintiff in error was charged with the larceny of eighteen head of cattle in said county, the property of one Timothy Cross and of the value of $300. To this information, on being arraigned, the plaintiff in error pleaded not guilty, and as the result of a trial was convicted and sentenced to imprisonment in the penitentiary for a term of eight years. He presents the case to this court for review, alleging in his petition many errors, a number of which are in relation to the action of the trial court in the discharge of a regular panel of jurors and matters incidental thereto, the ordering and summoning special panels of jurors, and overruling certain objections to the same. It was also assigned that the court erred in instructing the jury as follows: "A doubt, to justify an acquittal, must be a reasonable one, and must arise from a candid and impartial investigation of all the evidence in the case. A doubt produced by an undue sensibility in the mind of any juror in view of the consequences of his verdict is not a reasonable doubt, and the juror is not allowed to create sources or materials of doubt by resorting to trivial or fanciful suppositions and

remote conjectures as to possible states of facts differing from those established by the evidence. You are not at liberty to disbelieve, as jurors, if from all the evidence you believe as men. Your oath imposes on you no obligation to doubt where no doubt would exist if no oath had been administered. If, after a careful and impartial examination and consideration of all the evidence in the case, you can say that you feel an abiding conviction of the guilt of the defendant, and are fully satisfied, to a moral certainty, of the truth of the charge made against him, then the jury are satisfied beyond a reasonable doubt." It was further claimed that the sentence was excessive. In the case of *Barney v. State*, 49 Neb., 515, the plaintiff in error was informed against in the district court of Holt county and tried on the charge of stealing cattle. The trial was at the same term of court during which the case at bar was tried. That case was reviewed in this court and an opinion filed October 22, 1896. The questions therein presented and decided were identical with the ones involved in this case, which we have hereinbefore generally or specifically designated, and some of them, in regard to jurors, had their origin in the same conditions, facts, and circumstances, and they fall within and are governed by the rules then announced, which we now approve, as follows:

"1. A district judge may, for any lawful cause, discharge a regular panel of the petit jury, and direct the sheriff to call other jurors to take its place.

"2. The fact that the jury was illegally drawn is a sufficient cause for discharging it from service.

"3. The fact that all, or nearly all, jurors upon the regular panel are disqualified from sitting in any case remaining to be tried at the term is a sufficient cause for discharging the panel.

"4. The provisions of section 465*a* of the Criminal Code are not exclusive, but are to be construed in connection with section 664 of the Civil Code.

"5. Therefore, when the causes exist which authorize

the court to order a special venire under section 465*a* of the Criminal Code, the court may, instead of so doing, in its discretion,—the regular panel being disqualified from sitting in other cases during the term,—discharge that panel and direct a new jury to be drawn under the provisions of section 664, Code of Civil Procedure.

"6. A rule of court is an order made by a court having competent jurisdiction, and therefore under section 8, chapter 5, Compiled Statutes, in a district where there are two district judges, the court may, by special order, direct a jury of less than forty-eight to be drawn; such special order being a 'rule' within the meaning of that section.

"9. In a criminal case it is not erroneous to direct the jury that its oath imposes upon it no obligation to doubt where no doubt would have existed if no oath had been administered. *Spies v. People*, 12 N. E. Rep., 865, 17 N. E. Rep., 898, and 122 Ill., 1, followed.

"10. Where no error appears in the record of a criminal case, and the sentence imposed is one warranted by the statute, it will not be reduced by this court because of apparent undue severity. To so reduce it would, in such case, be an act of clemency, and not a judicial review of the trial; and the exercise of such clemency is a power reposed by the constitution in the governor, and not in this court."

It appears that the plaintiff in error was arrested January 28, 1896, was given a preliminary hearing before the county judge of Holt county on February 15, 1896, and was held to appear before the district court, which was then in session, having convened on the 8th day of February, 1896. On the 17th of the same month the information was filed in the trial court. On the 18th the plaintiff in error was arraigned and entered a plea of not guilty. According to an affidavit accompanying the motion on behalf of plaintiff in error for a continuance, the case was, on the 19th of February, set for trial on the 25th. On the latter day the first motion for a continu-

ance was filed, and on the following day a further showing having the same purpose was filed. This motion was presented to the judge then presiding (there being two in the district), and nothing more was done until the case was called for trial, on April 8, by the other judge, who was then on the bench in Holt county, when objections to his hearing the motion were made and overruled. On the succeeding day, April 9, the plaintiff in error was allowed to refile the motion for continuance and all accompanying papers which had been filed February 25 and 26, and also filed an additional showing. The motion was denied and on April 10 the plaintiff in error was placed on trial. The jury failed to agree and was discharged. This last was done April 14, and the case was then set for trial on the 4th day of the following month of May. On the 6th day of May the plaintiff in error, by leave of court, refiled the motion for continuance, with all the affidavits which had been prepared and presented in that connection, and some additional ones. The motion was heard and after an admission by the county attorney, for the state, that the witnesses named in the affidavits filed in support of the motion for a continuance would, if present, testify to the state of facts set forth, and the further agreement that they might be read as evidence in the case, was overruled and the plaintiff in error was again placed on trial, and this time was convicted. The order overruling the motion for continuance is now the subject of complaint. The affidavits, or such portions of them as contained statements of what might be expected to be proven by absent witnesses, if present, were, during the trial, admitted in evidence. There is no statutory provision in this state governing the subject of continuances of trials of causes, either civil or criminal, pending in a district court. Such applications are, however, entertained, whether they shall be granted or refused resting largely within the discretion of the trial court. A refusal of such an application cannot be error calling for a reversal of the case, unless there appears to

have been an abuse of such discretion. (*Burrell v. State*, 25 Neb., 581.)

The rule that in a civil action an admission that the proposed witness would, if in court, testify as stated in an affidavit filed with a motion for a continuance of the cause, coupled with an agreement that the affidavits be read during the trial as evidence of the absent witness, may be sufficient to do away with the necessity for or right to a continuance and relieve the denial of one, if any error, was announced in *Burris v. Court*, 48 Neb., 179, but has not been settled in a direct criminal proceeding. The witnesses whose evidence was desired in the case at bar were, at the time of the motion for a continuance on the ground of their absence, without the jurisdiction of the court, and were not within the reach of its process; hence there was no denial, in the refusal to grant a continuance, of the constitutional right of one charged with a felony "to have process to compel the attendance of witnesses in his behalf" (Constitution, sec. 11, art. 1), or the statutory one given by section 461 of the Criminal Code, wherein it states that "any person accused of crime amounting to a felony shall have compulsory process to enforce the attendance of witnesses in his behalf;" for such process would have been futile and its issuance void of results. It was a withholding, at most, of the opportunity of obtaining the attendance of witnesses without the process of the court, or to take their depositions, this last being accorded to parties charged with crime by section 462 of the Criminal Code. "A continuance, according to the general practice, may be refused if the adverse party will admit that such witness would testify as is supposed by the party moving for a continuance." (Wharton, Criminal Pleading & Practice [9th ed.], sec. 595, and cases cited in note 3.) The above is the rule at common law where the witness is beyond the jurisdiction of the court. (4 Ency. Pleading & Practice, 865-6, and cases cited in note 2 to last page; also, page 868 and note 1.) In some states the rule

we have quoted, either entire or modified in some particular, has been embodied in statutory enactments, which have been made the objects of attack on the ground of their depriving the accused of the right of compulsory process for his witnesses, and of equal protection under the law. For a case in which such an attack was successful, see *State v. Berkley*, 4 S. W. Rep. [Mo.], 24, but in the same state it has been said: "The right to compulsory process for witnesses does not and cannot extend to non-resident witnesses." (*State v. Pagels*, 4 S. W. Rep. [Mo.], 931; *State v. Butler*, 67 Mo., 59.) Such an enactment has been approved in Kansas. It was first a rule of the supreme court, then enacted by the legislature. (See *State v. Bartley*, 48 Kan., 421; *Thompson v. State*, 5 Kan., 159; *State v. Rhea*, 25 Kan., 576.) Also in Kentucky (*Pace v. Commonwealth*, 89 Ky., 207; *Atkins v. Commonwealth*, 30 S. W. Rep. [Ky.], 948); in Illinois (*Keating v. People*, 43 N. E. Rep., 724, 160 Ill., 480); in Iowa (*State v. Felter*, 25 Ia., 73). (See, also, *Territory v. Perkins*, 2 Mont., 470; *McNealley v. State*, 36 Pac. Rep. [Wyo.], 824; *Territory v. Guthrie*, 2 Ida., 398.) There are arguments on this question, both *pro* and *con*, which are forcible, but it would serve no useful purpose either to summarize or set them forth at length. In this state, after the agreement and admission is made, as they were in the case at bar, the allowance or refusal of the continuance is still a matter within the sound discretion of the trial judge, as he is conversant with all the facts and circumstances of the case, and not only such as are disclosed by the affidavits filed with the application, but the conditions existing at the time, and what he may determine is the right and proper disposition of the request must be approved, unless an abuse of the discretion vested in him is apparent from an examination of the record. Such is not the case here. A careful perusal of the record, in so far as it appertains to the continuance, discloses no abuse of the discretion of the trial court in overruling the motion therefor; hence, this assignment is unavailing.

A further assignment is that the verdict was contrary to the evidence and not supported thereby. The main evidence against the accused was given by two of the witnesses, who, by their own confession, were cattle thieves and the accomplices of the plaintiff in error in the crime with which he was charged, and for the alleged commission of which he was on trial, but there were corroborative facts and circumstances. The credibility of these witnesses and the weight to be accorded their testimony were matters for the jury to determine. After a careful examination of the evidence, we do not feel warranted in the conclusion that there was not sufficient thereof to sustain the verdict; hence it will not be disturbed. The judgment of the district court is

AFFIRMED.

CHRIST ENGLE, APPELLEE, V. GEORGE HUNT, APPELLANT.

FILED JANUARY 19, 1897. No. 6966.

1. **Highways:** PRESCRIPTION: EVIDENCE. The existence of a legal public road over the premises of a private person may be shown by user alone, but in such case the user must have been with the knowledge of the owner and have continued the length of time necessary to bar an action to recover the title to land. This rule, however, does not apply when the user is of wild, unenclosed prairie land. *Graham v. Hartnett*, 10 Neb., 517, approved and followed.

2. ———: ———. To establish a highway by prescription there must be a user by the general public under a claim of right, and which is adverse to the occupancy of the owner of the land, of some particular or defined way or track, uninterruptedly, without substantial change, for a period of time necessary to bar an action to recover the land.

3. ———: EASEMENTS. To acquire an easement or way on another's land there must be a use of the way for the length of time which will bar an action for the recovery of title to land, and which is under claim of right, or adverse.

4. ———. The evidence *held* sufficient to sustain the findings and judgment.

APPEAL from the district court of Seward county. Heard below before WHEELER, J. *Affirmed.*

Norval Brothers and *George W. Lowley*, for appellant.

References: 2 Am. & Eng. Ency. Law, 651, 712; *Taft v. Commonwealth*, 33 N. E. Rep. [Mass.], 1046; *Wayne County Savings Bank v. Stockwell*, 84 Mich., 586; *Reimer v. Stuber*, 59 Am. Dec. [Pa.], 744; *French v. Marstin*, 57 Am. Dec. [N. H.], 294; *Worrall v. Rhoades*, 30 Am. Dec. [Pa.], 274; *Nelson v. Jenkins*, 42 Neb., 133; *Weld v. Brooks*, 25 N. E. Rep. [Mass.], 719; *Colburn v. Marsh*, 68 Hun [N. Y.], 269; *Garrett v. Jackson*, 20 Pa. St., 331; *Pierce v. Cloud*, 82 Am. Dec. [Pa.], 496; *Hamilton v. White*, 5 N. Y., 9; *Sims v. Davis*, 34 Am. Dec. [S. Car.], 583.

Biggs & Thomas and *Thomas A. Healey, contra.*

HARRISON, J.

The appellee filed a petition in the district court of Seward county, in which it was alleged that he was the owner of, and in possession, and had been since a day not definitely stated, of certain described portions of section 26, in township 10 north, of range 3 east of the 6th P. M. in Seward county, and that said premises were, and had been during several years preceding the commencement of this suit, enclosed by a fence; that on or about the 3d day of April, 1893, and at other times subsequent thereto, the appellant wrongfully and unlawfully destroyed, broke, and removed the gates of appellee on said premises and used a portion of the land of appellee as a road or highway. A threatened continuation of the alleged trespasses was pleaded, and the petition concluded with a prayer that the appellant be enjoined from committing any and all of the threatened acts. To the petition the appellant filed an answer, in which it was admitted that he had done the things with the doing of which he stood charged in the petition, but pleaded that

he was the owner of certain portions of the same section of land described in appellee's petition; that there was a public highway on and along the half section line running east and west through said section, which had become such public highway or road by the length of time which it had been in use as a road by the public or had been established as a highway by prescription. It was further set forth that the appellant had, by use or by prescription, acquired an easement, a right to pass to and from his land, along the line aforesaid and over the appellee's land; that there had never been any fence prior to the time (January, 1893), when it was alleged appellant tore one down "at the place where it was pleaded the trespass in this particular was committed, and that he removed the fences then and there, and at the other times stated in the petition, for the reason that they constituted obstructions to the road or highway and barred him from the rightful use and enjoyment thereof. To this answer a reply was filed, and of the issues joined a trial resulted in a judgment for the plaintiff, from which the defendant has appealed to this court.

Counsel for appellant contend that the findings and judgment of the trial court were not sustained by the evidence and were contrary to the weight thereof; and that under the rules of law applicable to the facts as they appeared in the evidence, the judgment was erroneous. It was undisputed that no plat of any road on the half-section line in question had ever been made or recorded; and further, that no work had ever been done by the public or at public expense, on the line as a road. A number of persons who had known the section in the early days and years of the settlement of Seward county, and some of them during the years which had intervened to the time of the trial, and others of them only during portions of such time, were sworn and testified in regard to the land of section 26 and the roads across it, and more particularly the parts of the section which, at the time of the trial, belonged to appellee. It appeared in evidence that

twenty-three or more years prior to the date of the trial the land was "raw" or uncultivated prairie, and, as some of the witnesses in substance expressed it, "Everyone had a road, or drove wherever his fancy or necessity dictated." There were few fixed roads, but many "trails or tracks" as they were called. Several of the witnesses state in respect to the road across the land of appellee, in the early years of the settlement, substantially as did one called for defendant, that "they did not travel along on the half-section line, but used to angle across the land." It further appeared that the travel over this land was in the main, at first, by parties going to the river, which ran along near the other side of the section from that where the land afterwards purchased by the appellee was situated, to reach the timber which stood there, to cut it for fuel, or buy it of persons who had cut it and had the wood for sale, and haul it home by way of these same prairie roads or "tracks" by which they had come; and by others driving to a place at or near the one end of this half-section line, where the river was fordable or where there was a ford. Some years subsequently, probably during the year 1883 or 1884, a dam was built in the river at a point below the ford, by the effect of which the water at the fording place was so deepened that it was not a safe crossing and people ceased the use of the ford and there was a consequent partial or entire cessation of travel by the general public on the road across the land of appellee and other portions of section 26. At a time between the beginning of travel across the section and its partial ceasing because of the destruction of the ford, some of the land had been plowed and the course of what was designated by the witness as the "angling road" was changed. Three or four years after the road was not generally used, because it was no longer the approach to a ford in the river, fences were made on portions of section 26, and some bars or gates were placed wherever the fences intersected the road in question, there being bars where a traveller would first come upon appellee's

land. The appellant had put up and maintained a gate at the end of the alleged road on his land, which he had kept open or closed as his convenience demanded, leaving it open when he had no live stock in the field through which the road ran, and closing it when the stock was there. The party who owned the land prior to the appellee purchased it in 1887, and during the month of August of the year 1889 did some fencing by which the course of the road, or track, on the land afterwards owned by appellee, was materially changed. The foregoing are but general statements of some of the main facts disclosed by the evidence. There were many others which gave material support to the contention of either party to the suit, and as to many points the evidence was conflicting, but it was sufficient to sustain a finding that there had not been a use of the half-section line by the public as a road, for the length of time and such as constituted it a public highway. Had the road been along on the half-section line during the time the land remained wild unenclosed prairie, no rights would have accrued to the public by its mere user. (*Graham v. Hartnett*, 10 Neb., 517; *Rathman v. Norenberg*, 21 Neb., 467; *Shaffer v. Stull*, 32 Neb., 94; *Nelson v. Jenkins*, 42 Neb., 137; *Smith v. Smith*, 34 Kan., 293; *State v. Horn*, 35 Kan., 717; *Sutton v. Nicolaisen*, 44 Pac. Rep. [Cal.], 805.)

It is sustained by the evidence that after cultivation of the land commenced the travel over it was in such tracks and directions and under conditions dictated by the owner of the land, and not under a claim of right of a road, and adverse to the rights and control of the owner. Such user, if continued for ten years or more, would not establish a highway by prescription. (Elliott, Roads & Streets, 137; *Shellhouse v. State*, 110 Ind., 509; *Alton v. Meeuwenberg*, 66 N. W. Rep. [Mich.], 571; *Gray v. Haas*, 67 N. W. Rep. [Ia.], 394; *Stewart v. Frink*, 55 Am. Rep. [N. Car.], 618.) In regard to the appellant's claim that he was entitled to a private road or way over appellee's land and along the half-section line, the evidence supports the

finding, which must have preceded the judgment rendered by the trial court, that no such right existed. If there was any, it was gained by prescription, and the trial judge was warranted in concluding that there had not been ten years' uninterrupted user of the line as a road or way by appellant under a claim of right as against the owners of the land; and that there had not been an adverse enjoyment or user,—a use of the way which was not subject to the direction or will or pleasure of the owner; and this being true, no easement had been gained. (2 Washburn, Real Property [4th ed.], 321, 322; *Zigefoose v. Zigefoose*, 28 N. W. Rep. [Ia.], 654.) It follows that the judgment of the district court is

AFFIRMED.

RUDOLPH R. GROTTE V. SIEGFRIED NAGLE ET AL.

FILED JANUARY 19, 1897. No. 6972.

1. **Pleading**: LEAVE TO AMEND: ITEMIZED STATEMENT. A motion was made, and sustained, that plaintiff be required to attach to his petition an itemized statement of the account for goods sold and delivered, the basis of the action. The plaintiff filed an amended petition, which declared on an account for money loaned. A motion to strike the amended petition was filed, one of its grounds being plaintiff's non-compliance therein with the order of the court in regard to the itemized statement. This last motion was overruled. *Held*, That such action was equivalent to leave granted to file the amended petition.

2. ———: AMENDMENTS: WAIVER OF OBJECTIONS. A motion to strike an amended petition from the files on the ground that it declared upon or introduced a cause of action new and different from that pleaded in the original petition was overruled. The defendant then answered to the merits of the action set forth in the amended petition and participated in a trial thereof. *Held*, That the right to further complain that a new cause of action was set forth in the amended petition was waived.

3. **Attachment Affidavit.** An attachment affidavit must contain a statement of "the nature of plaintiff's claim." (Code of Civil Procedure, sec. 199.)

4. ———. A statement in such an affidavit for attachment that the action is one "upon an account for goods sold and delivered by plaintiff to defendant at his request" was sufficient to show that the action was one in which an attachment might issue and to give the court jurisdiction of the attachment suit. The statement that it was on an account was a general description of the plaintiff's claim, and the further words which we have quoted served to designate the kind of an account.

5. ———: REFERENCE TO PETITION. If the claim appears from the statements of the affidavit to be one for which an attachment is authorized, but its nature is not fully set forth, reference may be had to the petition. (*Hart v. Barnes*, 24 Neb., 782.) RAGAN, C., dissenting.

6. ———: PETITION: VARIANCE. Where an attachment affidavit varies from an amended petition in the statement of the specific kind of an account in suit, and the defendant, by answering the amended petition and taking part in a trial of the issues joined, has waived the right to further object to the error, if any, in allowing the amended petition to be filed, in which it was claimed that a new cause of action was introduced, in that in the amended petition an account different in its particular character from that pleaded in the original petition was declared upon, *held*, that inasmuch as a reference to the petition would disclose the precise nature of the account, and hence the action could be pleaded in bar of a second attachment on the same account, the court did not err in overruling a motion to discharge the attachment on the ground, in substance, that it did not state the nature of plaintiff's claim as contained in the amended petition.

7. ———. It is required in section 199 of the Code of Civil Procedure that in an attachment affidavit there should be set forth "the amount which the affiant believes the plaintiff ought to recover." *Held*, That a slight variance in the amount stated and that actually due is immaterial, and not a fatal defect in the affidavit.

8. **Attachment:** UNMATURED CLAIM. It is not ground for the discharge of an attachment that some portion of the sum stated in the affidavit is not due.

9. ———: ———: PROOF. The proof in the attachment suit adjudged sufficient to support the finding of the court sustaining the attachment.

10. ———: ———: DISMISSAL. It appeared that one item in the suit, as to which there was a distinct paragraph, separately numbered, in the petition, was not due at the time the action was commenced. *Held*, That the court did not err, at the time of rendering judgment, in sustaining a motion by plaintiff to dismiss the suit as to such item, without prejudice.

11. **Pleading:** AMENDMENT. An amendment of a pleading to conform

to proof *held* proper in view of the facts in regard to such item, as disclosed by an examination of the petitions in the action.

12. Reference: ADDITIONAL FINDINGS. The action of the trial court in returning the case to the referee for further finding in respect to the item as to which the petition was allowed to be amended to conform to the proof, and the reception of a supplemental report containing such finding and its consideration in the final settlement of the issues, approved.

13. ———: ———. The evidence adjudged sufficient to sustain the findings and judgment.

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

Montgomery, Charlton & Hall, for plaintiff in error.

Joel W. West and *Charles Ogden, contra*

HARRISON, J.

The defendants in error (hereinafter styled the plaintiffs) commenced this action against the plaintiff in error (hereinafter designated defendant) in the district court of Douglas county to recover the sum of $——, alleged to be the plaintiffs' due as the result of certain business transactions between the parties. An affidavit was filed and a writ of attachment procured to issue, which was levied on a stock of liquors, etc., as property of the defendant. After issues joined the case was referred, and the referee heard the testimony and filed his report, and, subsequently, what was known in the record as a "supplemental report." The court, after hearing on the exceptions of the defendant to the reports of the referee, overruled the objections, confirmed the reports, and rendered judgment for the plaintiffs. During the pendency of the action a motion to discharge the attachment was filed for defendant, and, on hearing, was overruled. By leave of court a second motion was filed to discharge the attachment, of which, on hearing, a similar disposition was made as had been of the first. In the original petition filed in the action the declaration of the plaintiffs' cause

was "that on or about the —— day of ——, 1891, plaintiffs sold and delivered to the defendant, at defendant's special instance and request, goods, wares, and merchandise aggregating in value the sum of $7,500, and at the agreed price of $7,500." To this counsel for defendant filed a motion that plaintiffs be required to make the petition more definite and certain, by attaching thereto an itemized statement of the goods alleged to have been sold to defendant. This motion was sustained, and leave granted plaintiffs to file an amended petition. What was marked an "amended petition" was filed, in which the cause of action was stated to be for money loaned to defendant, at times specified. Counsel for defendant moved the court to strike the pleading denominated an "amended petition" from the files, for the reason that it was not a compliance with the order of the court, but by its allegations sought to substitute a new cause of action, other and different, and in place of that originally pleaded. On hearing, the court overruled this motion. After motion filed to require the amended petition to be made more definite and certain a second amended petition was filed, in which the burden of the charge was for money loaned to defendant. To this defendant filed an answer, to which there was a reply, and of the issues joined a trial, as we have hereinbefore stated.

It is urged that the court erred in not sustaining the defendant's motion to strike the first amended petition from the files, first, because it did not comply with the order of the court, which was that an itemized statement of the goods alleged in the original petition to have been sold to defendant should be thereto attached; and second, for the reason that it was not an amendment of the petition, but declared upon a new and independent cause of action. In regard to the first, it may suffice to say that the action of the court in overruling the motion to strike, to the extent it involved this reason, was equivalent to a grant of leave to file the amended petition, for it allowed it to remain on file as an authorized pleading. On the

second ground on which it was sought to strike the amended petition from the files, it must be said that the point raised, that the pleading which it was sought to eliminate from the record was based upon a new cause of action, independent of that stated in the original petition, we need not discuss or settle, for when the defendant's motion to strike out on this ground was overruled, and he pleaded and finally answered to the merits and participated in the trial of the issues presented, his actions constituted a waiver of the right to further complain that the amended petition was (if such was the fact) an attempt to substitute or introduce a new cause of action. (1 Ency. Pleading & Practice, 573; *Sauter v. Leverridge*, 15 S. W. Rep. [Mo.], 981, 103 Mo., 615; *Evens v. Hall*, 1 Handy [O.], 434; *Glover v. Flowers*, 7 S. E. Rep. [N. Car.], 579, 101 N. Car., 134; *Bishop v. Hill*, 54 Vt., 507; *Snyder v. Harper*, 24 W. Va., 212.)

It is contended that the first motion to dissolve the attachment should have been sustained: "First, because no affidavit was filed with the amended petition, nor was the original affidavit amended to conform to the allegations contained in such amended petition; second, because the affidavit did not state the exact amount which the plaintiffs demanded, as set forth in the amended petition; and third, because the evidence adduced on the hearing of the motion to dissolve the attachment did not disclose a state of facts sufficient to sustain the attachment." Under the head of the division of argument designated "First" is presented the question of the sufficiency of the statement in the attachment affidavit of "the nature of the plaintiffs' claim," that this shall be stated in the affidavit, being one of the requirements of the statute. (Code of Civil Procedure, sec. 199.) The affidavit in attachment, in this particular, was as follows: "Upon an account for goods sold and delivered by the plaintiffs to defendant, at his request." This was a description of the nature of the plaintiffs' claim which warranted the proper officer in issuing the writ of attachment, and suffi-

cient to give the court jurisdiction in the attachment proceedings. (*Tessier v. Reed*, 17 Neb., 105; 1 Shinn, Attachment & Garnishment, p. 225; *Theirman v. Vable*, 32 Ind., 400.) The general nature of the claim was set forth in the words "on account," and disclosed, without other or further statement, that the cause of action was one on which an attachment might issue. If there had been nothing more in the affidavit in regard to the nature of the claim, reference might have been made to the petition, and if a sufficient statement appeared in it, the attachment affidavit should have been upheld as sufficient in its allegations of the nature of the claim.

In the decision of the case of *Phelps v. Young*, Breese [Ill.], 327, it was said: "The proceeding must be considered as one against a non-resident debtor, and all the forms of the statute appear to have been complied with, unless the affidavit upon which the attachment was sued out should be defective in not sufficiently specifying the nature of the indebtedness. The statute requires that the plaintiff in the attachment shall specify in his complaint, on oath or affirmation, the amount and nature of the indebtedness of the defendant. The deposition sets out that Phelps is justly indebted unto the plaintiff in the sum of fourteen hundred dollars, by his certain instrument of writing, signed by him, and the question is thus presented for determination whether this is the description or specification intended by the statute. It would seem, at a first examination of the object of the act, that there was not that compliance with its spirit in the specification given as its framers intended, but when it is recollected that the plaintiff has filed his declaration, in which the entire cause of action is fully set forth, the objection loses its force." (See, also, *Hart v. Barnes*, 24 Neb., 785.) The affidavit in the case at bar contained the further terms descriptive of the claim, "For goods sold and delivered by the plaintiffs to defendant, at his request," but these were merely of the kind of an account sued upon, and that they were wrong and ap-

peared there by mistake of the pleader, or rather his lack of knowledge at the time of the institution of the suit of the specific kind of an account on which it was predicated, did not work a lack of jurisdiction of the court in the attachment and could not govern in its disposition on a motion to discharge it. The original petition in the action declared upon an account for goods, wares, and merchandise sold and delivered, etc.; and the amended petition, upon the disputed allegations of which, together with other issues presented by the further pleadings, the cause was tried, set forth an account for money loaned. It will be borne in mind that the defendant waived his right to maintain his objections to the change in the amended petition from an account for goods sold and delivered, as pleaded in the original, to an account for money loaned, and that the case was finally tried and adjudicated as a suit on an account of the character last mentioned. The attachment affidavit was not amended to meet this change in the petition, but remained as originally filed throughout the progress and disposition of the cause; but the amended petition and affidavit were based on an account as the claim of action, and a resort to the amended petition, which, as we have seen, would be proper for a specific description of the account in suit, would definitely disclose such character and so identify and connect them that this action, in both its branches, could be invoked as a bar to any further proceeding by way of main or ancillary suit on the same account. This, it would seem, should be sufficient, and this branch of the contention must be declared of no avail.

Under the second point of the argument, in respect to the motion to discharge the attachment, it is urged that in the affidavit it was stated that the amount which the plaintiffs believed they should recover was $7,500, while in the amended petition but $7,428.67 was claimed due the plaintiffs; that this was such a variance between the two pleadings as was fatal to the affidavit, and furnished sufficient reason for the dissolution of the attach-

ment. The requirement of the statute as to statement of amount (Code of Civil Procedure, sec. 199) is that in the affidavit there shall be set forth "the amount which the affiant believes the plaintiff ought to recover." We think, under this provision, the statement in the affidavit of the amount did not differ sufficiently from that pleaded in the petition to vitiate the affidavit. The variance in the amounts stated was but slight, and was immaterial. (1 Shinn, Attachment & Garnishment, pp. 213, 214; *Paul v. Ward*, 21 Ind., 211; *Lathrop v. Snyder*, 16 Wis., 293; *Aultman v. Daggs*, 50 Mo. App., 280; 3 Ency. Pleading & Practice, p. 15.)

The third proposition of this portion of the argument was that the evidence introduced on the hearing of the motion to discharge the attachment was insufficient to warrant the court in its ruling by which it sustained the attachment. An examination of the evidence on this branch of the case convinces us that there was sufficient to sustain a finding that the defendant was acting as it was shown he did, with the intent stated in the attachment affidavit in regard to creditors, and more particularly the plaintiffs; hence the court did not err in refusing to discharge the attachment on the facts.

In a second motion to discharge the attachment, which was filed and considered, it was alleged as cause for such discharge that the "testimony of the plaintiffs shows that a portion of the alleged indebtedness of the defendant to the plaintiff was not due at the time this action was commenced, and no order allowing an attachment was granted by this court or any judge thereof." The facts were as set forth in the foregoing ground of the motion; but this was not sufficient to call for a discharge of the attachment. In the opinion of this court in the case of *Tessier v. Englehart*, 18 Neb., 167, it was said: "It is not a fatal objection to an attachment that it may be deducible from an examination of the petition or bill of particulars that some part of the amount stated in the affidavit for attachment is not yet due." And in the text

of the opinion appears the following: "The third objection to the affidavit for attachment is that it states plaintiffs 'ought to recover the sum of $1,963.19, now due and payable,' while the petition shows that there was only $1,637.88 due at the time of the commencement of the action. This constitutes no objection to the proceedings, but if the plaintiffs in the court below knowingly and willfully attached a greater amount of goods than was necessary to pay their debt then due, with costs and expenses, they would probably be liable in damages." (See, also, 1 Shinn, Attachment & Garnishment, 212, 213.)

In the claim of plaintiffs as stated in the several petitions there was included one item of $2,200 which, it developed during the trial, was not due until March 16, 1892, and as the action had its inception of date March 15, 1892, the portion of the account to which we have just referred had not matured at the time of the commencement of the action, and the case, as to this, was prematurely brought. It also appeared, or was of the findings of the court at the time judgment was rendered on the report of the referee, that this item, or claim, was not owned by plaintiffs when the cause was instituted. At the time of rendering judgment the court entertained and sustained a motion of plaintiffs to dismiss without prejudice as to this part of the cause of action, and such dismissal was entered, of which counsel for defendant complain, insisting that inasmuch as the matters in controversy had been submitted for adjudication, all should have been retained and settled. The facts in respect to the amount of $2,200 of plaintiffs' claim were such that the court could not consider and adjudicate upon its merits, and it was entirely proper to allow or to enter a dismissal as to it, and without prejudice, as was done.

Subsequent to the time of the trial before the referee, and the filing of his report, the plaintiffs asked and were granted leave to amend, by interlineation, what was styled in the motion the "second amended petition," by inserting therein a paragraph declaring upon an item or

claim of $1,600, to conform the pleading to the proofs, and on motion of plaintiffs the cause was returned to the referee for a further report, or a finding in regard to this particular item of $1,600, and the referee made and filed a supplemental or second report, confined to his conclusions as to the one item of $1,600. Counsel for defendant contend that it was error to send the case back to the referee for further report, and, when made, to consider the report. If it appeared that the report filed was incomplete in any respect, it certainly was not erroneous to call upon the referee for the further information to the extent it would serve to complete and perfect the report, nor improper to consider the further matter when furnished. In this connection it was also argued that the court should not have allowed the plaintiffs to amend and include the item of $1,600, as it brought into the case a cause of action, or part of a cause of action, which was not of it at its commencement, thus making the attached goods pay a claim for which they were not taken under the writ. An examination of the pleadings discloses that the aggregate of the amounts as pleaded and claimed by plaintiffs to have been loaned to defendant, the credits stated, and the balance alleged to be due, were the same as in the first amended petition and the second amended petition; that these conditions of the pleadings were not changed by the amendment of the second so that it included the item of $1,600, stated in a separate paragraph thereof, from which we conclude that this sum of $1,600 was at all times embraced in the aggregated amounts of the pleaded claim in the petitions, from which the credits were deducted, hence always entered into the calculations and figuring from which the balance demanded as a recovery was reached or determined; and that by an omission on the part of the pleader it was not, in the first instance, directly set forth in the specific portion of the petitions, as it should have been. This particular item was the subject of proof in the trial, was of the contested issues, and in view of all the facts and circumstances in

regard to it, which we have in the main outlined, it was not improper or erroneous to allow the amendment. It would not prejudice the rights of defendant and was but fair and just to plaintiffs.

It is further urged that the trial court erred in overruling the defendant's exceptions to the referee's reports, and in approving and affirming such reports. Under this heading the weight, sufficiency, and effect of the evidence in the case are argued. We have carefully read and considered the record, and do not deem it necessary to enter into a discussion of the evidence here. We determine from it that the findings and conclusions of the referee and the judgment of the trial court were sufficiently sustained thereby and will not be disturbed.

We have noticed all the points presented for review, and it results, from what has been herein announced, that the judgment of the district court will be

AFFIRMED.

J. E. COBBEY V. ANNA C. DORLAND ET AL.

FILED JANUARY 19, 1897. No. 7017.

1. **Insurance:** TOTAL LOSS: ATTORNEYS' FEES: NOTICE OF LIEN. In an action against an insurance company on its policy insuring property against loss by fire, when the property insured thereby has been totally destroyed by fire, it is provided by statute that the "court, upon rendering judgment against an insurance company on any such policy of insurance, shall allow the plaintiff a reasonable attorney's fee, to be taxed as a part of the costs." In such an action the summons was indorsed as follows: "If the defendant fail to appear and answer, the plaintiff will take judgment for $800, together with interest at 7 per cent from September 26, 1893, and attorney fees and costs of suit. Attest: R. W. Laflin, Clerk. By Orlando Swain, Deputy." *Held*, That such indorsement was not a notice of plaintiff's attorney's claim of a lien for fees for his services performed in and about the suit, and further, that service of the summons so indorsed on the company did not convey notice to it of such claim of lien.

2. ———: ———: ———: DISMISSAL: INTERVENTION. The attorney who instituted the suit for plaintiff applied to the trial court to be allowed to intervene and prosecute against the company his claim for fees. *Held*, That of the evidence filed in the matter of this application there was sufficient to sustain findings that there had been a dismissal of the action against the company, and a settlement and extinguishment of the plaintiff's claim against it, prior to any notice to it of any claim of the attorney's lien for fees; hence the denial of the application was not erroneous.

ERROR from the district court of Gage county. Tried below before BABCOCK, J. *Affirmed.*

J. E. Cobbey, pro se.

References: *German Ins. Co. v. Eddy*, 36 Neb., 461; *German Ins. Co. v. Penrod*, 35 Neb., 273; *Kansas P. R. Co. v. Thacher*, 17 Kan., 101; *Smith v. Chicago, R. I. & P. R. Co.*, 56 Ia., 720; *Ins. Co. of North America v. McLimans*, 28 Neb., 657.

Alfred Hazlett, contra.

HARRISON, J.

An action was commenced in the district court of Gage county for the plaintiff by the intervenor, as her attorney, in which it appeared in the petition filed that she, as mortgagee of certain property in Beatrice, was entitled to the amount of the insurance thereon, evidenced by a policy issued by the Ætna Insurance Company of defendants, the property having been totally destroyed by fire. The petition in the action was filed of date December 30, 1893. Subsequently, pursuant to a settlement of the disputed questions in the case, A. L. Green claiming to represent the plaintiff during such adjustment, the following statement was filed:

"Now comes the plaintiff and dismisses the above entitled action without prejudice to future action at her costs.

ANNA C. DORLAND,
"By A. L. GREEN, *Agent.*"

This was filed January 19, 1894. Of the same date the intervenor filed the following:

"All parties will take notice that the pretended dismissal filed in this case is without authority and that I still have and claim the sum of $100 as attorney's fees for services rendered in this case, as alleged and claimed in the papers heretofore filed and the notice heretofore given. J. E. COBBEY."

And on January 26 he filed a motion by which he asked to intervene. This motion was accompanied by a petition in which appeared a statement of his claim for an attorney fee. The insurance company filed objections to the allowance of the intervention, affidavits were filed in support of the contentions of the parties respectively, and on presentation of the matter to the court the application to intervene was denied. The party who sought to intervene asks a review in this court of the action which resulted in the refusal to him of such right.

That notice of the attorney's claim of a lien for fees must be brought home to any party as against whom it is sought to be made effectual, is not questioned, but it is urged that the requisite notice of such claim of lien was given the insurance company by an indorsement which appeared on the back of the summons served. The indorsement referred to was as follows:

"If the defendant fail to appear and answer the plaintiff will take judgment for $800 together with interest at 7 per cent from September 26, 1893, and attorney fees and costs of suit.

"Attest: R. W. LAFLIN, *Clerk*,
"By ORLANDO SWAIN, *Deputy*."

The claim against the insurance company was for a total loss by fire of a building insuring which it had issued a policy, and in such an action "The court, upon rendering judgment against an insurance company upon any policy of insurance, shall allow the plaintiff a reasonable sum as an attorney's fee, to be taxed as part of

the costs." (Compiled Statutes, ch. 43, sec. 45.) An inspection of the section which we have just quoted develops clearly that the amount to be allowed at the time judgment is rendered in a suit on a policy, as an attorney's fee, as part of the costs, is to be to the plaintiff in the action and not to his attorney. The indorsement on the summons in this case hereinbefore set forth was without doubt a statement, in short, of the plaintiff's claims in the action. It had none of the requisites of a notice of a claim of lien. It did not, either directly or indirectly, refer to the attorney or his fees, and was not signed by him either for himself asserting any claim or in his representative capacity as attorney for the plaintiff. It did not purport to emanate from the attorney or to any extent or degree set forth his rights to fees in the case, and cannot, by any allowable construction, or by intendment, be said to convey a notice of an attorney's claim of lien in the action for fees.

We are cited to the opinion in the case of *Smith v. Chicago, R. I. & P. R. Co.*, 10 N. W. Rep. [Ia.], 244, as authority for the contention that the notice of attorney's lien might be written on, or in, the summons, and thus served with it. It is therein stated: "The defendant claims that the notice of the lien upon which the plaintiffs rely is insufficient. The notice was inserted in the original notice and the service of it was made in connection with the service of the original notice. The objection is based upon the ground that the original notice can have but one office, and that is to bring the defendant into court, and that anything inserted in the notice not pertinent to this purpose is foreign and extraneous, and ought not to be treated as having any force. The statute simply requires the notice to be given in writing. In this respect the notice given conformed to the statute. It was not a part of the original notice but was written in a blank space between the parts of the original notice. If it had been written upon the margin below the original notice and properly signed, we think no question could

be properly raised as to its sufficiency. The case, in our opinion is not essentially different. To hold that it is would be giving more force to a mere matter of form than we feel justified in doing." From the foregoing we gather that the statement of the claim of lien must, in that case, have been sufficient. As we have seen, it was not in the case at bar, hence the case cited is not in point.

In the affidavit of A. L. Green, who acted as agent for the plaintiff in the matter of compromise with the insurance company, appeared the following: "Affiant says that the said J. E. Cobbey, before said case was dismissed on the 19th day of January, 1894, told this affiant to go on and dismiss said case, or do with it as he pleased; and affiant further says that the said J. E. Cobbey instructed this affiant as to the form, or the substance which should be contained and set forth in a dismissal of this case, all of which plaintiff used and made, and had the same filed on said 19th day of January aforesaid." This statement is not directly contradicted or denied. There are, however, some facts asserted in the affidavit of the intervenor somewhat inconsistent and conflicting therewith, but, coupled with other evidence on the same question, the foregoing statement fully sustained a finding that the dismissal, as made, was proper and binding on all parties concerned, including the intervenor, and there was evidence which supported a further finding that no notice of the attorney's claim for lien was given to the insurance company prior to the time of the extinguishment of its liability to the plaintiff by the completion of the settlement. This being true, no lien could accrue (*Sheedy v. McMurtry*, 44 Neb., 499, and citations therein), and the trial court did not err in denying the request for intervention. The judgment of the district court is

AFFIRMED.

CAROLINE A. ESTABROOK, EXECUTRIX, APPELLANT, V. SAMUEL STEVENSON ET AL., APPELLEES.

FILED JANUARY 19, 1897. NO. 6924.

Landlord and Tenant: REPAIRS: RECEIVER. Real property was leased for a term of ten years, an option reserved to the lessor to terminate it at the end of five years. The lessor elected to put an end to the lease at the close of the shorter period, and took the necessary steps to effect his purpose. This was resisted by the lessee, and during the course of the litigation which ensued the lessor made application for the appointment of a receiver to take charge and care of the property and collect the rents. This was granted, and subsequently the court was asked to order the receiver to pay some accounts due parties for material furnished and work performed in repairs to the property ordered to be made by the lessee and completed prior to the appointment of the receiver. This request was granted. No liens had been perfected against the property for the amounts of the accounts. *Held*, Not to be charges against either the property or the rent money in the hands of the receiver, but individual debts of the lessee, and that the order to the receiver to pay them was erroneous.

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

Estabrook & Davis, for appellant.

A. C. Wakeley, contra.

HARRISON, J.

It appears that on May 1, 1884, Experience Estabrook leased to Samuel Stevenson certain real estate in the city of Omaha for the term of ten years, with the privilege reserved to the lessor of terminating the lease at the expiration of five years of the term; that by a provision of the lease the lessor, at the termination of the term, should pay the lessee for such improvements as had been made or placed on the real estate by the lessee during the life of the lease, the value of such improvements to be determined by arbitrators. The lessor gave notice of his election to terminate the lease at the end of the five years,

arbitrators were chosen as had been provided, who made an award, to which the lessor objected and filed his petition in the district court of Douglas county setting forth the facts. To the petition the lessee and the party to whom he had conveyed his rights in the premises answered, and of the issues joined there was a trial and a resulting judgment, by which it was established that the lease had been terminated at the end of the five years. The award of the arbitrators as to the value of the improvements was set aside, and the court in its decree adjusted this and other matters. From this judgment an appeal was taken to this court by Samuel and Mary Stevenson. During the pendency of the appeal, Experience Estabrook made application to the district court for the appointment of a receiver to take possession of the property, to have the charge thereof, to collect the rents and retain the same subject to the orders of the court. This application was made of date November 18, A. D. 1893, and was resisted by the Stevensons. But on final hearing, December 30, 1893, the application was granted and a receiver appointed, who qualified, gave his bond, and assumed his duties. On November 30, 1893, during the pendency of the application for, and before the appointment of, the receiver, the building of the leased property was damaged by fire and certain repairs rendered necessary to again put portions of the premises in a fit condition for occupancy. Some of the repairing was done by parties employed by Stevenson, other parts of the necessary work he executed himself, all being completed before the appointment of the receiver. It is stated in Stevenson's affidavit that the full rent for the month of December, 1893, would have been $125, but it was lessened by reason of the injury to the building by fire to the sum of $42, which he retained to pay him for his own personal services in repairing the building. Subsequent to his appointment, an application was made for an order of the court directing the receiver to pay, out of rent moneys collected by him, the accounts of parties for ma-

terial used and labor performed in and about the repairs on the property of the injuries caused by the fire, and which were made and completed prior to his appointment. This application was supported by affidavits, and on hearing, February 24, 1894, was sustained and the receiver ordered to pay the accounts. From this order an appeal to this court was perfected for Experience Estabrook, who has since died, and the cause has been revived in the name of his executrix, Caroline Estabrook.

There is but one brief filed in the cause, that for appellant. The appeal was prosecuted by virtue of the provision of section 275 of the Code of Civil Procedure, wherein appears the following: "All orders appointing receivers, giving them further directions, and disposing of the property may be appealed to the supreme court in the same manner as final orders and decrees." The repairs were made and the debts contracted before the property was in the custody of the court or its receiver, and not by order of either court or receiver. The parties making them had no lien or claim against the premises, so far as this record discloses, and the accounts were not liens or charges on or against the fund in the receiver's hands of rents collected after he took charge of the property. The repairs were ordered by and made for Samuel Stevenson, and, unless liens had been perfected against the property, they had no other or further character than bills against him, and were accounts of his individual or personal indebtedness. We can discover no tenable grounds upon which the order to the receiver to pay these accounts from the rent money in his hands could be based. It was erroneous and must be reversed and the application for the order denied.

JUDGMENT ACCORDINGLY.

IRVINE, C., not sitting.

HOME FIRE INSURANCE COMPANY OF OMAHA V. RICHARD WOOD ET AL.

FILED JANUARY 19, 1897. No. 6863.

1. **Mistake:** REFORMATION OF CONTRACT. To justify the reformation of a written contract for mistake, the mistake must be mutual and be established by clear, convincing, and satisfactory evidence.
2. **Insurance:** REFORMATION OF POLICY. Evidence examined, and *held* insufficient to authorize the reformation of the policy in suit.
3. ———: OTHER POLICIES: INDORSEMENT. Where an insurance company issues a policy with knowledge of other insurance on the same property, it cannot escape liability on the ground that no memorandum of the prior insurance was indorsed on the policy.
4. ———: ———: NOTICE. A statement by the insured to the agent of the insurer that the former intends to procure additional insurance on the property is not notice of the existence of such additional insurance when obtained.
5. ———: ———: BREACH OF CONTRACT. A fire insurance policy provided that it should be void if other insurance was subsequently obtained without the consent of the company. The insured did thereafter procure other insurance on the same property, without such consent or knowledge of the insurer of its existence. *Held*, That there was a breach of the condition of the first policy, and a recovery cannot be had thereon.

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

B. G. Burbank and *Jacob Fawcett*, for plaintiff in error.

Charles B. Keller, contra.

NORVAL, J.

This was a suit to reform a policy of fire insurance, and for judgment on the policy when so corrected and reformed. The court found for plaintiffs, reforming the policy and entering judgment for the full amount of insurance, with interest and costs. The only assignment urged for a reversal is the one which challenges the suf-

ficiency of the evidence to sustain the finding and judgment.

The facts may be briefly summarized thus: Wright Bros., on and for some time prior to June 27, 1891, were, and had been, engaged in the mercantile business at Fairfield, and B. F. Hyde was the soliciting agent at said place for the Home Fire Insurance Company of Omaha, with power to solicit applications for insurance, transmit them to the home office at Omaha, where the policies were written, and on the receipt of the policies by Mr. Hyde, he delivered the same to the insured and collected the premiums. On the date aforesaid, Hyde solicited insurance of Wright Bros. on their stock of merchandise and store fixtures in the sum of $1,000 for the period of one year. The policy was prepared and executed by the proper officers of the defendant company in Omaha, after which it was transmitted to Mr. Hyde, who thereupon delivered the same to Wright Bros., and collected the premium thereon. The policy contained a provision that "this policy shall be void * * * if there is now, or shall hereafter be, obtained any other insurance (whether valid or not) on said property or any part thereof;" and further, that "no agent or employe of this company, or any other person or persons, have power or authority to waive or alter any of the terms or conditions of this policy, or make any indorsements thereon, except only the secretary of this company, and any waiver or alteration by him must be in writing, and must be signed by him." The property covered by the policy was wholly destroyed by fire on December 8, 1891, and at that time the insured were carrying a total insurance of $5,500, $2,000 of which was in force when this policy was given, and Hyde then knew it, but the policy in suit contained no stipulation permitting other concurrent insurance. After the loss the policy was assigned to plaintiffs. The company defends on the ground of the obtaining additional insurance, subsequent to the issuance of the policy, without notice thereof to it, or making any request that consent

therefor be given. On the other hand, plaintiffs alleged in their petition, in effect, that at the time the insurance was written it was agreed between Wright Bros. and the company that plaintiffs were to be permitted to carry $5,500 total insurance on the property; that without any fault or neglect of theirs, but through design or mistake of the defendant, or its agent, the company omitted to write in the policy, or to indorse thereon, any provision for concurrent insurance, and that said policy was received and the premium paid Wright Bros. in good faith without reading the same, believing that the policy contained the proper and necessary provisions permitting concurrent insurance. This averment was put in issue by the answer.

The question involved is whether the evidence was sufficient to justify the reforming of the policy relative to additional insurance. The only testimony adduced on that branch of the case by plaintiffs was given by B. J. Wright, one of the insured, and is as follows:

Mr. Hyde came to me several times before we made out the policy, or gave him a right to make it out, and wanted to take out a policy in the Home for $1,000, and tried to get us to take out more in that company.

Mr. Fawcett: State what he said. Don't give your conclusion.

A. Well, he said he wanted us to take out more insurance,—make the policy larger; and at that time I told him that I did not see fit to do that, but we intended to replenish the stock and take out more insurance afterwards, which we did, and stated to him about the amount that we intended to carry, which at that time I told him that we intended carrying about $5,500; and a few days after he had been several times, I told him to make out a policy for $1,000, and told him the amount of insurance we had then, and what we intended to get.

Q. How much insurance did you then have upon that stock at the time this policy was written?

A. $2,000.

Q. State whether or not you told Mr. Hyde what companies that insurance was in, and whether you showed him the policies or not.

A. I do not remember whether I showed him the policies or not, but think I told him the companies it was in, and the amount.

Q. And how much insurance do you swear that you told Mr. Hyde at that time that you wanted to carry on that stock, and intended to carry on that stock?

A. $5,500.

Q. What, if anything, did you say to Mr. Hyde with reference to renewing the policy in the German-American, and taking it out for $1,500 instead of $1,000?

A. Why I think I told Mr. Hyde about the running out of this policy that Mr. Randall carried, and that I was going to renew it with an additional amount of $500 or $1,000. I do not remember just the words that we used at that time; we had several talks about it. * * *

Q. When you received this policy what was done with it?

A. I received it and put it in the safe with the balance of them.

Q. State whether or not you examined or read over that policy at the time you received it.

A. No, sir; I did not.

Q. When did you first read over and examine that policy?

A. The next day after the fire.

Cross-examination:

Q. Did you ever at any time, after this policy was delivered to you, direct the defendant company or any of its agents to make any indorsements upon the policy for additional insurance?

A. I did not.

Q. Did you ever at any time after you put on the additional $500 insurance in the German-American, and before the fire, notify the defendant company, or any of its agents, that you had done so?

A. No, sir; I did not.

Q. Did you ever at any time after obtaining that additional $500 insurance in the German-American request the defendant, or any of its agents, to indorse permission for such additional insurance upon your policy?

A. Not that I remember of.

It is also admitted of record that prior to the fire no request was made of the company by the insured to indorse any provision upon the policy permitting additional insurance. B. F. Hyde testified that he was a soliciting agent of the defendant, issued no policies for them, and made no indorsements thereon, and had no authority to do so; that he had no recollection, at the time he solicited this insurance, of B. J. Wright telling him it was the intention to carry $5,500 insurance on the property and wished to arrange to carry that amount; "It has occurred in my mind that I never had any conversation about it, except at the time of soliciting the insurance he showed me two policies of $1,000 each;" that he informed the company when he made the daily report of the risk of the amount of insurance on the property. A. C. Hull testified that he was special agent of the defendant, empowered to inspect risks, approve or reject them, in the south half of the state; that on June 27, 1891, he visited the store of Wright Bros. at Fairfield and inspected and approved their risk; that on that occasion one of said firm told him they were carrying $2,000 other insurance besides the $1,000 they were applying for that day; that $3,000 was the total amount they asked for or wanted to carry on this stock; that there was nothing said about any additional insurance above $3,000.

That a court of equity will relieve against a mutual mistake there can be no question; but it will not reform a policy of insurance or other contract on the ground of a mistake of fact, unless the proof is clear, convincing, and satisfactory, and free from reasonable controversy. The burden is upon the party alleging the mistake to establish it upon the trial. (*Blake Opera House Co. v. Home Ins. Co.*,

73 Wis., 667; *Cox v. Woods*, 67 Cal., 317; *National Fire Ins. Co. v. Crane*, 16 Md., 260; *Steinberg v. Phœnix Ins. Co.*, 49 Mo. App., 255; *Smith v. Allen*, 14 So. Rep. [Ala.], 760; *Northfield Farmers Township Mutual Fire Ins. Co. v. Sweet*, 46 Ill. App., 598; *Osmundson v. Thompson*, 57 N. W. Rep. [Ia.], 863; *Howland v. Blake*, 97 U. S., 624.) In the last case cited above Mr. Justice Hunt, in discussing the question of the reformation of written instruments upon the ground of mistake, observes: "In each case the burden rests upon the moving party of overcoming the strong presumption arising from the terms of a written instrument. If the proofs are doubtful and unsatisfactory, if there is a failure to overcome this presumption by testimony entirely plain and convincing beyond reasonable controversy, the writing will be held to express correctly the intention of the parties. A judgment of the court, a deliberate deed or writing, are of too much solemnity to be brushed away by loose and inconclusive evidence."

A careful reading and consideration of the proofs on behalf of plaintiffs convinces us that it falls far short of establishing that a mistake was made in writing the policy in its not providing for subsequent concurrent insurance. It probably should have contained an indorsement of the $2,000 prior insurance; but that it failed in this respect did not affect the rights of the insured, since the company, at the time this risk was written, had notice of the existence of such prior insurance. (*Home Fire Ins. Co. v. Hammang*, 44 Neb., 567.) It does not appear from Mr. Wright's testimony that there was any agreement or understanding between himself and defendant's agent, Mr. Hyde, that the policy should provide for $5,500 concurrent insurance. The most that can be claimed for Mr. Wright's testimony is that he informed the company's agent of the intention of his firm to replenish the stock, and afterwards take out additional insurance, so as to make the total amount of insurance on the property about $5,500. Not until the stock was increased by new purchases was it proposed to take out other policies. The

insured should have applied for and obtained an indorsement upon the policy in suit for additional insurance after the stock was replenished. The evidence of Wright, standing alone, falls far short of establishing a mutual mistake, such as would justify a court of equity in reforming the policy. This being true, it is unnecessary to discuss the evidence on behalf of the insurer.

It is undisputed that the company had no notice of the additional insurance. The statement of Mr. Wright to defendant's agent when the risk was solicited, that the former intended to take out additional insurance on the property, is not notice that the insured had procured such additional insurance. (*Eagle Fire Co. of New York v. Globe Loan & Trust Co.*, 44 Neb., 380.) The procuring of the subsequent insurance by the insured on the property without the knowledge of the defendant or its written consent therefor being indorsed on the policy is in violation of the clause therein forbidding additional insurance, and avoids the policy. (*German Ins. Co. v. Heiduk*, 30 Neb., 296; *Hughes v. Insurance Co. of North America*, 40 Neb., 626.) From this it follows that the district court erred in reforming the policy, and entering judgment thereon. The judgment will, therefore, be reversed and the cause remanded for further procedings.

REVERSED AND REMANDED.

BAUM IRON COMPANY V. UNION SAVINGS BANK.

FILED JANUARY 19, 1897. No. 6944.

1. **Verdict:** IMMATERIAL FINDINGS. A verdict which is responsive to all the issues made by the pleadings will not be rejected because of immaterial findings.

2. ———: JUDGMENT: VARIANCE. When a verdict is sufficient to authorize a judgment, and there is no substantial variance between it and the judgment, the case will not be reversed for an informality in the verdict.

3. Replevin: CONVERSION: DAMAGES. In replevin, where the property has been returned to the defendant for the failure of the plaintiff to give the statutory undertaking, and the action proceeds as one for conversion, the measure of his damages, in case the right of property and right of possession are found in his favor, is the market value of the property, with lawful interest thereon.

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

Kennedy & Learned, for plaintiff in error.

Frederick Shepherd, *Hugh La Master*, and *McClanahan & Halligan*, *contra.*

NORVAL, J.

A single question is presented for review, viz., whether the judgment is supported by the verdict of the jury.

The Union Savings Bank instituted an action of replevin against the Baum Iron Company to recover certain personal property, of which the petition alleged plaintiff was the owner and entitled to its immediate possession; that the value of the chattels was $2,000; that defendant wrongfully detained them, to plaintiff's damage in the sum aforesaid. The prayer was for the return of the property, or its value if not returned, and for damages for the wrongful detention, and costs. The answer was a general denial. The property was taken under the writ, but the plaintiff having failed to give the undertaking required by statute, the chattels were returned by the officer to the defendant, and the action thereafter proceeded as one for damages only, under section 193 of the Code of Civil Procedure, which resulted in the following verdict being returned by the jury:

"We, the jury, duly impaneled and sworn to try the issues joined between the said parties, do find for the said plaintiff, that at the commencement of this action the plaintiff was, and now is, entitled to the possession of the following described articles, to-wit: 19 iron pulleys, 6 wooden pulleys, 40 feet of one and one-quarter inch shaft-

ing, 7 shaft hangers, 1 sand paper machine, 1 grindstone and fixtures, 1 ripsaw and stand, 1 buzz jointer, 1 boring machine, 1 trusser, 1 power windlass, 1 heading lathe, 1 wheel stave jointer and 5 saws, of the value of $715, and do assess his damage at the sum of $1.

"We further find that at the commencement of this action the defendant was, and now is, entitled to the possession of the remainder of said goods mentioned in the writ of replevin in this case.

"PERRY C. HOUGH,
"Foreman."

A motion for a new trial was made by the defendant, which was overruled by the court and judgment entered upon the verdict in favor of the plaintiff for the sum of $716, together with costs of suit.

It is argued that the verdict is wholly insufficient to authorize a judgment for plaintiff for more than $1 and costs, in that it did not pass upon the question of ownership of the property, but the right of possession merely, and hence the value of the property was not recoverable. This position is untenable. If the premises were true, obviously the conclusion drawn therefrom by counsel would inevitably follow. But the jury found more than the right of possession of part of the property in plaintiff. They found generally for the bank, which responded to the issue made by the pleadings that it was the owner of the chattels; and had the verdict contained no specific finding upon the question of possession, plaintiff would have been entitled to recover the value of all the property, with legal interest. But the jury having determined that the plaintiff had the right of possession of a part of the property only, its recovery was limited to the value of such portion, and interest. The action proceeded to trial, not for the recovery of the property, but as for conversion, to recover its value; and it is conceded by counsel that no specific findings as to ownership and right of possession were necessary. The soundness of the proposition cannot be successfully assailed. The verdict would have

been good had it merely found generally for the plaintiff, and assessed the amount of its recovery. (*Philleo v. McDonald*, 27 Neb., 142.) Such is the effect of the verdict in this case when the immaterial finding as to the right of possession is eliminated and disregarded as surplusage. If such finding had been omitted, the verdict would nevertheless have been responsive to the issues to be tried; and a verdict will not be rejected because informal or containing immaterial findings. (*Degering v. Flick*, 14 Neb., 448; *State v. Beal*, 48 Neb., 817.) Counsel for defendant misconstrue the force and effect of the verdict returned when they say that it finds the right of possession alone in the plaintiff of a portion of the property, and is silent as to ownership. The first finding of the jury upon the issues joined is "for the said plaintiff." The right of property, as well as the right of possession, was involved, and both of these were determined in favor of the bank by the finding "for the said plaintiff," and it was limited only by the special findings as to right of possession. The decisions cited by defendant below do not sustain the contention of its counsel that the jury failed to pass upon the ownership of the property, since the verdict in each of such cases differed materially from the one under consideration. Thus, in *Holt v. Van Eps*, 46 N. W. Rep. [Dak.], 689, the verdict returned was: "We, the jury, find that the plaintiff is entitled to the possession of the property, and find its value to be $650, and assess his damages to be $75;" and in *Yick Kee v. Dunbar*, 26 Pac. Rep. [Ore.], 275, the verdict read: "We, the jury in the above entitled action, find that the plaintiff is entitled to the possession of the property described in the complaint, and assess the value thereof at $3,000, and that plaintiff has been damaged by the detention thereof $—." In neither of those cases was there a general finding for the plaintiff, but merely an adjudication upon the question of the right of possession to the property. The same is true of the other cases cited by defendant below. Manifestly a verdict like either of those above quoted would not be sufficient to

warrant a judgment for the value of the property, since such a recovery cannot be had upon a mere right of possession. *Phipps v. Taylor*, 16 Pac. Rep. [Ore.], 172, was replevin, and the verdict found the right of possession of a portion of the property in plaintiff and the remainder in the defendant, but was wholly silent as to the question of ownership; hence it is not an authority for holding that the verdict in this case is defective in substance. The same observations apply to *Child v. Child*, 13 Wis., 18, and *Appleton v. Barrett*, 22 Wis., 568, in neither of which did the verdict determine the title to the property. The case of *Smith v. Phelps*, 7 Wis., 211*, cited by defendant below in this action, was overruled by the same court in *Everit v. Walworth County Bank*, 13 Wis., 469, in so far as it decided that the verdict there under consideration was insufficient. In the Everit case, which was replevin, the verdict was sustained as sufficient in substance, which was in this language: "The jury find for the plaintiff; they find the value of the property in question to be $600, and assess its damages at the sum of six cents." Strike out of the verdict before us the specific finding as to possession, and it is substantially like the one last above quoted. *Ela v. Bankes*, 37 Wis., 89, was an action to recover possession of certain crops, in which the jury found "for the defendant, and that he was entitled to the possession of the property," and also found its value and his damages for its detention. It was held that the verdict was a finding that the property belonged to the defendant and disposed of all the issues in the case. To the same effect are *Hall v. Jenness*, 6 Kan., 356; *Cain v. Cody*, 29 Pac. Rep. [Cal.], 778.

We are constrained to hold that the verdict in this case determined the right of property in favor of plaintiff below, and is responsive to every issue the jury were required to pass upon. The verdict, it is true, is somewhat irregular in the matter of the assessment of the amount of recovery, in that it does not specifically state the aggregate amount to which the jury

deemed him entitled, but merely found the value of the property to be $715, and assessed the amount of the damages at $1. It is not for these reasons fatally defective. The amount of recovery was not left indefinite, but was easily ascertainable without going outside of the verdict, by adding together the value and damages specifically determined by the jury. The measure of plaintiff's recovery was the market value of the property, of which the title and right of possession were found to be in plaintiff below, with lawful interest thereon from the date of the unlawful taking to the first day of the term of court at which the trial was had. Interest was an element of damages, and the presumption must be indulged that the amount awarded therefor is represented by the $1 assessed as damages.

It is argued that the valuation of the property at $715 cannot be regarded as equivalent to an assessment of damages in that sum, and *Black v. Winterstein*, 6 Neb., 224, is cited to sustain the contention. That was replevin, the property being taken under the writ and possession delivered to plaintiff. The jury simply found the right of possession in the defendant and assessed the value of the property, but omitted to assess his damages, nevertheless the court rendered judgment for the defendant for the amount of the value returned by the jury, less $55, the sum remitted by the defendant. In that case the ownership of the property was not found to be in the defendant, but the mere right of possession; hence it lacks analogy. LAKE, C. J., in the opinion, observed: "If the jury had found the right of property, as well as the right of possession, in the defendant, then the true measure of damages would have been its fair market value." The verdict herein supports the judgment, and the latter is accordingly

AFFIRMED.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY v. NEMAHA COUNTY.

FILED JANUARY 19, 1897. No. 6934.

1. **Taxation:** COUNTIES: EXCESSIVE LEVY. Under the constitution a county board has no authority to levy taxes which in the aggregate exceed $1.50 per $100 valuation, unless authorized so to do by the vote of the electors of the county, except for the payment of indebtedness existing at the date of the adoption of the constitution.

2. ———: ———: ———. When taxes levied by the county exceed the maximum rate fixed by the constitution, such portion of such taxes as is above the constitutional limit was levied for an "illegal and unauthorized purpose" within the meaning of section 144 of article 1, chapter 77, of the Compiled Statutes.

3. ———: ———: RECOVERY OF TAXES PAID UNDER PROTEST. Said section has provided two methods of recovering from a county illegal taxes paid under protest: First—Where the tax is claimed to be invalid for the reason that the property is not liable for taxation, or has been twice assessed in the same year and the taxes paid thereon, the party may, within thirty days after paying the same, file a verified claim with the county board setting forth the amount of taxes paid under protest, the grounds of such protest, and attach thereto the tax receipt, and he may appeal to the district court from any adverse decision. Second—If the tax paid under protest was imposed for any illegal or unauthorized purpose, or for any reason, other than double assessment or that the property was not subject to taxation, the tax is invalid, a suit at law may be maintained to recover the same.

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

J. W. Deweese and *J. S. Stull*, for plaintiff in error.

A. J. Burnham, contra.

NORVAL, J.

This action was brought by the railroad company in the district court of Nemaha county to recover from the county $213.12 for taxes paid under protest, and alleged to have been illegally and unlawfully levied in the year

1892 upon the property of the plaintiff. A demurrer to the petition was sustained by the court below, and the action dismissed, which ruling is assigned for error.

From the allegations of the petition it is disclosed that the county board of Nemaha county levied taxes in said county for the year 1892 for the following amounts: General fund, 9 mills; special road fund, 1 mill; county bridge, 4 mills; county road, 2 mills; county soldiers' relief fund, ¼ mill; total, 16¼ mills; that no vote of the people had been taken authorizing any such levies; that the assessed valuation of the property of the plaintiff in said county for said year was $213,120, and the amount of taxes imposed in excess of the constitutional and statutory limit was $213.12, which last mentioned sum plaintiff paid to the treasurer of Nemaha county on January 27, 1893, under written protest at the time duly made, and on the same day made a demand in writing upon said treasurer for the refunding to it of the amount of taxes thus paid, but that no part of the same has been refunded, and that on the 16th day of March, 1893, the county clerk of said county notified plaintiff that the county had decided, upon due consideration, not to refund the same.

The first question to be considered is whether the county board had any authority to levy a tax of 16¼ mills on the dollar valuation for county purposes. Section 5 of article 9 of the constitution of this state declares: "County authorities shall never assess taxes the aggregate of which shall exceed one and a half dollars per one hundred dollars valuation, except for the payment of indebtedness existing at the adoption of this conconstitution, unless authorized by a vote of the people of the county." The foregoing provision is clear and unambiguous. The maximum rate of taxes which county boards can impose in any one year is by it fixed at "one and a half dollars per one hundred dollars valuation," unless a greater rate is authorized by a vote of the county, except for the payment of a valid indebtedness

existing when the constitution was adopted. This is a limitation upon the power of the legislature, and it cannot authorize a levy of taxes in excess of the maximum rate named in the constitution. (*In re House Roll 284*, 31 Neb., 505; *State v. Weir*, 33 Neb., 35; *Young v. Lane*, 43 Neb., 812.) No portion of this 16¼-mill levy having been made to pay any indebtedness of the county which existed when the constitution was adopted, and it being specifically alleged that no vote of the electors of the county had ever been taken to authorize such levy, the taxes exceeding the constitutional limit levied and assessed upon plaintiff's property were illegal and void.

It is insisted that the court below had no original jurisdiction of the action, but that the remedy of plaintiff was to have presented its claim to the county board, and if the same was rejected, appeal from the decision to the district court. The determination of this question involves a consideration and construction of sections 144 and 145 of article 1, chapter 77, Compiled Statutes. Section 144, *inter alia*, provides: "In every case the person or persons claiming any tax, or any part thereof, to be for any reason invalid, who shall pay the same to the county treasurer, tax collector, or other proper authority, may proceed in the following manner, viz.: First—If such person claim the tax, or any part thereof, to be invalid for the reason that the property upon which it was levied was not liable to taxation, or that said property has been twice assessed in the same year and taxes paid thereon, he may pay such taxes under protest to the tax collector, county treasurer, or other proper authority, and it shall be the duty of the collector, treasurer, or other proper authority receiving such taxes, to give a receipt therefor, stating thereon that they were paid under protest, and the grounds of such protest, whether not taxable, or twice assessed, and taxes paid thereon. * * * Within thirty days after paying such taxes, the person paying them shall file a statement in writing, duly verified, with the county board, setting forth the amount of

taxes paid under protest, the grounds of said protest, and shall attach thereto the receipt taken for said taxes. Whereupon at the first meeting of the county board thereafter, they shall enquire into the matter, and if they shall find either that the property upon which such taxes were levied, was not liable to taxation, or that it had been twice assessed in the same year, and taxes paid thereon, they shall issue an order to the county treasurer to refund said taxes, stating therein what sum shall be refunded, and if they shall find that the grounds of such protest are not true, they shall issue an order to the county treasurer to dispose of said money in the same manner as though it had not been paid under protest. Appeals may be taken from such decisions in the same manner and within the times set forth in sections 37 and 38, chapter 18, of the Compiled Statutes of Nebraska; and if such an appeal be taken, the treasurer shall retain such taxes until the case is finally determined. Provided, That he shall in all cases retain said money until the time for an appeal shall have elapsed. * * * Second—If such person claim the tax, or any part thereof, to be invalid for the reason that it was levied or assessed for an illegal or unauthorized purpose, or for any other reason, except as hereinbefore set forth, when he shall have paid the same to the treasurer, tax collector, or other proper authority, in all respects as though the same was legal and valid, he may, at any time, within thirty days after such payment, demand the same, in writing, from the treasurer of the state, of the county, city, village, township, district or other subdivision for the benefit, or under the authority, or by the request of which the same was levied, and if the same shall not be refunded within ninety days thereafter, may sue such county, city, village, township, district, or other subdivision, for the amount so demanded, and if upon the trial it shall be determined that such tax, or any part thereof, was levied or assessed for an illegal or unauthorized purpose, or was for any reason invalid, judgment shall be

rendered therefor, with interest, and the same shall be collected as in other cases."

It is very evident that the legislature has, by the foregoing section, provided two separate and distinct modes of procedure to obtain illegal taxes which have been paid under protest,—one by the presentation of a claim for such taxes, by the person paying the same, to the county board for audit and allowance, with the right of appeal from the decision provided for; and the other remedy being by suit at law to recover such taxes. But it will not escape notice that the method of procedure is determinable by the ground or grounds which render the taxes illegal. The first method provided in the section is limited to taxes imposed on property not subject to taxation, or to taxes rendered invalid by the reason of double assessment of the same property, while suit against the county, city, or other subdivision is authorized when the tax paid under protest was imposed for an illegal or unauthorized purpose, or for any reason other than for double assessment, or that the property was exempt from taxation, is invalid. The taxes in controversy in this case exceeded the maximum constitutional limit; therefore they were assessed for an illegal and unauthorized purpose within the meaning of said section 144, and the remedy by suit was the proper one to pursue.

In reaching this conclusion the provisions of section 145 of said chapter have not been lost sight of. They, it is true, authorized the treasurer, when a demand is made upon him to refund taxes paid, as provided in the second method of procedure indicated in section 144, to transmit a copy of such demand to the authorities whose duty it is to audit and pay claims against the state, county, city, etc., as the case may be, and they are required to pass upon the same as upon any other claim. This section, 145, was not enacted for the benefit of the taxpayer, but for the public, to afford the proper authorities an opportunity to pass upon and pay claims for taxes paid under

protest, which were assessed for an illegal and unauthorized purpose, and thereby prevent needless litigation. Said section does not require the person paying a tax under protest to file a claim therefor with any board, for audit and allowance, nor does the record before us show that plaintiff has done so in the case at bar. The only averment in the petition on the subject is that the county clerk notified the company that the county had decided not to refund the taxes, but this does not justify the inference that the plaintiff presented its claim to the county board for allowance, since by section 145 it was made the duty of the county treasurer to transmit to such board a copy of the demand to refund the taxes, for allowance or rejection, which was probably done in this case. No provision is made for appeal from such action. Whether plaintiff might have presented its claim to the county board for allowance as a general creditor of the county, and after an adverse decision, appealed to the district court, it is unnecessary to decide, as the question does not arise in this case. Under the statute it had the right to recover the taxes by suit. The court below erred in sustaining the demurrer to the petition, and the judgment is reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

EDWARD RENARD, APPELLEE, V. IRA THOMAS ET AL., APPELLANTS.

FILED JANUARY 19, 1897. No. 6961.

Appeal: LACHES: DISMISSAL. An appeal to the supreme court not taken within six months from the date of the rendition of the decree or final order sought to be reviewed will be dismissed.

APPEAL from the district court of Burt county. Heard below before FERGUSON, J. *Appeal dismissed.*

Ira Thomas, for appellants.

H. H. Bowes, contra.

NORVAL, J.

This is an appeal from a decree rendered in the court below on the 17th day of November, 1893, foreclosing a tax lien. The transcript was filed in this court, and the appeal docketed, on May 18, 1894, which was more than six months after the rendition of the decree; hence this court has no jurisdiction of the cause. (*Verges v. Roush*, 1 Neb., 113; *Glore v. Hare*, 4 Neb., 131; *Schuyler v. Hanna*, 28 Neb., 601; *Fitzgerald v. Brandt*, 36 Neb., 683; *Withnell v. City of Omaha*, 37 Neb., 621; *Omaha Loan & Trust Co. v. Ayer*, 38 Neb., 891.) The appeal is accordingly

DISMISSED.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY v. STATE OF NEBRASKA, EX REL. STATE BOARD OF TRANSPORTATION.

FILED JANUARY 19, 1897. No. 6795.

Railroad Companies: RIGHT OF WAY: ELEVATORS: BOARD OF TRANSPORTATION: CONSTITUTIONAL LAW. An order of the state board of transportation under the provisions of the act of March 31, 1887, entitled "An act to regulate railroads and prevent unjust discrimination," etc., which requires a railroad company to surrender a portion of its right of way for an elevator site to a person or corporation engaged in the buying and shipping of grain, contemplates the taking of property for mere private use within the prohibition of the United States constitution, and is accordingly without authority and void. (*Missouri P. R. Co. v. State*, 17 Sup. Ct. Rep., 130, reversing same case, 29 Neb., 550.)

ERROR from the district court of Custer county. Tried below before HARRISON, J. *Reversed.*

J. W. Deweese and *J. S. Kirkpatrick*, for plaintiff in error.

Sullivan & Gutterson and *J. R. Dean, contra.*

NORVAL, J.

On the 9th day of February, 1893, the state board of transportation, on the complaint of one Byram Blair, made and entered of record an order requiring the plaintiff in error, hereafter called the railroad company, to furnish him, the said Blair, the site for the erection of a grain elevator upon its right of way and sidetracks in the city of Broken Bow. On the 5th day of July, 1893, said board instituted this proceeding in the district court of Custer county for the purpose of enforcing the order aforesaid by means of a writ of *mandamus* against the respondent railroad company. A trial was had in the district court upon issues joined, which resulted in a finding and judgment in accordance with the prayer of the relator, and which has, by means of the petition in error of the railroad company, been removed into this court for review.

Several questions are presented by the record, although the one necessarily decisive of the controversy is whether railroad companies doing business as common carriers within this state are, by virtue of the act of March 13, 1887, entitled "An act to regulate railroads and prevent unjust discrimination," etc. (Session Laws, 1887, p. 541, ch. 60), required to furnish elevator sites upon their rights of way for persons and corporations engaged in the business of buying and shipping grain. That question was in *State v. Missouri P. R. Co.*, 29 Neb., 550, after a careful consideration of the subject, resolved in the affirmative. But a petition in error prosecuted by the respondent therein to the supreme court of the United States resulted in the reversal of the judgment of this court. (See *Missouri P. R. Co. v. State*, 17 Sup. Ct. Rep., 130.) The court, in the decision last cited, speaking by Mr. Justice Gray, declared that the order of the board of transportation, similar in effect to the one here relied upon, contemplated the taking of the property of the respondent without its consent, for a mere private use, and

was accordingly violative of article 14, amendment to the constitution of the United States. To that decision of the court of last resort in all cases of alleged repugnance of the laws of any state to the constitution of the United States, it is our duty to yield obedience. It follows that the judgment complained of, which is based upon the decision of this court in the case above cited, must be reversed and the cause dismissed.

REVERSED.

HARRISON, J., not sitting.

THOMAS FICKES, APPELLEE, V. VICK BROTHERS ET AL., APPELLANTS.

FILED JANUARY 19, 1897. No. 7013.

Judgment: INJUNCTION. In an action to enjoin the enforcement of a judgment, relief should not be granted because of the service of an unauthorized summons upon which such judgment was rendered, in the absence of a showing of the existence of a defense to the cause of action which formed the basis of the judgment assailed.

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

Stevens & Cochran, for appellants.

E. H. Wooley, contra.

RYAN, C.

This action was brought in the district court of Saunders county by Thomas Fickes to enjoin the collection of a judgment rendered against him by a justice of the peace of Lancaster county. It was alleged in the petition of Mr. Fickes that at the time that said judgment was rendered he was a resident of Cass county, and that by

reason of a collusive entry of appearance by a co-defendant, also a resident of Cass county, the aforesaid justice of the peace assumed to have jurisdiction, upon a summons afterwards served in Cass county, to render judgment against Fickes. There was a decree as prayed, and to reverse such decree this appeal is prosecuted.

There was a radical defect in the petition of Mr. Fickes as to the existence of a defense to the cause of action upon which judgment had been rendered by the justice of the peace in Lancaster county. There were in the petition the following averments: "That said judgment was so fraudulently obtained as aforesaid because this plaintiff had a good and valid defense against said note, which fact the Vick Bros. well knew and so fraudulently obtained said judgment to prevent this plaintiff from making said defense." There was no reference to a defense other than was contained in the language just quoted. In *Hughes v. Housel*, 33 Neb., 703, it was held that when a party seeks to set aside a judgment against him which is regular on its face, on the ground that he has a meritorious defense, he must plead the facts constituting such alleged defense. The same rule was enforced in *Lander v. Abrahamson*, 34 Neb., 553, and in *Winters v. Means*, 25 Neb., 241. In *Janes v. Howell*, 37 Neb., 320, it was held that even where the return of service of summons was shown to be false, there must, to entitle to relief, be averments and proof of the existence of a meritorious defense. In the case under consideration there was no defense alleged or found by the court in its special findings of fact, neither was there any evidence to justify such a finding had it been made. The judgment is therefore reversed and the cause is remanded for further proceedings.

REVERSED AND REMANDED.

T. A. SHAW & COMPANY v. ROBINSON & STOKES COMPANY ET AL.

FILED JANUARY 19, 1897. No. 6997.

1. Corporations: INSOLVENCY: PREFERRING CREDITORS. There is no inflexible rule in existence which, under all conditions, prevents an insolvent corporation from transferring or incumbering its property in good faith and for proper purposes.
2. ———: ———: ———. Whether or not an insolvent corporation has made a disposition of its property in fraud of the rights of its creditors cannot be determined as a question of law, but, as a question of fact, must be determined upon consideration of the evidence in each particular case.

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

The facts are stated by the commissioner.

Duffie & Van Dusen, for plaintiff in error:

The assignments made and the attachment suits commenced by the assignees and levied upon the property of the company, followed by placing the company in the hands of a receiver upon its own application, constituted a general assignment for the benefit of the creditors. It was one transaction in the eyes of the law, and the company having attempted to prefer certain creditors, the assignment is void. (*Burrows v. Lehndorff*, 8 Ia., 96; *Van Patten v. Burr*, 52 Ia., 518; *Perry v. Holden*, 22 Pick. [Mass.], 269; *Kellogg v. Root*, 23 Fed. Rep., 525; *Berry v. Cutts*, 42 Me., 445; *Doggett v. Herman*, 5 McCrary [U. S.], 269.)

The directors of an insolvent corporation are trustees for the creditors. (*Bliss v. Matteson*, 45 N. Y., 22; *Butts v. Wood*, 37 N. Y., 317; *Robinson v. Smith*, 3 Paige Ch. [N. Y.], 222; *Aberdeen R. Co. v. Blaike*, 1 McQueen [Scotch], 461; *Horbach v. Marsh*, 37 Neb., 22; *Bradley v. Farwell*, 1 Holmes [U. S.], 433.)

The directors of an insolvent corporation cannot give

preference to one of its creditors over another. (*Wood v. Dummer*, 3 Mason [U. S.], 308; *Rouse v. Merchants Nat. Bank*, 46 O. St., 493; *Beach v. Miller*, 130 Ill., 162; *Drury v. Cross*, 7 Wall. [U. S.], 299; *Curran v. State*, 15 How. [U. S.], 307; *Richards v. New Hampshire Ins. Co.*, 43 N. H., 263; *Haywood v. Lincoln Lumber Co.*, 64 Wis., 639; *Port v. Russell*, 36 Ind., 60; *Lippincott v. Shaw Carriage Co.*, 21 Fed. Rep., 577; *Martin v. Zellerbach*, 38 Cal., 300; *Holder v. Lafayette, B. & M. R. Co.*, 71 Ill., 106; *Pyles v. Riverside Furniture Co.*, 30 W. Va., 134; *Lamb v. Laughlin*, 25 W. Va., 300; *Burr v. McDonald*, 3 Gratt. [Va.], 206; *Briggs v. Penniman*, 8 Cow. [N. Y.], 390; *Carey v. Cincinnati & C. R. Co.*, 5 Ia., 357; *Philips v. Whickham*, 1 Paige Ch. [N. Y.], 595; *Bank of Poughkeepsie v. Ibbotsen*, 24 Wend. [N. Y.], 478; *Moore v. Whitcomb*, 48 Mo., 543; *State Savings Ass'n v. Kellogg*, 52 Mo., 588.)

The fact that the company is an Iowa corporation gives it no additional right to prefer creditors. (*Guillander v. Howell*, 35 N. Y., 657; *Delahaye v. Heitkemper*, 16 Neb., 475; *Ford v. Plankinton Bank*, 58 N. W. Rep. [Wis.], 766; *Conover v. Hull*, 10 Wash., 673; *Orr v. Thompson*, 35 S. W. Rep. [Tex.], 473; *Lyons v. Perry*, 27 S. W. Rep. [Tex.], 100.)

References as to rights which plaintiff in error acquired by garnishment: *Brooks v. Greathead*, 1 J. & W. [Eng.], 176; *Angel v. Smith*, 9 Ves. [Eng.], 335; *Vermont & C. R. Co. v. Vermont Central R. Co.*, 46 Vt., 798; *Riggs v. Whitney*, 15 Abb. Pr. [N. Y.], 390; *In re Day*, 34 Wis., 643; *Brown v. Rauch*, 1 Wash., 497; *Moore v. Mercer Wire Co.*, 15 Atl. Rep. [N. J.], 737; *Reed v. Richmond & A. R. Co.*, 4 S. E. Rep. [Va.], 587; *Lyman v. Central V. R. Co.*, 10 Atl. Rep. [Vt.], 346; *Jones v. Browse*, 9 S. E. Rep. [W. Va.], 873; *Melendy v. Barbour*, 78 Va., 544; *Conwell v. Lowrance*, 26 Pac. Rep. [Kan.], 462; *Webster v. Lawrence*, 47 Hun [N. Y.], 565; *Adams v. Woods*, 8 Cal., 153, 9 Cal., 24; *Meara v. Holbrook*, 20 O. St., 143; *Hawkins v. Gathercole*, 1 Drew. [Eng.], 17; *Randfield v. Randfield*, 4 Drew. [Eng.], 314; *Adams v. Hackett*, 7 Cal., 187.

Winfield S. Strawn, appearing by permission of the court and courtesy of counsel in the case, argued the following propositions:

An insolvent corporation cannot prefer a creditor or creditors. Such a preference by an insolvent corporation is a use of its property for a purpose other than "to accomplish the legitimate object of its creation." (Compiled Statutes, ch. 16, sec. 55, ch. 15, sec. 1; *Graham v. La Crosse & M. R. Co.*, 102 U. S., 148; *Head v. Providence Ins. Co.*, 2 Cranch [U. S.], 169; *Lyons v. Perry Stove Co.*, 86 Tex., 143; *Orr v. Thompson*, 35 S. W. Rep. [Tex.], 473; *Thomas v. West Jersey R. Co.*, 101 U. S., 81; *Richie v. Ashbury Iron Co.*, L. R., 7 H. L. [Eng.], 633; *Sutton Mfg. Co. v. Hutchinson*, 63 Fed. Rep., 496.)

The property, when the corporation is actually insolvent, is a trust fund to which all creditors have a right to resort for the payment of the claims ratably. (*State v. Commercial State Bank*, 28 Neb., 677; *Ingwersen v. Edgecombe*, 42 Neb., 744; *Sutton Mfg. Co. v. Hutchinson*, 63 Fed. Rep., 496; *Bosworth v. Jacksonville Nat. Bank*, 64 Fed. Rep., 621; *Tillson v. Downing*, 45 Neb., 549; *Upton v. Tribilcock*, 91 U. S., 47; *Conover v. Hull*, 10 Wash., 673; *Ford v. Plankinton Bank*, 87 Wis., 363; *Ballin v. Merchants Exchange Bank*, 61 N. W. Rep. [Wis.], 1118.)

It is not the policy of the law to extend the privileges of corporate bodies beyond the express powers granted them by the legislature.

Abbott, Selleck & Lane, amici curiæ:

An insolvent corporation that has ceased to be a going concern has no power, in the distribution of its assets, to prefer one or more of its creditors to the exclusion of others. The relation of the directors toward the property and assets of the insolvent corporation is that of trustees for all the creditors. (*Adams v. Deyette*, 59 N. W. Rep. [S. Dak.], 215; *Atwater v. American Exchange Bank*, 38 N. E. Rep. [Ill.], 1019; *Marr v. Bank of West Tennessee*, 4 Cold.

[Tenn.], 471; *Swyer v. Hoag*, 17 Wall. [U. S.], 620; *Sanger v. Upton*, 91 U. S., 60; *Adler v. Milwaukee Patent Brick Mfg. Co.*, 13 Wis., 63; *Messersmith v. Sharon Savings Bank*, 96 Pa. St., 443; *Consolidated Tank Line Co. v. Kansas City Varnish Co.*, 45 Fed. Rep., 7; *Turnbull v. Prentis Lumber Co.*, 21 N. W. Rep. [Mich.], 379; *Hastings v. Drew*, 76 N. Y., 9; *Tompson v. Huron Lumber Co.*, 30 Pac. Rep. [Wash.], 741; *Holbrook v. Peters*, 8 Wash., 344; *Harrigan v. Quay*, 26 S. W. Rep. [Tex.], 512.)

Montgomery & Hall, for defendants in error:

A private corporation, in failing circumstances, may prefer certain creditors. (*La Grange Butter-Tub Co. v. Nat. Bank of Commerce*, 26 S. W. Rep. [Mo.], 710; *Roseboom v. Whittaker*, 132 Ill., 81; *Moon Bros. v. Waxahachie Grain & Improvement Co.*, 35 S. W. Rep. [Tex.], 337; *Ballin v. Merchants Exchange Bank*, 61 N. W. Rep. [Wis.], 1118; *Buchanan v. Barnes*, 34 S. W. Rep. [Tenn.], 425; *Buell v. Buckingham*, 16 Ia., 284; *Hallam v. Indianola Hotel Co.*, 56 Ia., 178; *Garrett v Burlington Plow Co.*, 70 Ia., 697; *Warfield v. Marshall County Canning Co.*, 72 Ia., 666; *Rollins v. Shaver Wagon & Carriage Co.*, 80 Ia., 380; *Gould v. Little Rock, M. R. & T. R. Co.*, 52 Fed. Rep., 680; *Allis v. Jones*, 45 Fed. Rep., 148; *Britton v. Boyer*, 27 Neb., 522; *Davis v. Scott*, 27 Neb., 642; *Brown v. Furniture Co.*, 58 Fed. Rep., 286; *Fogg v. Blair*, 133 U. S., 534; *Smith v. McGroarty*, 136 U. S., 237; *Hollins v. Brierfield Coal & Iron Co.*, 150 U. S., 371; *Lininger v. Raymond*, 12 Neb., 19; *Deitrich v. Hutchinson*, 20 Neb., 52; *Duncomb v. New York H. & N. R. Co.*, 84 N. Y., 190; *Coats v. Donnell*, 94 N. Y., 168; *Dabney v. Bank of South Carolina*, 3 S. Car., 156; *Stratton v. Allen*, 16 N. J. Eq., 229; *Wilkinson v. Bauerle*, 41 N. J. Eq., 635; *Covert v. Rogers*, 38 Mich., 363; *Bank of Montreal v. Potts*, 51 N. W. Rep. [Mich.], 512; *State v. Bank of Maryland*, 6 Gill & J. [Md.], 205; *Catlin v. Eagle Bank*, 6 Conn., 233; *Smith v. Skeary*, 47 Conn., 47; *Foster v. Mullanphy Planing Mill Co.*, 92 Mo., 79; *Alberger v. National Bank of Commerce*, 27 S. W. Rep. [Mo.], 657; *Meyer v. American Chair Co.*, 32 S. W. Rep.

[Mo.], 300; *Dana v. United States Bank*, 5 W. & S. [Pa.], 245; *Ashhurst's Appeal*, 60 Pa. St., 314; *Ringo v. Bisco*, 13 Ark., 563; *Worthen v. Griffith*, 28 S. W. Rep. [Ark.], 286; *Planter's Bank v. Whittle*, 78 Va., 737; *Warner v. Mower*, 11 Vt., 390; *Arthur v. Commercial & B. Bank*, 17 Miss., 430; *Palmer v. Hutchinson*, 11 So. Rep. [Miss.], 789; *O'Bear Jewelry Co. v. Volfer*, 17 So. Rep. [Ala.], 525; *Hospes v. Northwestern Mfg. Co.*, 50 N. W. Rep. [Minn.], 1117; *Reichwald v. Hotel Co.*, 106 Ill., 439; *Illinois Steel Co. v. O'Donnell*, 41 N. E. Rep. [Ill.], 185; *Blair v. Illinois Steel Co.*, 42 N. E. Rep. [Ill.], 895.)

Charles B. Keller, also for defendants in error:

A receiver cannot be garnished. (*Field v. Jones*, 11 Ga., 413; *Columbia Book Co. v. De Golyer*, 115 Mass., 67; *Richards v. People*, 81 Ill., 551; *Taylor v. Gillelan*, 23 Tex., 508; *Blake Crusher Co. v. Town of New Haven*, 46 Conn., 472; *Atlas Bank v. Nahant Bank*, 23 Pick. [Mass.], 480; *Hubbard v. Hamilton Bank*, 7 Met. [Mass.], 346; *McGowan v. Myers*, 66 Ia., 103; *Noe v. Gibson*, 7 Paige Ch. [N. Y.], 513; *Hills v. Parker*, 111 Mass., 508; *Northfield Knife Co. v. Sharpleigh*, 24 Neb., 635; *Rogers v. Corning*, 44 Barb. [N. Y.], 229.)

The overwhelming array of decisions supports the right of an insolvent corporation to prefer one or more creditors to the exclusion of others. (*Pondville Co. v. Clark*, 25 Conn., 97; *New Haven Savings Bank v. Bates*, 8 Conn., 505; *Hopson v. Ætna Axle & S. Co.*, 50 Conn., 597; *Southern White Lead Co. v. Haas*, 73 Ia., 404; *Warren v. First Nat. Bank*, 149 Ill., 10; *Ragland v. McFall*, 27 N. E. Rep. [Ill.], 75; *Glover v. Lee*, 140 Ill., 102; *Peterson v. Brabrook Tailoring Co.*, 37 N. E. Rep. [Ill.], 42; *Brabrook v. Belden Bros.*, 40 Ill. App., 326; *Warren v. First Nat. Bank*, 38 N. E. Rep. [Ill.], 122; *Beach v. Miller*, 22 N. E. Rep. [Ill.], 464; *Mullanphy Bank v. Schott*, 26 N. E. Rep. [Ill.], 640; *Atwater v. American Exchange Bank*, 38 N. E. Rep. [Ill.], 1017; *Paulding v. Chrome Steel Co.*, 94 N. Y., 334; *Varnon v. Hart*, 119 N. Y., 101; *Town v. Bank of River Raisin*, 2 Doug. [Mich.], 530; *Vail v. Jameson*, 7 Atl. Rep. [N. J.], 520; *Bergen v.*

Porpoise Fishing Co., 8 Atl. Rep. [N. J.], 23; *Burr v. McDonald*, 3 Grat. [Va.], 216; *Pyles v. Riverside Furniture Co.*, 2 S. E. Rep. [W. Va.], 909; *Hulings v. Hulings Lumber Co.*, 18 S. E. Rep. [W. Va.], 620; *Union Bank v. Ellicott*, 6 Gill & J. [Md.], 363; *Ex parte Conway*, 4 Ark., 303; *Whitwell v. Warner*, 20 Vt., 425; *Sargent v. Webster*, 13 Met. [Mass.], 497; *Pond v. Framingham & T. R. Co.*, 130 Mass., 194; *Hospes v. Northwestern Mfg. Co.*, 48 Minn., 174; *Weihl v. Atlanta Furniture Co.*, 15 S. E. Rep. [Ga.], 282; *Ardesco Oil Co. v. North American Oil & Mfg. Co.*, 66 Pa. St., 375; *United States v. Bank of United States*, 8 Rob. [La.], 262; *Bank of United States v. Huth*, 4 B. Mon. [Ky.], 429; *Gibson v. Goldthwait*, 7 Ala., 281; *Corey v. Wadsworth*, 11 So. Rep. [Ala.], 350; *Goodyear Rubber Co. v. Scott*, 11 So. Rep. [Ala.], 370; *Globe Iron Roofing Co. v. Thatcher*, 6 So. Rep. [Ala.], 367; *Henderson v. Indiana Trust Co.*, 40 N. E. Rep. [Ind.], 516; *DeCamp v. Alward*, 52 Ind., 468; *Schufeldt v. Smith*, 31 S. W. Rep. [Mo.], 1039; *City of St. Louis v. Alexander*, 23 Mo., 524; *Kitchen v. St. Louis, K. C. & N. R. Co.*, 69 Mo., 259; *Roan v. Winn*, 93 Mo., 503; *Williams v. Jones*, 23 Mo. App., 132; *Slavens v. Cook Drug Co.*, 30 S. W. Rep. [Mo.], 1025; *Hills v. Stockwell & D. Furniture Co.*, 23 Fed. Rep., 432; *Lippencott v. Shaw Carriage Co.*, 25 Fed. Rep., 577; *Milroy v. Eage*, 30 Fed. Rep., 544; *White v. Pettes*, 30 Fed. Rep., 864; *Sanford Fork Co. v. Howe, Brown & Co.*, 157 U. S., 312; *Graham v. La Crosse & M. R. Co.*, 102 U. S., 148; *Wabash, St. L. & P. R. Co. v. Ham*, 114 U. S., 587; *Hawkins v. Glenn*, 131 U. S., 319.)

Mahoney, Minahan & Smyth, also for defendants in error.

W. W. Morsman, Harwood, Ames & Pettis, Capps & Stevens, John A. Casto, and *J. B. Cessna*, filed printed arguments in favor of the points urged on behalf of defendants in error.

RYAN, C.

In the district court of Douglas county the Robinson & Stokes Company, a corporation, petitioned for and ob-

tained a receiver. In the petition, which was filed on the 16th day of November, 1892, it was alleged that the defendants, the Commercial National Bank, Anastatia Burnette, and the National Bank of Commerce had each procured to be levied attachments upon the wares and merchandise of the plaintiff, and that, to prevent irreparable loss by reason of certain facts pleaded, it was necessary that the plaintiff's factory, wherein its goods and wares were situated, should be kept in operation. The receiver was appointed, as prayed, to operate said factory and collect outstanding debts due the plaintiff. From the proceeds of the sales of merchandise it seems that the claims of the defendants above named were fully paid. The Commercial National Bank, one of these defendants, had in its possession book accounts and bills receivable of the plaintiff as collateral security to its claim, and it is in respect to the proper distribution of the proceeds of these that this controversy exists between the intervenors, May Bros. on one hand and T. A. Shaw & Co. on the other. By its petition of intervention the firm of May Bros. founded its claim upon the following written agreement:

"OMAHA, November 15, 1892.

"Whereas, we are indebted to May Bros., of Fremont, Nebraska, in the sum of $5,000; and whereas, we have assigned all our book accounts and bills receivable to the Commercial National Bank of Omaha, Nebraska, as collateral security for our indebtedness to said bank (excepting thirteen hundred dollars assigned to First National Bank, Marshalltown, Iowa); and whereas, we have also assigned said book accounts and bills receivable as aforesaid to Mrs. Anastatia Burnette as collateral security to secure the sum of about $11,500, subject to that of the bank as aforesaid; and whereas, we have further assigned said book accounts and bills receivable as aforesaid to the National Bank of Commerce to secure the sum of about $6,000, subject to the aforesaid assignments: Now, therefore, we hereby assign all our right, title, and

interest in and to said book accounts and bills receivable to said May Bros., of Fremont, Nebraska, as collateral security for said indebtedness of $5,000, subject, however, to the rights of each and all of the aforesaid assignees, as hereinbefore specified."

The right of the firm of T. A. Shaw & Co. to the amount in controversy was, in its petition of intervention, predicated upon averments that on November 18, 1892, said firm had brought its action in the district court of Douglas county against the Robinson & Stokes Company, and had on the same day caused to be garnished the Commercial National Bank. On motion of May Bros. the amount in controversy was ordered paid to May Bros., and it is for a review of this order that T. A. Shaw & Co. have prosecuted error proceedings to this court.

It appears from the evidence that after nightfall of November 15, 1892, there were present in the law office of Montgomery, Charlton & Hall the president, the secretary, and the attorney of the Robinson & Stokes Company and certain attorneys representing the defendants named in the petition for a receiver, and that there was at said time and place adopted by the Robinson & Stokes Company this resolution: "Whereas this company is indebted to the Com. Nat. Bank, of Omaha, Nebraska, in the sum of $40,000; and whereas said bank is demanding security for the payment of said indebtedness, now therefore, be it resolved that the Pres. and Secy. of this Co., on behalf of the Co., be authorized to assign to May Bros., Fremont, Neb., all their notes, bills receivable, accounts, books of accounts, demands and claims of every kind and name owing to and belonging to this Co., subject to prior assignments as collateral for the payment of the indebtedness of this Co. to said May Bros. evidenced by a certain promissory note calling for $5,000 in favor J. T. Robinson, R. E. Sears, T. H. Burnette, G. E. Stokes." The parties who are named after the words "in favor" seem to have been concerned in the Robinson & Stokes Company as officers and stockholders. On September 7,

1893, there were the following proceedings, as shown by the journal entry in this case: "The above cause coming on this day to be heard upon the exceptions of May Bros., intervenors, to the report of the receiver and the exceptions of Theodore A. Shaw and others to the report of the receiver, and the exceptions of the Robinson & Stokes Company to the report of the receiver, and, after hearing the evidence and the argument of counsel, and the court being fully advised in the premises overrules the exceptions of Theodore A. Shaw and others to the report of the receiver so far as the same pertains or relates to the power of a corporation to prefer a creditor and to prefer the parties which the said Robinson & Stokes Company did prefer in this case, to which the said Theodore A. Shaw and others except." Conformably with the above ruling the receiver was directed to pay to May Bros. the amount in dispute. In the petition in error there is assigned the overruling of the exceptions above noted, but we have been unable to find in the record any exception of the nature indicated. Indeed, the report of the receiver very properly dealt only with what he had done, and how much he held in his hands subject to the order of the court. The record therefore must be assumed to have described the contention of counsel for Shaw & Co. as exceptions of the nature indicated, and the question to be determined is thus limited to the power of an insolvent corporation, under any circumstances, to prefer one of its creditors. It would be useless to attempt a review of all the cases cited on this proposition, and we shall therefore take up the contentions of plaintiff in error in the order in which they are presented by its brief and with reference to each express our views in a general way.

It is first contended that the transfer of November 15 by the Robinson & Stokes Company amounted in law to a general assignment for the benefit of creditors. This question is not presented by the order assailed by the petition in error, for this is not an appeal from a decree

which presents all questions for trial *de novo*, but is a proceeding in error to review an order affecting a substantial right, made in a special proceeding determined upon an exception limited to a certain matter which was the abstract right of an insolvent corporation to prefer certain creditors.

It is next urged that the directors of an insolvent corporation are trustees for its creditors; that is to say, upon the insolvency of a corporation, its directors become mere trustees to hold its property for the benefit of its creditors, for, as it is argued, a corporation's insolvency is, civilly, its death. If the proposition that at the instant a corporation becomes insolvent it is dead is conceded, there would be no question that it could not afterwards transact business of any kind, and plaintiff in error would be entitled to the relief he prays, unless, perchance, this principle is too far-reaching in its consequences. Let us suppose that the Robinson & Stokes Company was civilly dead on the 15th of November, 1892, and that the transfer of its assets which precluded the transaction of business by it was conclusive evidence that as a corporation it had no further existence, and what inevitably follows? In the first place it could not have commenced and maintained this action for the appointment of a receiver and the winding up of its business affairs, for a dead person cannot be plaintiff in an action or civil proceeding. In the next place the firm of T. A. Shaw & Co. would have no standing in this case, for their attachment action was begun on November 16 and was prosecuted, according to their own argument, against a dead person. Other general considerations point to the same result, one of which is that a corporation may, in an insolvent condition, do business for years and, if the contention of the plaintiff in error is correct, its transactions during this time be found finally to be absolutely void. We are now speaking of the status of an insolvent corporation unaffected by statutory provisions. Later we shall consider an argument based on a statutory enactment. The

functions of such a corporation may be suspended, and such a suspension must inevitably accompany its death; but from these predicates it does not necessarily result that a suspension of functions always implies death. As to the proposition that the directors of an insolvent corporation hold its property in trust for its creditors the same observation applies, for, in a certain sense, this is true, and yet it by no means follows that the law impresses this property with such a trust as may be enforced only in a court of equity. If the funds of an insolvent corporation are purely trust funds in the hands of its directors as trustees, it would follow that, in any action of creditors of such corporation to subject said funds to the payment of their claims, the trustees should be made defendants. Among all the cases cited we have observed none in which the creditor of an insolvent corporation has proceeded against its directors on the assumption that it should be required that they should execute a trust with respect to property of the corporation in their possession. On general principles this would seem very significant. Plaintiff in error, however, argues that insolvency operates the dissolution of a corporation, and, therefore, that the provisions of sections 62 *et seq.*, chapter 16, Compiled Statutes, countenance the trust fund theory and authorize the very proceedings, which, as we have just remarked, we have never found to have been resorted to. Section 62, above referred to, provides: "Upon the dissolution, by the expiration of the terms of its charter or otherwise, of any corporation now existing or hereafter created, and unless other persons be appointed by the legislature or by some court of competent authority, the directors or managers of the affairs of such corporation acting last before the time of its dissolution, by whatever name they may be known in law, and the survivors of them, shall be the trustees of the creditors and stockholders of the corporation dissolved, and shall have full power to settle the affairs of the same, collect and pay outstanding debts and divide

among the stockholders the moneys and property that shall remain, in proportion to the stock of each stockholder paid up, after the payment of debts and necessary expenses," etc. By sections 63, 64, 67, and 68 of chapter 16, Compiled Statutes, provisions are made for prosecuting or enforcing pending or necessary suits in the name of the dissolved corporation where found necessary. It is provided by section 65 of said chapter 16: "The title of all real estate belonging to any such corporation shall, at the time of the dissolution of the same, pass to the trustees of such corporation, who shall have full power and authority to sell and dispose of any such real estate, in such manner and upon such terms as may be thought best for the interest of the creditors and stockholders, and, upon any such sale to make a good and sufficient title therefor." If, as contended by the plaintiff in error, an insolvent corporation is to be deemed a dissolved corporation, it would follow under the provisions of the section just quoted that the directors of such insolvent corporation are expressly authorized to sell and dispose of its real property for the interests of not only its creditors but of its stockholders as well. It is not usually necessary to provide with reference to stockholders when a corporation becomes insolvent, for in that event the creditors are generally compelled to appropriate all its assets. The contentions of plaintiff in error then are: First, that on general principles the entire assets of an insolvent corporation constitute a trust fund and cannot be disposed of for the payment of its debts; and, second, under the above statutory provisions that if its assets are real property they may be sold by the directors and the proceeds of such sale be paid over by such directors, as shall be thought best for the interests of the creditors and the stockholders. It seems to us that these are inconsistent propositions and that it is very unreasonable to suppose an insolvent corporation cannot transfer its personal property but that the directors, as trustees, may sell and dispose of its real property. We

are of the opinion that the dissolution contemplated in the above statute is the voluntary dissolution provided for by the two-thirds vote of the members of the corporation under section 134, chapter 16, Compiled Statutes, or the expiration of limitation of charter, the loss of membership, the surrender of its franchise as a corporation, or forfeiture by non-user or misuser described in 2 Morawetz, Private Corporations, p. 1005, 2 Beach, Private Corporations, secs. 780, 782. The full purport of what is expressed or implied by the statement that the assets of an insolvent corporation are a trust fund for the benefit of its creditors is expressed in the following cases:

In *Hollins v. Brierfield Coal & Iron Co.*, 150 U. S., 371, 14 Sup. Ct. Rep., 127, Mr. Justice Brewer said: "The expression often used that the property of a corporation constitutes a 'trust fund,' for its creditors, only means that when the corporation is insolvent and the court of equity has possession of its assets for administration, such assets must be appropriated to the payment of its debts before any distribution to the stockholders, but as between the corporation itself and its debtors, the former does not hold its property in trust, or subject to a lien in favor of its creditors in any other sense than does an individual debtor."

In *Fogg v. Blair*, 133 U. S., 534, Field, J., said: "We do not question the general doctrine invoked by the appellant that the property of a railroad company is a trust fund for the payment of its debts, but do not perceive any place for its application here. That doctrine only means that the property must first be appropriated to the payment of the debts of the company before any portion of it can be distributed to the stockholders; it does not mean that the property is so affected by the indebtedness of the company that it cannot be sold, transferred, or mortgaged to *bona fide* purchasers for a valuable consideration except subject to the liability of being appropriated to pay that indebtedness. Such a doctrine has no existence."

In *Hospes v. Northwestern Mfg. & Car Co.*, 50 N. W. Rep. [Minn.], 1117, it is said by Mitchell, J., speaking for the whole court: "This trust fund doctrine, commonly called the 'American doctrine,' has given rise to much confusion of ideas as to its real meaning and much conflict of decision in its application. To such an extent has this been the case that many have questioned the accuracy of the phrase, as well as doubted the necessity or expediency of inventing any such doctrine. While a convenient phrase to express a certain general idea, it is not sufficiently precise or accurate to constitute a safe foundation upon which to build a set of legal rules. The doctrine was invented by Justice Story in *Wood v. Dummer*, 3 Mason [U. S.], 308, which called for no such invention, the fact in that case being, that a bank divided up two-thirds of its capital among its stockholders, without providing funds sufficient to pay its outstanding bill-holders. Upon old and familiar principles, this was a fraud on creditors. Evidently, all that the eminent jurist meant by the doctrine was, that corporate property must be first appropriated to the payment of the debts of the company before there can be any distribution of it among stockholders—a proposition that is sound, upon the plainest principles of common honesty. * * * The phrase that 'the capital of the corporation constitutes a trust fund for the benefit of creditors' is misleading. The corporate property is not held in trust, in any proper sense of the term. A trust implies two estates or interests—one equitable and one legal—one person as trustee holding the legal title, while another as the *cestui que trust* has the beneficial interest. Absolute control and power of disposition are inconsistent with the idea of a trust. The capital of a corporation is its property. It has the whole beneficial interest in it, as well as the legal title. It may use the income and profits of it, and sell and dispose of it, as a natural person. It is a trustee for its creditors in the same sense, and to the same extent as a natural person, but no further."

In *Wabash, St. L. & P. R. Co. v. Ham*, 114 U. S., 587, it is said: "The property of a corporation is doubtless a trust fund for the payment of its debts, in the sense that when the corporation is lawfully dissolved and all its business wound up, or when it is insolvent, all its creditors are entitled, in equity, to have their debts paid out of the corporate property, before any distribution thereof among the stockholders. It is also true, in the case of a corporation, as in that of a natural person, that any conveyance of the property of the debtor, without authority of law and in fraud of existing creditors, is void as against them." This court has never had occasion to define its views of the subject under discussion, though it has recognized the existence of a personal trust relation between the officers of a corporation and its creditors.

In *Gorder v. Plattsmouth Canning Co.*, 36 Neb., 549, there was this holding as reflected in the fourth paragraph of the syllabus: "The relation of the directors to stockholders of a corporation is of a fiduciary character and their contracts and dealing with respect to the corporate property will be carefully scrutinized by the courts. Such contracts are not, however, necessarily void. Where it is clear that the transaction is in good faith on the part of the director and beneficial to the corporation which has, with the sanction of the stockholders, received and appropriated the consideration without offering to make restitution, it may be upheld when assailed even in a court of equity."

In *Ingwersen v. Edgecombe*, 42 Neb., 740, there was again involved the right of an officer to secure to himself a preference, and POST, J., delivering the opinion of this court said: "But the view which may be said to rest upon the soundest reasons and is sanctioned by the decided weight of authority is, that when a corporation becomes insolvent, its property and assets constitute a trust fund for the benefit of its creditors and that the directors and officers in possession thereof, being trustees for all the creditors, cannot take advantage of their position to se-

cure a preference for themselves but must share ratably with other creditors." In this last case it was held that the relations of the officers to the corporation were such that under the circumstances it amounted to securing an undue preference for one officer with the concurrence of another officer, to obtain security of an indebtedness due to himself from the corporation. The trust spoken of as having been violated was such as is implied from the relations and implied duties of an officer of a corporation toward his principal. This is illustrated by the holding in *Gorder v. Plattsmouth Canning Co., supra*, that upon the showing therein made of fairness in every respect the mortgage of property of the corporation in favor of certain of its officers was valid. If what, in *Hospes v. Northwestern Mfg. & Car Co., supra*, was called the "American doctrine" of trust funds had been applied, this holding would have been impossible, no matter how meritorious the claim secured.

It seems to us that the correct principle is enunciated in the federal cases above cited and in *Hospes v. Northwestern Mfg. & Car Co., supra*. A court of equity, at the instance of proper parties in a proper proceeding, can, when the corporation becomes insolvent, administer such relief as the circumstances of each case may demand. The insolvency of the corporation, when it gave a preference, would in such a proceeding be a proper matter for consideration. If the corporation has fraudulently conveyed or incumbered its property, such property may be followed and subjected to the payment of the debts of the corporation. If the corporation has disposed of its property under unusual conditions, that fact is a circumstance properly to be taken into account. The effects of these circumstances are not properly determinable as matters of law, and we think it is from the failure to bear this in mind that plaintiff in error asks this court inflexibly to enforce the rule that an insolvent corporation cannot, in any case, prefer one of its creditors. In each case as it arises the question must be whether or not there has

been a disposition of the property of the corporation for the purpose of making a fraudulent preference or for other illegal purposes. As against a corporation in the class of actions of which we are now speaking, creditors have the same remedies and none other than against an individual debtor. The inferences to be deduced from the proofs are inferences of fact and not of law. It may be that the inference is unavoidable; it is none the less an inference of fact. Section 20, chapter 32, Compiled Statutes, provides that, "The question of fraudulent intent in all cases arising under the provisions of this chapter shall be deemed a question of fact and not of law," etc. The right of a debtor in good faith to prefer *bona fide* creditors has been repeatedly recognized by this court. (*Lininger v. Raymond*, 12 Neb., 19; *Grimes v. Farrington*, 19 Neb., 48; *Nelson v. Garey*, 15 Neb., 531; *Bierbower v. Polk*, 17 Neb., 268; *Costello v. Chamberlain*, 36 Neb., 45; *Kilpatrick-Koch Dry Goods Co. v. McPheely*, 37 Neb., 800; *Jones v. Loree*, 37 Neb., 816; *Farwell v. Wright*, 38 Neb., 445; *Kavanaugh v. Oberfelder*, 37 Neb., 649; *Sherwin v. Gaghagen*, 39 Neb., 238; *Hewitt v. Commercial Banking Co.*, 40 Neb., 820; *Grand Island Banking Co. v. Costello*, 45 Neb., 119; *Kilpatrick-Koch Dry Goods Co. v. Strauss*, 45 Neb., 793; *Powell v. Yeazel*, 46 Neb., 225.) While it may be true that from the inherent nature of a corporation, inferences unfavorable to a preference by it of certain of its creditors are justifiable from facts which would not sustain the same inferences with respect to a preference by a natural person, we cannot believe that the abstract legal right of making a preference in one class of cases is, by law, more restricted than is the other. The judgment of the district court is

AFFIRMED.

NORVAL, J., not sitting.

HENRY MOSEMAN ET AL., TRUSTEES, APPELLEES, V. JOHN HEITSHUSEN ET AL., APPELLANTS.

FILED JANUARY 19, 1897. No. 7038.

1. **Deeds:** CONDITIONS. The condition in a deed upon which title of lands conveyed for church purposes shall revert to the grantor cannot be invoked by one faction of the grantee to the prejudice of another.
2. **Religious Societies:** CIVIL COURTS. Where the rights of a faction of a church to control its property or records are mainly dependent upon matters of religious doctrine, as to which the disputing factions entertain diverse views, civil courts should decline to interfere.

APPEAL from the district court of Burt county. Heard below before FERGUSON, J. *Reversed.*

Ira Thomas, for appellants.

H. H. Bowes, contra.

RYAN, C.

By their petition filed in the office of the clerk of the district court of Burt county, the appellees, as plaintiffs, alleged that in 1873 Simon and Mary Kerl, for church purposes, deeded to certain named persons, as trustees of the Lutheran Church of Burt and Dodge counties, a certain described forty-acre tract of land situated in Burt county, and that it was provided in said deed that "if said Lutheran Church shall be dissolved, or if some other religious society shall occupy said church and property," then thirty of the said forty acres should revert to the grantors. A considerable portion of the argument found in the briefs of the respective litigants is devoted to the discussion of the effect of certain acts of certain church factions as working a forfeiture under the terms of the aforesaid deed, but as the grantors in said deed are not parties to this action this discussion is entirely irrelevant. When the parties in interest seek a forfeiture it

will be time to consider this question and not till then. It is alleged in the petition that the members of the society to which said deed had been made on April 4, 1893, adopted the following preamble and resolution: "Whereas it appears that there is no record of the adoption of the constitution of this religious association or the change of name from the Lutheran church of Burt and Dodge counties to the St. Paul German Lutheran Church: Therefore, be it resolved, that we proceed to adopt a constitution to govern the association or church as provided in the deed from Simon Kerl." It was averred in the petition that the defendants voted against the adoption of the above preamble and resolution, and immediately following this averment were allegations in this language: "That after the adoption of said constitution the said members signed the same, except defendants herein, and adopted the following resolution by a unanimous vote; that the members of plaintiffs' faction are as follows: Henry Von Essen, T. D. Claussen, J. H. Kuhlman, H. Morsemann, Herman Von Essen, John Kuhlman, Mauritz Stevens, Otto Uehling, Gerard Havekost, Claus Hartz, R. C. Suhr, Jr.,R. C. Suhr, Sr., John D. Suhr, Dietrich Stolle, Carl Kuenemann, Johannes Jopp, H. Heinrich Schutte, D. Herreilers. Resolved, that the name of this church be changed from the Lutheran Church of Burt and Dodge counties to the Evangelical Lutheran St. Paul's Church of Burt county and the vicinity." It was alleged in the petition that this resolution was published in the Oakland *Times* (presumably a newspaper) for three weeks as provided by law, and that prior to the adoption of said resolution plaintiffs had been duly elected trustees of said church, of which election a certificate was filed in the office of the county clerk of Burt county. It was further alleged by the plaintiffs that John Heitshusen, one of the defendants, had with force taken the records of this said church and turned them over to J. P. Kuehnert, and that both Heitshusen and Kuehnert refused to return them to plaintiffs, who, by law, are made the custodians

of said books and papers of said church; that Kuehnert is the minister the defendants desire to employ as minister in charge of said church, and that Kuehnert had threatened and was about to hold church in the church building of this society, and that unless restrained by an order of the court would break and enter said building; that there were fifteen members of said church as against nine of the defendants. From the foregoing averments of the petition we assume that plaintiffs claimed to assert certain rights by virtue of being the sole members of the church organization entitled to the possession and use of the property conveyed by Simon and Mary Kerl as well as of certain church records. The prayer of the petition accordingly was, in effect, that the defendants be enjoined from interfering with the exclusive rights claimed by the plaintiffs. The attitude of the contending parties toward each other was described in the petition in this language: "Said J. P. Kuehnert is a member of what is known as the Missouri Synod of the Lutheran Church. There is but little difference in the religious teachings of said two synods (the General Lutheran Synod of the United States and the Missouri Synod of the Lutheran Church), but there is a great difference in the government. The General Synod is much more liberal with its members than the Missouri Synod; said Missouri Synod is very strict in its control of its members; they insist upon the children of the members attending the parochial schools, and prevent members from joining any secret organization or secret society of any kind; the majority of this society desire to join the General Synod and have made application so to do; said Lutheran church of Burt and Dodge counties has never belonged to any synod; the buildings on the said land were built by the subscription of the several members at that time; said defendants, although in the minority, refuse to unite with the plaintiffs in joining the General Synod." It was further alleged in the petition that J. P. Kuehnert, as the minister in charge, contrary to the wishes of

plaintiffs, the trustees and the majority of the congregation of said church society, and said several defendants, threatened to, and would, if not prevented, although in the minority, turn over the property of said church to the Missouri Synod and join said Missouri Synod. There were issues duly joined between the litigants, and upon a final hearing there was a decree as prayed by the plaintiffs, from which the defendants appeal.

We have already indicated why there can be enforced in this case no forfeiture under the provisions of the deed of Simon and Mary Kerl. The denial of defendants' rights in the real property and the church records is a mere collateral incident to the matter chiefly sought to be enjoined, and that is the turning over of the church society to the control of the Missouri Synod. On the part of the defendants it was alleged that the original organization of this church society was in harmony with the doctrines of the Missouri Synod; that this relation still exists and that no one could become a member of said church society without working a fraud upon it, without agreeing to said constitution, and agreeing in doctrine and practice with said church and said Missouri Synod in all things. The essential differences of doctrine between the General Synod and the Missouri Synod are defined in the answer, according to the views of the defendants, with such circumstantial detail as show how important to them were these matters of faith in this action. If the action was one brought by the grantor to enforce the conditions of their deed there might be good reason for determining whether or not the donation had been diverted to an improper or unauthorized purpose. As it is, the real question is one of mere doctrine, into which civil courts are not equipped to inquire. (*Pounder v. Ashe*, 44 Neb., 672; *Powers v. Budy*, 45 Neb., 208.) The judgment of the district court is therefore

REVERSED.

RICHARD B. GRIFFITH V. SUSAN F. THOMPSON.

FILED JANUARY 19, 1897. No. 7019.

Statute of Frauds: VENDOR AND VENDEE. The statute of frauds relative to the sale of lands will not enable one who has obtained the title and possession of real property to avoid making payment therefor merely because there had been no formal acceptance in writing of the original written offer of the purchaser.

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

C. A. Baldwin and *Weaver & Giller*, for plaintiff in error.

Andrew Bevins, contra.

RYAN, C.

In the district court of Douglas county there was a verdict and judgment for the sum of $478.78 in favor of Susan F. Thompson, the plaintiff in that court. We have carefully examined the evidence and find that the jury was justified in finding the averments of the petition sufficiently proved, and we shall therefore devote our attention to the question chiefly argued by the plaintiff in error, and that is, whether or not the petition in the district court stated a cause of action.

In her said petition, Mrs. Thompson alleged that previous to and until the year 1889 she was the owner of a life estate in a certain described tract of land containing 160 acres, more or less, situated in Douglas county; that said tract had been by her husband and herself mortgaged to secure payment of the sum of $1,000; that Richard B. Griffith, with reference to said land, wrote to her the following letter:

"DEAR MOTHER: We got your letter and in regard to your farm I do not know what to say as I have got so much stock now, but I will make you an offer on it provided it is not sold. I will assume all indebtedness on

that farm and give you five hundred dollars. If you accept this offer come down, if not please come down anyway, as we are alone. Bring Dell along to stay this winter. The girls are at school in York. We are all well.

"Yours truly, R. B. G."

In her petition Mrs. Thompson alleged that she accepted said proposition and that defendant immediately took possession by reason of such purchase, and still remains in possession, and that said agreement was fully performed on her own part and that, by consent of both parties, the real property was purchased by Griffith at a foreclosure sale of the aforesaid mortgage, whereby said Griffith secured a fee-simple title to said land. Mrs. Thompson further averred in her petition that after the sheriff's deed had been delivered to Griffith, he paid to her the sum of $50 as part of the said purchase price of $500, but that he has ever since refused to pay the balance, for which balance, with interest, she prayed judgment.

The theory of the plaintiff in error is that there was required to constitute a complete sale such specific averments of the making of a written contract by Mrs. Thompson as would amount to a compliance with section 5, chapter 32, Compiled Statutes, entitled "Frauds." If Mrs. Thompson was suing for an estate in the land, or for relief as against it, this position might be correct. Her action was not of that nature. In her petition she alleged a written offer to purchase, an acceptance, and, finally, a part payment of the purchase price. Whether or not the original written proposition was formally accepted became, under these circumstances, a matter of no importance with respect to the liability of Griffith for the unpaid purchase money. He, by virtue of the sheriff's sale, under his arrangement with Mrs. Thompson, had obtained the title and possession and thereby became liable to pay according to his promise. This action was solely to enforce performance of this promise,

and the section of the statute of frauds invoked in avoidance of this liability was no defense. (*Harris v. Roberts*, 12 Neb., 631; *Galley v. Galley*, 14 Neb., 174.) The judgment of the district court is

AFFIRMED.

JOHN WILSON, SHERIFF, V. ROSS GAMBLE.

FILED JANUARY 19, 1897. No. 6876.

1. **Fraudulent Conveyances:** CONSIDERATION: EVIDENCE: INSTRUCTIONS. In a proceeding to avoid a sale of personal property as having been made in fraud of the rights of creditors of a firm, the circumstances that a part of the consideration for such sale was the cancellation of a debt by one partner, incurred before the partnership was entered into, and secured by an unrecorded chattel mortgage on the said property before the firm became its owner, was not one which would have justified an instruction that the sale was void, but was proper to be submitted as evidence bearing upon the good faith of such sale.

2. **Instructions:** WEIGHT OF EVIDENCE. An instruction by which the jury was sought to be directed what weight must be attached to certain facts developed by the proofs was, on that account, erroneous, and, therefore, properly refused.

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

Lamb, Adams & Scott, for plaintiff in error.

H. M. Sinclair, E. C. Calkins, and *H. V. Calkins, contra.*

RYAN, C.

On the 18th day of February, 1890, George Ellis and J. S. Caldwell became partners under the firm name and style of "The Ellis & Caldwell Plumbing & Heating Company." Previous to the date just named George Ellis had individually carried on the business indicated by the above partnership name, and, on March 5, 1888, had mortgaged all his stock and tools to Ross Gamble to se-

cure three promissory notes each for the sum of $558.84. This mortgage was never recorded. On the 4th of December, 1890, Jacob S. Caldwell and George Ellis, by a bill of sale, transferred their entire partnership property and immediately gave possession thereof to the grantee, Ross Gamble. The consideration named was $4,000. On the 8th day of December, 1891, John Wilson, the sheriff of Kearney county, levied on said property two executions which had been issued on judgments rendered against said partnership firm. Ross Gamble, as the owner entitled to recover possession from the sheriff, immediately replevied the property, and upon a trial had in the district court of Kearney county there was a verdict and a judgment in his favor. The plaintiff in error insists that the transfer to Gamble was fraudulent as against the creditors of The Ellis & Caldwell Plumbing & Heating Company, and accordingly reviews the proofs to establish this proposition. The verdict of the jury is found, upon examination of the proofs, to be sufficiently supported in that respect, and the errors, if any there are, must be found in other directions.

It is first urged that when a firm is insolvent the partnership property will be applied to the payment of the partnership debts and that a creditor of an individual partner is not entitled to be paid out of such property in preference to partnership creditors. The principle, thus broadly urged, even if conceded to be correctly stated, is not applicable to the facts which the evidence adduced by the defendant in error tended to establish. Mr. Gamble and Mr. Ellis testified that when the partnership agreement was being formulated, Mr. Caldwell was told of the existence of the mortgage made by Mr. Ellis to Mr. Gamble and entered into said partnership in view of that fact. It is true Caldwell testified that Mr. Ellis said he would take care of this mortgage, but there was no proof that this was assented to by Mr. Gamble. When the members of the partnership firm found they could not amicably continue their partnership relations they agreed to

sell their entire stock, tools, and books of account to Ross Gamble, and that the amount secured by the mortgage to him should be reckoned a part of the consideration. Under this agreement the transfer of the title and possession took place as has heretofore been stated, and after deducting certain sums due from the firm, together with the amount secured by the mortgage, the balance was paid in cash and a promissory note of Mr. Gamble due one year from its date, which was December 4, 1890. This note was, therefore, past due when the levies of execution were made on December 8, 1891, and the uncontradicted evidence was of its complete payment in the meantime. Under these circumstances the court very properly, in its instructions to the jury, used the language against which the present criticism of the plaintiff in error is directed, which language is as follows: "If you believe from the evidence that at the time of the alleged sale to the plaintiff * * * Ellis was indebted to the plaintiff for money to purchase goods before Caldwell entered into partnership with Ellis, and that Caldwell, as one of the members of the firm, agreed and consented that such indebtedness should be satisfied, and as a part consideration of the purchase price by such sale, and the sale was in all other respects made in good faith for a valuable consideration and without intent to defraud, delay, or hinder the creditors of Ellis and Caldwell, then such sale would be valid and plaintiff would be entitled to recover." In view of the propositions already stated, it is scarcely necessary to say that there was no error in receiving in evidence the chattel mortgage above referred to, and this disposes of all the assignments argued except one, which we shall now consider.

It is urged that there was error in refusing to instruct the jury that as to the matters above discussed the length of time which elapsed after the alleged sale before the executions were levied had no effect and should be given no weight by the jury. This would have been to direct that no importance could be attached to the cir-

cumstance which, from the detailed statement of facts hereinbefore given, might have been quite important in its bearing. This instruction was, therefore, properly refused. The judgment of the district court is

AFFIRMED.

NORFOLK NATIONAL BANK V. MINNA NENOW.

FILED JANUARY 19, 1897. No. 6971.

1. **Pledge by Husband:** NOTICE OF WIFE'S TITLE: PROMISSORY NOTE. A father owned a negotiable note payable to his order, secured by a real estate mortgage. Before the maturity of the note he gave it to his daughter, and at the same time duly executed and delivered to her an assignment of the mortgage. The daughter delivered the note and mortgage assignment to her husband for deposit in a bank for collection. The husband borrowed money of the bank and pledged the note as security. *Held*, That the mortgage assignment accompanying the note was sufficient to put the bank on inquiry as to the husband's title to the note.
2. **Husband and Wife:** PRINCIPAL AND AGENT. A husband may act as the agent of his wife, but in order to bind her he must previously be authorized, or she must, with a knowledge of his acts, subsequently ratify them.

ERROR from the district court of Madison county. Tried below before JACKSON, J. *Affirmed.*

Powers & Hays, for plaintiff in error.

Mapes & Hazen, contra.

RAGAN, C.

In the district court of Madison county, Minna Nenow sued the Norfolk National Bank, alleging for cause of action that about October, 1891, she left with the bank for collection, a note which she owned; that the bank had collected the note and refused to pay to her its proceeds. The defense of the bank was that about the 1st of Janu-

ary, 1892, the husband of Mrs. Nenow became indebted to it for which he executed his note, and to secure the payment of the same he "turned over and caused to be assigned" to the bank the note of Mrs. Nenow, with her knowledge and consent, and that it had collected Mrs. Nenow's note and applied the proceeds to the husband's debt. Mrs. Nenow had a verdict and judgment and the bank has prosecuted here a petition in error.

1. The first argument is that the verdict is unsupported by sufficient evidence. The evidence is uncontradicted that on the 20th of June, 1887, one William Boche executed his note for $200, due two years after date, payable to the order of Carl Hille to whom said note was delivered, and secured the payment of the same by a real estate mortgage. Carl Hille was the father of the defendant in error, and sometime in January, 1888, he made her a present of this note and delivered it to her and at the same time duly executed and acknowledged and delivered to her an assignment of the mortgage securing the note. This note—the assignment of the mortgage being therewith, the note at the time not being indorsed by the defendant in error—was delivered by the husband to the bank as collateral security for a debt he owed it, and the note subsequently collected by the bank and the proceeds applied towards the liquidation of the husband's debt. There is a conflict in the evidence as to what indorsements were on the note at the time the bank received it; but the evidence tends very strongly to show that the note at that time was indorsed "Pay to the order of Minna Nenow. Carl Hille." The theory of Mrs. Nenow was—and the evidence introduced in her behalf tends to support it—that she placed this note in her husband's hands and instructed him to deposit it in the bank for collection; that she did this because her father had told her to do so; that soon after the note was so deposited she called at the bank and inquired if it had been collected and was informed that it had not; that she did not know that her husband was indebted to the bank;

that she never authorized him to collect the money on the note nor authorized him to pledge it as security for his debt; and that shortly before the suit was brought, upon inquiring of the bank if it had collected the note, she was informed by its officers that it had, and had applied the proceeds to her husband's debt; and this was the first intimation she had that her note had been thus disposed of by her husband. As already stated, the defense of the bank was that the note was assigned to it by Mrs. Nenow's husband, as security for his debt, with her knowledge and consent. There is not a word of evidence in the record to sustain this defense. About the 30th of December, 1891, the bank sent for Mrs. Nenow and induced her to execute to it an assignment of the mortgage securing the note; and the evidence introduced on its behalf tends to show that at that time some of the officers of the bank informed Mrs. Nenow that they held the Hille note as security and that she consented thereto. But the bank's evidence also shows that at this very time she told the bank officers that when the money was collected on the Hille note that it was hers; that her father had given it to her; and it is impossible to resist the conclusion that she executed this assignment to enable the bank to collect the money on the Hille note, expecting when it was done that the money would be paid to her; and subsequent to this time she called at the bank and asked for the money. Without quoting further from the evidence we think the verdict rendered is the only one that could have been rightly rendered. When this note was delivered to the bank by the husband, the assignment of the mortgage that accompanied it showed on its face that this note belonged to Mrs. Nenow. This was sufficient to put the bank on inquiry as to the husband's title to this note. The evidence sustains the verdict.

2. Another assignment is that the court erred in giving instruction No. 5 to the jury. This instruction was as follows: "If you find from a preponderance of the evidence that the plaintiff placed the note in controversy in

the defendant bank for collection, and for no other purpose, and that the defendant has collected the note and has failed to deliver to the plaintiff the proceeds thereof, and that the plaintiff was the owner of the note, then your verdict should be for the plaintiff." Counsel say that the instruction enunciated a correct principle of law but there is no evidence on which to base this instruction. This contention is groundless, as Mrs. Nenow testified that after her father gave her the note she talked with him about how it was to be collected; that she did not know what to do with it; that he told her to take it down and have the bank collect it; that she could not go there; she did not know "how to start," and that she had "her man" take it there. It is true that this testimony is not so concise as it would have been had this woman been an educated English lady,—as it seems that she was an illiterate German,—but nevertheless the evidence is clear enough for ordinary understanding. The court did not err in giving the instruction.

3. Another assignment is that the court erred in giving an instruction in the following language: "You are instructed that property coming to the wife by gift is not subject to the disposition of the husband, nor is it liable for his debts, unless she voluntarily pledges her property or creates a lien thereon for that purpose." There was no error in giving this instruction.

4. Counsel for the bank have argued this case throughout upon the theory that Mrs. Nenow put this note in the hands of her husband for collection by him. The bank pleaded no such defense nor is there any evidence in the record which tends to show such a state of facts. The evidence and all the evidence on the subject tends to show that the wife made the husband her agent for the special purpose of leaving this note with the bank for collection by it. The husband having this special authority was not thereby clothed by his principal with authority to collect the note, much less with authority to pledge it for his own debt. An agent employed for a

special purpose derives from this no general authority from his principal. If such an agent exceed his authority the principal is not bound. (*Matthews v. Soule*, 12 Neb., 398.)

5. Counsel for the bank insist that even if the husband had not the authority which he exercised, nevertheless the bank was justified in assuming that he had such authority, because of the relation of husband and wife; and, was, therefore, justified in dealing with the wife's property found in the husband's possession as the husband's property. We cannot agree to this contention as applied to the facts of this case. Generally a husband may act as the agent of his wife, but in order to bind her he must previously be authorized to so act or she must, with a knowledge of his acts, subsequently ratify them. In the case at bar the husband was not authorized by the wife to make the disposition which he did of the Hille note, nor does the evidence show that the wife ratified his unauthorized act. Here the property of the wife in the husband's possession was a negotiable promissory note, probably indorsed payable to her order. With the note was an assignment of the mortgage which secured its payment made to the wife. This pointed definitely to the conclusion that the wife owned the note; and if there was not thereon an express indorsement to her, still the bank had no right to assume that the husband owned the note because in his possession. The judgment of the district court is right and is

AFFIRMED.

GREELEY STATE BANK, APPELLEE, V. THOMAS H. LINE, APPELLANT, ET AL.

FILED JANUARY 19, 1897. No. 6722.

1. **Mortgages:** EVIDENCE OF EXECUTION. A real estate mortgage duly witnessed and acknowledged is of itself *prima facie* evidence that the mortgagor signed said mortgage.

2. ———: EQUITABLE ASSIGNMENT OF NOTE: INDORSEMENT. An equitable assignment of a negotiable promissory note, secured by a mortgage, may be made by a sale and delivery thereof by the person to whose order the note is payable, without an indorsement of the note or a formal assignment in writing of the mortgage or note; and such purchaser may maintain an action in his own name to foreclose said mortgage.

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

Whitmore & Carr and *Howard M. Kellogg*, for appellant.

References: 1 Daniels, Negotiable Instruments, sec. 812; 1 Randolph, Commercial Paper, sec. 13; Tiedeman, Real Property, sec. 328; 15 Am. & Eng. Ency. Law, 843, 849; *Richards v. Kountze*, 4 Neb., 200; *Daniels v. Densmore*, 32 Neb., 40.

J. R. Hanna, contra.

RAGAN, C.

The Greeley State Bank brought this suit in the district court of Hamilton county against Thomas H. Line and wife. In its petition the bank alleged that on the 22d day of July, 1889, Line made and delivered to the Capital Loan & Investment Company, a corporation, a promissory note payable to the order of such corporation and due six years after date, together with interest thereon; and on the same date, to secure the payment of said note, Line and his wife executed and delivered to said corporation a mortgage upon certain real estate in Hamilton county; that before the maturity of such note, and for a valuable

consideration, in the ordinary course of business, such corporation sold and assigned said note and mortgage to it, the bank; that the bank was the owner and holder of the note and mortgage, and that no part of the same had been paid and that default had been made in the payment of the interest reserved, whereby the whole debt had become due. There was the usual prayer for an accounting and a decree of foreclosure. The answer of Line to this petition was a general denial. The district court rendered a decree as prayed and Line has appealed.

1. The appeal presents the question of the sufficiency of the evidence to sustain the decree. The argument that the decree is not sustained by sufficient evidence is directed to two issues. First—It is insisted that the evidence upon which the district court acted was insufficient to justify its finding that Line executed the note and mortgage. This contention does not merit serious consideration. Line offered no evidence on the trial of the action, and while no one testified for the bank that the signature on the note and mortgage was Line's, the court had before it certain letters written by Line to the bank in reference to the note and mortgage in suit, and we think the court was justified in finding from these letters alone that Line had executed the note and mortgage. The note which the mortgage was given to secure was described in the mortgage, and the latter was duly witnessed and acknowledged. The mortgage, having been witnessed and acknowledged, was of itself evidence that it had been executed by Line. It was not conclusive evidence of that fact, but it was sufficient, in the absence of any evidence on the part of Line that he did not execute it, to justify a finding that he had.

2. The second contention is that the finding of the district court that the Capital Loan & Investment Company sold and assigned the note and mortgage in suit to the bank has no evidence to support it. The cashier of the bank testified that the bank was the owner of the note and mortgage, and that it purchased it before due. The

bank produced on the trial the note and the mortgage and put them in evidence. The note was not indorsed by the Capital Loan & Investment Company, the original payee thereof, nor was there before the court any competent evidence that the investment company had ever made and delivered to the bank an assignment in writing of the note or mortgage. We have, then, the question whether the owner and holder of a negotiable promissory note secured by a mortgage, to whom they have been delivered by the original payee thereof without an indorsement of the note or an assignment in writing of the note or mortgage, may maintain an action to foreclose.

Our Code of Civil Procedure, section 29, provides that every action must be prosecuted in the name of the real party in interest, except in certain cases not material here.

In *Nelson v. Ferris*, 30 Mich., 497, it was held that one who purchased a note secured by a mortgage, and took no legal transfer by indorsement of the note or written assignment of the mortgage, acquired only an equitable interest in the mortgage and note, but that such interest would enable him to deal with the mortgage and note for all "beneficial purposes."

In *Haescig v. Brown*, 34 Mich., 502, a husband owned a note payable to his order, secured by a real estate mortgage. In satisfaction of a claim of the wife, he delivered her this note and mortgage without an indorsement of the note or an assignment of the mortgage. Subsequently the husband formally assigned in writing, but without delivery, this note and mortgage to a third party. The mortgagor, with notice of the assignment, paid the mortgage debt in full to the wife, and then instituted an action to enjoin the husband's assignee from prosecuting a suit to foreclose under the formal assignment. The court held that he was entitled to maintain the action and held, in effect, that the delivery of the note and mortgage, unindorsed and unassigned, by the husband to the wife vested in the latter the equitable title to the same.

In *Baker v. Armstrong*, 57 Ind., 189, it was held that a married woman, with the consent of her husband, might make an equitable assignment of a note and mortgage executed to her by a sale and a mere delivery of the same to another. To the same effect see *Andrews v. Powers*, 35 Wis., 644; *Kamena v. Huelbig*, 23 N. J. Eq., 78; *Strause v. Josephthal*, 77 N. Y., 622.

In *Younker v. Martin*, 18 Ia., 143, it was held that the holder without indorsement of a promissory note, payable to the order of the payee, might maintain an action thereon in his own name. Dillon, J., speaking for the court, said: "Notes are choses in action; that is, things which must be recovered by action at law, and, like all other things in action, they may be assigned and the title will pass without indorsement."

In *Crain v. Paine*, 4 Cush. [Mass.], 483, the owner of a note, payable to his order and secured by a mortgage, sold and delivered the note and mortgage to a third party without indorsing the note or making any written assignment of the note or mortgage, and the court held that such third party by the transaction became the equitable owner of the note and mortgage, and was entitled to maintain an action.

In *Willard v. Moics*, 30 Mo., 142, the court held that "no written assignment of a promissory note is necessary in order to entitle the holder to sue thereon in his own name."

From these authorities we conclude that an equitable assignment of a negotiable promissory note secured by a mortgage may be made by a sale and delivery of them, or the note, by the person to whose order the note is payable, without an indorsement of the note or formal assignment in writing of the mortgage or note; and that such purchaser may maintain an action in his own name to foreclose such mortgage. Applying this rule to the case at bar, the finding of the district court that the bank was the owner and holder of the mortgage in suit was supported by sufficient competent evidence and was correct.

It was not necessary that the bank should produce an indorsement of the note from the original payee thereof, nor a formal assignment in writing from such payee to it of the note or mortgage. When the evidence disclosed that the bank purchased the note and mortgage; that they were delivered to it; that it was the owner of them and that the note was due and unpaid, it was entitled to the decree it prayed for. The judgment of the district court is

AFFIRMED.

HOWARD WHITNEY, SHERIFF, V. GRETNA STATE BANK.

FILED JANUARY 19, 1897. No. 7016.

1. **Partnership**: EVIDENCE OF MEMBERSHIP. The receipt by a party of a share of the profits of a venture merely as compensation for services, such party having no interest in the property made the subject of the venture and no power in the management or control of such property other than that of an ordinary retail salesman thereof, does not constitute such person a partner. *Ætna Ins. Co. v. Bank of Wilcox*, 48 Neb., 544, followed.
2. **Rejected Evidence**: HARMLESS ERROR. It is not reversible error for a court to reject an offer of competent and relevant evidence if the evidence rejected, when considered with all other evidence bearing on the issue to which it was directed, would not support the conclusion sought to be established by the rejected evidence.

ERROR from the district court of Sarpy county. Tried below before KEYSOR, J. *Affirmed.*

Charles B. Keller and *Clinton N. Powell*, for plaintiff in error.

Gregory, Day & Day, contra.

RAGAN, C.

This is an action in replevin for a stock of goods, brought in the district court of Sarpy county by the

Gretna State Bank against Howard Whitney, sheriff of said county. The bank's claim was that the goods belonged to A. U. Hancock; that he became indebted to it, the bank, in a large sum of money and pledged the goods by chattel mortgage to it to secure his debt. The sheriff claimed that the goods, after and before the making of the bank's mortgage, were the property of A. U. Hancock and S. E. Wolverton; that these two parties were copartners; that he had seized the goods as theirs by virtue of certain attachments issued at the instance of their creditors. The case was tried to the court without a jury, a finding and judgment rendered in favor of the bank, and the sheriff prosecutes here a petition in error.

1. It is insisted that the finding of the court that the mortgaged property was the individual property of A. U. Hancock and that Hancock and Wolverton were not copartners is not supported by sufficient evidence. The evidence shows without substantial conflict that Hancock established a general store at Gretna, Nebraska; that he furnished all the capital that went into that business; that Wolverton never furnished any capital for the venture; that Hancock employed Wolverton to conduct the store, and in lieu of a salary promised to pay him as compensation for his services "a living out of the business," and if the venture proved profitable, one-half of the profits. The evidence further discloses that Wolverton took charge of the store and conducted the business under this agreement as clerk and manager; that he and Hancock held themselves out to the world as copartners, and on their letter-heads they designated themselves as A. U. Hancock & Co.; that in their reports to commercial agencies they held themselves out as copartners and that the creditors represented by the sheriff in this suit believed they were copartners, and relying upon that gave them credit. If this was an action by some creditor of Hancock & Co. against Hancock & Wolverton to recover a debt for goods he had sold them, relying upon the fact that they were copart-

ners, we have not the slightest doubt but that Hancock & Wolverton, by reason of their conduct, would be estopped as against such creditor from asserting that they were not in fact copartners. But this is not the case before us. The question presented to us is: Were these men in fact copartners? Was the property involved in this action copartnership property or was it the property of Hancock? The relation of copartners rests in contract. Whether two or more persons are copartners depends upon intention, and while a copartnership may be established by the course of dealing and the conduct of the parties, and perhaps by the admission of each member thereof, still the relation, if it exists, must rest in the consent and the intention of the parties thereto. It is sometimes said in the books that parties, by their course of dealing, may make themselves partners as to creditors notwithstanding they were not in fact partners; but this expression is not strictly accurate. An examination of all those cases, we think, will show that where parties who were not partners have, nevertheless, been held liable as such, they were so held liable because by their conduct they had estopped themselves from averring that they were not partners; but in no case that I have been able to find has any court assumed to hold that two or more persons were copartners as a matter of law when the persons had never agreed or intended to become such. The fact that Wolverton was to receive as compensation his living from the business and was to receive a share of the profits of the venture if it should prove profitable, would not alone support a finding that Wolverton and Hancock were copartners. It takes more than that to constitute a copartnership. Wolverton had no interest in the subject-matter of the venture. He had no power in the management or control of this venture other than that of an ordinary retail salesman. In *Ætna Ins. Co. v. Bank of Wilcox*, 48 Neb., 544, the precise question presented here was decided and the court held: "The receipt by a party of a share of the profits of a venture

merely as compensation for services, such party having no interest in the property made the subject of the venture, and no power in the management or control of such property other than that of an ordinary retail salesman thereof, does not constitute such person a partner." The decision in this last case followed *Waggoner v. First Nat. Bank of Creighton*, 43 Neb., 84, and *Gibson v. Smith*, 31 Neb., 354. We have been to some pains to re-examine this question, and we are satisfied that the rule announced in the cases referred to is supported by the great weight of authority.

2. The mortgage in controversy was filed and possession of the goods taken by the bank on the 17th of October, 1891. On the 19th of that month Wolverton wrote to one of the creditors represented by the sheriff here the following letter:

"GENTLEMEN: Yours of the 19th at hand and would say that our affairs are in the hands of a bank receiver. Everything is out of our control. Mr. Hancock's individual liabilities were so large that he had to mortgage everything that he had to the bank."

On the trial counsel for the sheriff offered to read this letter in evidence. The court rejected the offer and it is now insisted that this action of the court was erroneous. Treating this letter as a declaration and admission by Wolverton that he and Hancock were partners and that it was competent and relevant evidence,—a point not decided,—we are clearly of opinion that the plaintiff in error was not prejudiced by the court refusing to consider this letter in evidence, for the reason that if the letter be considered in evidence with all the other evidence bearing on the issue to which it was directed, the court would still not have been justified in finding that Wolverton and Hancock were copartners.

3. On the trial of the case the books of account used at the Hancock store were brought into court by a subpœna. These books, at the request of the sheriff, were examined by a gentleman and he was then called as a

witness and the sheriff offered to prove by him that he had examined the books and that the account therein between Hancock & Co. and the bank did not show any entry with reference to a note which Hancock claimed he had sold to the bank; and that the books did not show that the money which it was claimed the bank had furnished to Hancock on the note discounted went into the business of the store. The refusal of the court to permit this testimony to be given is the final assignment of error argued here. We think the evidence offered was wholly immaterial. It did not tend to prove or disprove any issue being litigated. If Hancock discounted a note at the bank and neglected to make memoranda thereof on his account books the absence of such memoranda would not tend to prove that the bank had not discounted the note; and certainly the bank was under no obligation in this case to see that Hancock appropriated the money loaned to him towards the conduct of the store. The judgment of the district court is right and is

AFFIRMED.

AULTMAN, MILLER & COMPANY, APPELLANT, V. J. T. WARD ET AL., APPELLEES.

FILED JANUARY 19, 1897. No. 7025.

Vendor and Vendee: CONSIDERATION: EVIDENCE. Evidence examined, and *held* to sustain the findings of the district court (1) that the appellees were innocent purchasers, for a valuable consideration, of certain real estate; (2) and that appellees never assumed and promised to pay the judgment of appellant.

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

Davis, Hibner & Whitmore, for appellant.

F. E. Brown and *S. L. Geisthardt, contra.*

RAGAN, C.

J. T. Ward executed and delivered two promissory notes to Aultman, Miller & Co., hereinafter called "Aultman." On the 18th of March, 1889, Aultman sued Ward on these notes before a justice of the peace of Lancaster county. Counsel for Aultman used the notes in lieu of a bill of particulars. By mistake the summons was directed to S. T. Ward, and, though personally served on J. T. Ward, was returned as served on S. T. Ward. J. T. Ward made no appearance in the action, and judgments by default were rendered on the notes against S. T. Ward. In January, 1890, a transcript of these judgments was duly filed and docketed in the office of the clerk of the district court of said Lancaster county. At the time of the filing of this transcript J. T. Ward was the owner of a tract of land in said Lancaster county, and afterwards, in May, 1890, he sold and conveyed such real estate to Levi Ward and Mary H. Ward. In December, 1892, Aultman brought this suit in the district court of Lancaster county, making J. T. Ward, Levi Ward, and Mary H. Ward defendants. Aultman, in his petition, set out the facts already enumerated, and also alleged that Levi Ward and Mary H. Ward had assumed and agreed to pay the Aultman judgments in consideration of the conveyance to them of the land by J. T. Ward. Aultman prayed that the judgments rendered before the justice of the peace, and the transcript thereof docketed in the office of the clerk of the district court, might be amended into judgments against J. T. Ward, instead of S. T. Ward, and declared a lien upon the real estate conveyed by J. T. Ward from the date of the filing of such transcript, and for a personal judgment against Levi Ward and Mary H. Ward for the amount of such judgments. Levi and Mary H. Ward defended the action upon the ground that they had purchased the real estate of J. T. Ward for a valuable consideration, without knowledge, actual or constructive, of the Aultman judgments, and denied that they ever

assumed or promised to pay such judgments. The district court found that Levi and Mary H. Ward purchased the real estate of J. T. Ward on May 6, 1890, in good faith and for a valuable consideration, and without any knowledge, either actual or constructive, of the Aultman judgments; and further found that they never assumed or promised to pay those judgments, and entered a decree that they "go hence without day and recover their costs." The court also entered a decree in favor of Aultman amending the judgments and the transcript thereof so as to make the judgments of record against J. T. Ward. From this decree Aultman has appealed.

The entire argument of the appellant is directed to the contention that the findings of the district court are not sustained by sufficient evidence. We think they are. Indeed, we think under the evidence the court would not have been justified in rendering any other decree than the one it did. Levi and Mary H. Ward are innocent purchasers for value of the real estate upon which it is sought to fasten the lien of the Aultman judgments, and they became such purchasers for value, parted with before either actual or constructive notice of the Aultman judgments, and there is no room in the record for the contention that they assumed or agreed to pay the Aultman judgments as a part of the consideration for the conveyance to them of the real estate. The appellant, by the decree of the court, has succeeded in having a judgment which was rendered against S. T. Ward amended and changed so as to be a judgment against J. T. Ward, the party sued, and as such it stands of record in the office of the clerk of the district court of Lancaster county, and from the date of the decree appealed from it became a lien upon any real estate that J. T. Ward owned in that county. This was all the appellant was entitled to. The appeal is entirely without merit and the decree of the district court is

AFFIRMED.

SARAH C. SMITH V. WILLIAM H. BEAGLE.

FILED JANUARY 19, 1897. NO. 6993.

Transcript for Review. The filing of the original pleadings and other documents belonging to the records of the district court does not take the place of the certified transcript which the statute requires as a foundation for appellate proceedings, even though the parties may stipulate to that effect. *Moore v. Waterman*, 40 Neb., 498, followed.

ERROR from the district court of Valley county. Tried below before HARRISON, J. *Affirmed.*

Coffin & Stone and *C. A. Munn*, for plaintiff in error.

A. M. Robbins, contra.

IRVINE, C.

We have in this case, properly authenticated, a bill of exceptions and a transcript of the verdict, motion for new trial, and judgment. In addition to this there is a bundle of loose papers which look as if they might be the original files from the office of the clerk of the district court, but not authenticated as such, and a stipulation of counsel that the original files may be used in lieu of a transcript. This does not comply with the statutes regulating proceedings in this court. (*Moore v. Waterman*, 40 Neb., 498; *Bell v. Beller*, 40 Neb., 501; *School District v. Cooper*, 44 Neb., 714; *McDonald v. Grabow*, 46 Neb., 406; *Otis v. Butters*, 46 Neb., 492; *Peck v. Nebraska Loan & Trust Co.*, 50 Neb., 227.) Without a transcript of the pleadings we are unable to examine the evidence to ascertain whether it was sufficient to support the verdict, as we have no means of determining what was in issue. Nor have we the instructions before us for examination. All assignments of error relate to questions of this character.

AFFIRMED.

HARRISON, J., not sitting.

WILLIAM H. BEAGLE, SHERIFF, V. LAURA A. SMITH.

FILED JANUARY 19, 1897. No. 6986.

1. **Execution**: LEVY: REPLEVIN: PROPERTY IN CUSTODIA LEGIS. When property has been levied upon on writ of execution and has been delivered to a third person, plaintiff in a replevin suit against the officer making the levy, such property cannot be again seized by the officer under another writ against the same person while the replevin suit is pending.

2. **Pleading**: EXECUTION: REPLEVIN: TROVER. An action in the nature of trover was brought against a sheriff, who answered justifying his acts under a levy of a writ of execution directed against a third person, by whom it was alleged the property had been fraudulently conveyed to the plaintiff. The plaintiff replied that prior to the levy the same officer had levied upon the same property by virtue of another writ against the same grantor; that plaintiff had replevied from the officer, and that the replevin suit was still pending. *Held*, That such matter was properly pleaded in the reply.

ERROR from the district court of Valley county. Tried below before HARRISON, J. *Affirmed.*

A. M. Robbins and *E. J. Babcock*, for plaintiff in error.

References: *Hastings School District v. Caldwell*, 16 Neb., 68; *Holmes v. Bailey*, 16 Neb., 300; *Zunkle v. Cunningham*, 10 Neb., 162; *Davidson v. Waldron*, 31 Ill., 120; *Mulligan v. Bailey*, 28 Ga., 507; *Bernheimer v. Marshall*, 2 Minn., 61; *Webb v. Bidwell*, 15 Minn., 394; *Hatch v. Coddington*, 32 Minn., 92; *Gregory v. Karr*, 36 Neb., 533; *First Nat. Bank v. Gerson*, 32 Pac. Rep. [Kan.], 907; *Bruner v. Dyball*, 42 Ill., 34; *Lovett v. Burkhardt*, 44 Pa., 174; *Moore v. Herron*, 17 Neb., 701; *Hunt v. Robinson*, 11 Cal., 262.

Coffin & Stone and *C. A. Munn, contra.*

IRVINE, C.

This was an action by Laura A. Smith against Beagle, the sheriff of Valley county, for the conversion of certain

horses. The sheriff justified by alleging that the property had been fraudulently conveyed by Shelby L. Smith to the plaintiff, and that he had seized it under certain writs of attachment and execution against Shelby L. Smith. The plaintiff in reply, among other things, pleaded that prior to the levy alleged in the answer the property had been seized by Beagle under another writ against Shelby L. Smith; that the plaintiff had replevied the property from him, and had given bond; and that the property had been delivered to the plaintiff under the writ of replevin. There was a verdict and judgment for the plaintiff. The petition in error contains fifty-seven assignments of error, but all of those discussed in the brief relate to the matter pleaded in reply. The defendant raised the question in the first place by moving to strike from the reply the allegations referred to; in the second place, by objecting to the admission of the evidence in support of those allegations; and in the third place, by excepting to a peremptory instruction to find for the plaintiff as to such property as the evidence disclosed she held by virtue of the first writ of replevin. It is not contended that the evidence did not warrant a peremptory instruction provided the facts pleaded required, as a matter of law, a verdict for the plaintiff. Two questions are thus presented: First, when property has been levied upon on a writ of execution and has been delivered to a third person, the plaintiff in a replevin suit against the officer making the levy, can such property be again seized by the officer under another writ against the same defendant while the replevin suit is pending; and second, was such matter properly pleaded in reply?

The first question must be answered in the negative. (*Acker v. White*, 25 Wend. [N. Y.], 614; *Selleck v. Phelps*, 11 Wis., 380; *Bates County Nat. Bank v. Owen*, 79 Mo., 429; *Rhines v. Phelps*, 3 Gilm. [Ill.], 455; *Pipher v. Fordyce*, 88 Ind., 436.) The case of *Hagan v. Lucas*, 10 Pet. [U. S.], 400, supports the doctrine of the other cases cited in its reasoning, although the question there was upon levies

made in one case by a sheriff and in the other by a United States marshal. Property taken under a writ of replevin from an officer who has seized it on execution remains *in custodia legis*, although it has been delivered to the plaintiff. The lien acquired by the levy while suspended is not destroyed, and should judgment be rendered for the defendant in the replevin case it would be for a return of the property or for its value, or at least for the value of the officer's interest therein. The bond binds the plaintiff to that effect. To hold that while a plaintiff so holds property it may be again seized under other writs against the same person, would, as pointed out in the cases cited, work manifest injustice. It would follow either that the replevin bond would be discharged, in which event the defendant in the replevin case would unjustly suffer, or else the property would be liable to be subjected not only once, but as frequently as the writs might be issued, to the satisfaction of the debts of the same person; but either result would be intolerable. The plaintiff in error seeks to avoid the operation of the rule on the ground that the first replevin action was fraudulent, and in support of his argument cites *First Nat. Bank v. Gerson*, 32 Pac. Rep. [Kan.], 905. But the rule there laid down related to a case where both the first levy and the replevin suit were collusive for the purpose of placing the property *in custodia legis*, and thereby defeating creditors. It is not contended here that the first levy was collusive or fraudulent, nor that the replevin suit was the result of collusion between the plaintiff therein and the sheriff, or the plaintiff to the first writ. The contention merely is that the claim of this plaintiff and the plaintiff in replevin was fraudulent as against the creditors of Shelby L. Smith. That would be a matter of defense in the replevin suit, but it did not avoid jurisdiction in that or in the action wherein the first levy was made. We think this matter was properly pleaded in the reply. The plaintiff claimed a general ownership both in the replevin suit and in this. Therefore there is no inconsistency in claiming in this

the right of possession also by virtue of the writ of replevin. The defendant specially pleaded justification under the later writs, and it was perfectly proper in reply to plead facts showing that aside from the main matters in issue the later levies were illegal. The plaintiff pleaded and proved good title, unless it might be against creditors of Shelby L. Smith enforcing their demands by valid legal process, and such process being first alleged in the answer, matter in avoidance of its legality might properly be pleaded in the reply.

AFFIRMED.

HARRISON, J., not sitting.

JAMES MORAN, SR., v. ENOS MCCULLUM.

FILED JANUARY 19, 1897. No. 6990.

Continuance: JUSTICE OF THE PEACE. A party to an action before a justice of the peace, who has obtained one adjournment, cannot procure another extending more than thirty days from the return day, on a general affidavit in the language of section 960 of the Code of Civil Procedure. For that purpose he must comply with section 961.

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

Buck & McConnell, for plaintiff in error.

Searle & Coleman, contra.

IRVINE, C.

McCullum brought an action in replevin against Moran before a justice of the peace. On the return day an adjournment was granted, on the request of the defendant and by consent of the plaintiff, for seventeen days. When the day to which the cause stood adjourned came, the de-

fendant filed a motion for an adjournment for thirty days further and supported the same by his affidavit as follows: "James Moran, the defendant in this action, being first duly sworn, on his oath says he cannot safely proceed with the trial of said action at this time for the want of material testimony for the defense which he expects to procure. Wherefore he requests of the court that said cause may be continued for thirty days from this date." The motion was overruled and after judgment for the plaintiff the defendant prosecuted error to the district court, where the judgment of the justice was affirmed. The defendant now prosecutes error to this court from the judgment of the district court. The sole question raised is the sufficiency under the circumstances above stated of the affidavit for a continuance.

Sections 959, 960, and 961 of the Code of Civil Procedure provide for adjournment of trials before justices of the peace. Section 959 provides for certain cases where the justice may adjourn the trial upon the return day without the consent of either party; and closes as follows: "If the trial be not adjourned it must take place immediately upon the return of the summons." Sections 960 and 961 are as follows:

"Sec. 960. The trial may be adjourned upon the application of either party, without the consent of the other, for a period not exceeding thirty days, as follows; the party asking the adjournment must, if required by his adversary, prove by his own oath, or otherwise, that he cannot, for want of material testimony which he expects to procure, safely proceed to trial.

"Sec. 961. An adjournment may be had at the return day, or at any subsequent time to which the cause may stand adjourned, on the application of either party, for a period longer than thirty days, but not to exceed ninety days from the time of the return of the summons, upon compliance with the provisions of the preceding section, and upon proof by the oath of the party, or otherwise, to the satisfaction of the justice, that such party cannot be

ready for trial before the time to which he desires an adjournment for the want of material evidence, describing it, that the delay has not been made necessary by any act or negligence on his part since the action was commenced, and that he expects to procure the evidence at the time stated by him."

In *Belcher v. Skinner*, 28 Neb., 91, and in *Coombs v. Brenklander*, 29 Neb., 586, it was held that an affidavit in the language of section 960 was sufficient to entitle a party to a continuance not exceeding thirty days, but in both cases the application was made on the day when the cause was first set for trial. In *Belcher v. Skinner* it is said that this latitude is allowed because the statute seems to regard thirty days as not an unreasonably short time to prepare for trial. In the case before us one adjournment had been had at the defendant's request, and the fact that the plaintiff consented is not material, because section 960 demands an affidavit only when required by the adverse party. Possibly, though this we do not decide, where the first adjournment is for less than thirty days, a further adjournment might be had under section 960 by general affidavit, provided the two adjournments together would not exceed thirty days; but section 961 plainly contemplates that in order to procure an adjournment extending more than thirty days from the return day the affidavit must be according to the requirement of that section. The affidavit here filed was insufficient to justify an adjournment extending beyond thirty days from the return day.

AFFIRMED.

UNION PACIFIC RAILWAY COMPANY V. METCALF & WOOD.

FILED JANUARY 19, 1897. No. 7007.

1. **Partnership:** ACTIONS: DEATH OF PARTNER: ABATEMENT. A petition set forth that the plaintiffs, A & B, were a firm composed of A and B, formed for the purpose of doing business in this state. The caption was in the firm name alone. The summons did not appear in the record. *Held*, That the action was not one brought under section 24 of the Code, authorizing partnerships to sue without setting forth the names of the partners, and that it did not abate on the death of one of the partners.

2. ———: ———: ———: ———. That the surviving partner was already a party to the action, and that on the death of the other partner the action could properly be continued in the name of the survivor alone.

3. **Carriers:** FAILURE TO DELIVER CONSIGNMENT: PLEADING. An action against a carrier for failure to deliver goods cannot be maintained by the consignor in the absence of averments that he was the owner of the goods, that he was liable for their loss, or that he had sustained special damage.

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

The facts and issues are stated in the opinion.

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

The court erred in overruling the motion of defendant below, founded on its plea in the nature of abatement, that the action be dismissed. (*Burlington & M. R. R. Co. v. Dick*, 7 Neb., 242; *Lease v. Vance*, 28 Ia., 509; *Weisz v. Davey*, 28 Neb., 566; *Hays v. Lanier*, 3 Blackf. [Ind.], 322; *Bentley v. Smith*, 3 Caines [N. Y.], 170; *Simmons v. Titche*, 14 S. R. [Ala.], 786; *Leach v. Milburn*, 14 Neb., 106; *Burrows v. Bashford*, 22 Wis., 104; *Otis v. Thorn*, 18 Ala., 395; *Davis Avenue R. Co. v. Mallon*, 57 Ala., 168; *Dubbers v. Goux*, 51 Cal., 154; *Sheldon v. Hoy*, 11 How. P. [N. Y.], 11; *Merritt v. Seaman*, 6 N. Y., 168.)

The court erred in overruling the demurrer to the petition and the objection on the trial to any evidence being given by the plaintiff in the case, for the reason that the petition did not state facts sufficient to constitute a cause of action against defendant. (*Arzbacher v. Mayer*, 53 Wis., 384; *Stevens v. Nichols*, 130 U. S., 230; *Roberts v. Lovell*, 38 Wis., 211; *Nelson v. Swan*, 13 Johns. [N. Y.], 483.)

The petition affirmatively shows that the cause of action is in McCourtie, Hill & Co., named therein as consignee, and not in the plaintiff Metcalf & Wood. *Prima facie* the consignees are the owners and the right of action is in them, the legal presumption being that when goods are sent to a consignee, the title thereto vests in him as soon as they are shipped. (*Dawes v. Peck*, 8 Term R. [Eng.], 330; *Lawrence v. Minturn*, 17 How. [U. S.], 100; *Ogden v. Coddington*, 2 E. D. Smith [N. Y.], 317; *Tronson v. Dent*, 36 Eng. L. & Eq., 41; *Coleman v. Lambert*, 5 M. & W. [Eng.], 502; *Pennsylvania Co. v. Poor*, 103 Ind., 553; *Madison, I. & P. R. Co. v. Whitesel*, 11 Ind., 55; *Pennsylvania Co. v. Holderman*, 69 Ind., 18; *Ludlow v. Bowne*, 1 Johns. [N. Y.], 1; *Wiseman v. Vandeputt*, 2 Vern. [Eng.], 203; *Coxe v. Harden*, 4 East [Eng.], 211; *Dawes v. Peck*, 8 Term [Eng.], 330; *Coates v. Chaplin*, 2 G. & D. [Eng.], 552; *Dunlap v. Lambert*, 6 Clark & F. [Eng.], 600; *Hazleton v. Union Bank of Columbus*, 32 Wis., 34; *Roberts v. Lovell*, 38 Wis., 211; *Friddle v. Crane*, 68 Ind., 583; *Wilson v. Town of Monticello*, 85 Ind., 10; *Wier v. State*, 96 Ind., 311.)

There was nothing in the petition charging defendant, or showing it liable, as a common carrier, except on its own lines within the state. There is no evidence showing any loss or damage to the consignment while being transported within the state. Plaintiff should not recover. (*Gibbons v. Ogden*, 9 Wheat. [U. S.], 1; *Hannibal & St. J. R. Co. v. Husen*, 95 U. S., 472; *State Freight Tax*, 15 Wall. [U. S.], 232; *Ward v. Maryland*, 12 Wall. [U. S.], 418; *Welton v. State of Missouri*, 91 U. S., 275; *Henderson v. Mayor of New York*, 92 U. S., 259; *Chi Lung v. Freeman*, 92 U. S., 275; *Hobart v. Drogan*, 10 Pet. [U. S.], 108; *United*

States v. New Bedford Bridge, 1 W. & M. [U. S.], 418; *Davis v. Duncan*, 17 Am. & Eng. R. Cas. [Miss.], 295.)

The limitations printed upon the face of the bill of lading, and the rules and regulations indorsed upon the back thereof, were in terms agreed to by both of the contracting parties, and were in all respects valid and binding. (*Swift v. Philadelphia & R. R. Co.*, 58 Fed. Rep., 858; *Welton v. State of Missouri*, 91 U. S., 282; *Brown v. Houston*, 114 U. S., 622.)

A common carrier may lawfully contract for indemnity from responsibility beyond its own lines as to freight shipped on its own road and from thence carried over another road than that of the carrier, but connecting therewith. (*Terre Haute & L. R. Co. v. Sherwood*, 31 N. E. Rep. [Ind.], 786; *Hallenbake v. Fish*, 8 Wend. [N. Y.], 547; *Russell v. Fagan*, 8 Atl. Rep. [Del.], 258; *Mason v. Thompson*, 9 Pick. [Mass.], 280; *Myrick v. Michigan C. R. Co.*, 107 U. S., 102; *Nutting v. Connecticut River R. Co.*, 1 Gray [Mass.], 502; *Burroughs v. Norwich & W. R. Co.*, 100 Mass., 26; *Case v. Dunmore*, 23 Pa. St., 93; *Butt v. Green*, 29 O. St., 667; *Shelly's Appeal*, 36 Pa. St., 373; *Spitley v. Frost*, 15 Fed. Rep., 299; *Weinberg v. Albemarle & R. R. Co.*, 91 N. Car., 31; *Boorman v. American Express Co.*, 21 Wis., 157; *Grace v. Adams*, 100 Mass., 505; *Illinois C. R. Co. v. Jonte*, 13 Brad. [Ill. App.], 424; *Muller v. Cincinnati, H. & D. R. Co.*, 2 Cinn. Sup. Ct. Rep. [O.], 280; *McCarn v. International & G. N. R. Co.*, 19 S. W. Rep. [Tex.], 547; *Atchison & N. R. Co. v. Washburn*, 5 Neb., 117; *Missouri P. R. Co. v. Vandercenter*, 26 Neb., 222; *Union P. R. Co. v. Marston*, 30 Neb., 241.)

F. C. Power, contra:

The action did not abate upon the death of the partner. (2 Bates, Partnership, sec. 725; *Cragin v. Gardner*, 31 N. W. Rep. [Mich.], 206; *Phœnix Ins. Co. v. Moog*, 1 So. Rep. [Ala.], 108.)

The carrier's liability is not restricted to its own line. (Compiled Statutes, ch. 16, sec. 111; *Atchison & N. R. Co.*

v. Washburn, 5 Neb., 117; *Missouri P. R. Co. v. Vandeventer*, 26 Neb., 222; *Union P. R. Co. v. Marston*, 30 Neb., 241; *St. Joseph & G. I. R. Co. v. Palmer*, 38 Neb., 463; *Atchison, T. & S. F. R. Co. v. Lawler*, 40 Neb., 356; *Murray v. Chicago & N. W. R. Co.*, 62 Fed. Rep., 24.)

IRVINE, C.

This was an action against the Union Pacific Railway Company for failure to convey and deliver certain goods consigned by Metcalf & Wood from York, Nebraska, to McCourtie, Hill & Co., at Chicago, Illinois. As several questions arise out of averments in the petition, we quote a portion thereof:

"METCALF & WOOD AND JAMES H. WOOD, SURVIVING MEMBER OF THE SAID FIRM, PLAINTIFFS,
v.
UNION PACIFIC RAILROAD COMPANY, DEFENDANT.

"Plaintiff for cause of action against the defendant alleges that this plaintiff, Metcalf & Wood, is a firm of persons composed of Lafayette Metcalf and James H. Wood, formed for the purpose of doing business in this state and not incorporated, and doing business in York, York county, Nebraska, in the name and style of Metcalf & Wood.

"2. Defendant is a corporation duly incorporated by act of congress of the United States.

"3. Said defendant, at the times thereinafter mentioned, was and still is a common carrier of goods and chattels for hire from York, York county, Nebraska, to Chicago, in the state of Illinois.

"4. On or about the 1st day of December, 1891, the plaintiff delivered to the defendant one car load of flaxseed at York, Nebraska, containing one thousand bushels of flax, to be safely and securely conveyed by said defendant from said York, Nebraska, to said Chicago, in the

state of Illinois, and the defendant then and there undertook and agreed, for a certain reward to be paid by the plaintiff to the said defendant, to so safely and securely deliver the said flaxseed to McCourtie, Hill & Co., at the city of Chicago and state of Illinois.

"5. The said defendant did not safely convey and deliver the said flax as it had undertaken to do, but, on the contrary, conducted itself so negligently in and about carrying and transporting the same that on the line of the defendant's railroad between said York and Chicago five hundred bushels of said flaxseed, which was of the value of ninety-two cents per bushel, was wholly lost to the plaintiff, to the plaintiff's damage in the sum of $460."

This was followed by a second count, in similar language, averring the shipment and failure to deliver of a car load of shelled corn. The verdict having been in favor of the defendant, which is here the complaining party, on the second count of the petition, it is unnecessary to set it out or further consider it. The defendant demurred to each cause of action. The demurrers were overruled, and the defendant then answered denying *seriatim* the averments of the petition, including the alleged partnership. Further, the defendant averred "that said flaxseed and corn * * * was delivered to and received by said defendant and placed in the cars of the defendant for McCourtie, Hill & Co. of Chicago, and that the same was safely conveyed and delivered to the said McCourtie, Hill & Co. in the city of Chicago, in the state of Illinois, without any negligence or want of care on the part of the defendant in respect thereto." In addition to this, it was alleged that the action was one arising under the constitution and laws of the United States, the goods being received in accordance with two certain bills of lading at York, Nebraska, to be carried to Council Bluffs, Iowa, the terminus of defendant's line, under the agreement that the responsibility of defendant as a common carrier should cease at Council Bluffs, and that said goods were forwarded therefrom over some other road

to Chicago. Finally, it was pleaded that if there was any such firm as Metcalf & Wood it had, since the commencement of the action, been dissolved by the death of Lafayette Metcalf, and that by reason thereof the action had abated. Thereafter the defendant moved the court for a judgment of dismissal on the plea in abatement. This motion was overruled and the plaintiff given leave to insert in the caption the words, now appearing therein, "and James H. Wood, surviving member of said firm." Thereupon the plaintiff filed a reply denying new matter in the answer, admitting the death of Lafayette Metcalf, and alleging that James H. Wood was the surviving member of the firm. The case was then tried, resulting in a verdict for the plaintiff on account of the flax. This judgment the defendant seeks to reverse, assigning fifty-four errors, most of which are more or less specifically argued in the briefs.

The first question presented relates to the action of the court in overruling the plea in abatement. The argument is founded upon the theory that the action is prosecuted under section 24 of the Code of Civil Procedure, whereby "Any company or association of persons formed for the purpose of carrying on any trade or business, or for the purpose of holding any species of property in this state, and not incorporated, may sue and be sued by such usual name as such company, partnership, or association may have assumed to itself or be known by, and it shall not be necessary in such case to set forth in the process or pleading, or to prove at the trial, the names of the persons composing such company." It is contended that when a suit is brought under this section it is an impersonal proceeding, the individual members of the firm are not, as such, parties thereto, and that when dissolution occurs the firm has no longer any legal existence, and that an action so brought therefore abates. We need not investigate this question, because the suit was not in fact brought under the section referred to. The opening paragraph of the petition describes the firm of Metcalf &

Wood as composed of Lafayette Metcalf and James H. Wood, and the caption, which originally contained merely the name of the firm, should not be permitted to control this specific averment, which was undoubtedly traversable and constituted the individual members parties plaintiff. We do not know how the summons issued, but the pleadings, in the language of section 24 of the Code, set forth the names of the persons composing the company, and the action must be treated as if brought regardless of that section. We have quite recently held, following well established principles, that on the death of a partner the assets and choses in action of the partnership vest in the survivor. (*Lindner v. Adams County Bank*, 49 Neb., 735.) It is, therefore, the surviving partner who has in such case a right to proceed with the action. He was already a party, and the orderly course, perhaps, would have been to suggest the death of the other partner and to procure an order permitting the action to proceed in the name of the survivor alone. But the death of Metcalf was suggested in this case by both answer and reply. Wood was already a party and there was no error in permitting his name to be added in the caption of the petition. The judgment was rendered in favor of Wood alone, so that while the proceedings were not strictly regular, they were without prejudice to the defendant.

It is next argued that the court erred in overruling the objection of the defendant to the introduction of any evidence, on the ground that the petition did not state a cause of action. It will be observed that the petition contained no averment that the plaintiffs were the owners of the goods shipped, nor did it contain any averment of facts showing that the plaintiffs were in any manner liable for their loss. On the other hand, it affirmatively averred that the goods were to be safely conveyed and delivered to McCourtie, Hill & Co. in Chicago. It is claimed that it was thus affirmatively shown that the cause of action was in McCourtie, Hill & Co., and not in

the plaintiff. This raises a question on which the authorities present a most embarrassing conflict. To review them *in extenso* would be tedious and not very profitable. A few English cases seem, according to the varying opinions of different courts and judges, to have formed bases for the different views expressed in this country. In *Davis v. James*, 5 Burr. [Eng.], 2680, Lord Mansfield sustained an action by the consignor upon the theory that wherever the property lay, the contract was between the consignor and the carrier, and that the consignor was bound to pay the freight. In *Joseph v. Knox*, 3 Camp. [Eng.], 320, Lord Ellenborough sustained a similar action on the same ground of privity of contract, and because the consideration moved from the consignor. However, in *Dawes v. Peck*, 8 T. R. [Eng.], 330, the prior cases were distinguished upon the ground that a special contract had been established, and the king's bench held unanimously that the right of action must depend upon the ownership of the goods; that they became the property of the consignee on delivery to the carrier. Therefore, the right of action was in the consignee, and not the consignor. These and many other cases were reviewed by the house of lords in *Dunlop v. Lambert*, 6 C. & F. [Eng.], 600, and the conclusion reached that generally the consignee is the proper person to sue. Yet this rule may be varied by circumstances, among them the fact of a special contract between the consignor and the carrier. As before remarked, these different views are reflected throughout the decisions of American courts, and in the absence of uniform direct authority we might be free to adopt whatever view seemed to us best founded on principle. We have, however, in our own law a few landmarks by which we must to a certain extent be guided. In the first place, the constitution provides that "the liability of railroad corporations as common carriers shall never be limited" (Constitution, art. 11, sec. 4), and it has been held that by special contract a railroad company may not limit its liability as a carrier. (*Atchison & N. R. Co. v. Washburn*,

5 Neb., 117; *Missouri P. R. Co. v. Vandeventer*, 26 Neb., 222; *St. Joseph & G. I. R. Co. v. Palmer*, 38 Neb., 463; *Atchison, T. & S. F. R. Co. v. Lawler*, 40 Neb., 356.) It would seem to result from this doctrine that the liability of carriers must be measured according to the common-law rule, without regard to special contracts, and that this rule should operate in favor of both parties. Next, it has been held that a bill of lading is a symbol of property, and one properly indorsed operates as a delivery of the property, so that delivery must be made to the lawful holder of the bill of lading in order to discharge the carrier; and this was held in an action by such lawful indorsee of the bill of lading against a carrier who had delivered the goods to another. (*Union P. R. Co. v. Johnson*, 45 Neb., 57.) It would seem to follow from this that by issuing its bill of lading a carrier becomes responsible for the delivery of goods to the consignee or his assignee, the duty following the bill of lading and not remaining in favor simply of the consignor. (See, also, *Union Stock Yards Co. v. Westcott*, 47 Neb., 300.) Again, it has been held that the refusal of a carrier to surrender goods to the rightful owner amounts to a conversion, and to surrender to the rightful owner is a good defense to an action by the consignee. (*Shellenberg v. Fremont, E. & M. V. R. Co.*, 45 Neb., 487.) We think it may be safely said, then, that the law of this state establishes these propositions: That the rights and liabilities of carriers must be determined according to the rules of the common law, without regard to special contracts of shipment, and that the carrier on receiving goods receives them for the owner, presumably the consignee, or his assignee, but the real owner, whoever he may be; that the consignee may sue and recover merely on proof that he is the consignee; that the indorsee of the bill of lading may sue on the production of the bill of lading, properly indorsed to him; that the real owner may sue. We think it would be an intolerable hardship on the carrier to hold also that an action would lie by the consignor merely because he is

the consignor, without any averment that he is the owner, that he is liable for the goods, or that he has sustained special damage. The cases holding that in the absence of such averments the consignor may sue are not, as we believe, in accordance with the principles of law established in this state. As already seen, Lord Mansfield, in *Davis v. James*, *supra*, based the right on the fact that the consignor was to pay the freight, and that the contract for carriage was with him. This principle was more clearly stated by Lord Ellenborough in *Joseph v. Knox*, *supra*, recovery being placed on the ground that the consideration moved from the consignor, to whom the promise was made. But it is well settled here that a third person for whose benefit a promise is made, although not a party to the consideration, may sue thereon. (*Shamp v. Meyer*, 20 Neb., 223; *Keedle v. Flack*, 27 Neb., 836; *Fonner v. Smith*, 31 Neb., 107; *Kaufman v. United States Nat. Bank*, 31 Neb., 661; *Hale v. Ripp*, 32 Neb., 259; *Sample v. Hale*, 34 Neb., 220; *Lyman v. City of Lincoln*, 38 Neb., 794; *Doll v. Crume*, 41 Neb., 655; *Chicago, B. & Q. R. Co. v. Bell*, 44 Neb., 44; *Hare v. Murphy*, 45 Neb., 809.) Prior to the establishment of this rule all benefits from the express contract of carriage would be lost unless the consignor himself might sue. But the establishment of the modern principle undermines the whole reasoning on which the decisions of Lord Mansfield and Lord Ellenborough were based. The American cases taking a similar view are based largely on the learned opinion of Chief Justice Shaw in *Blanchard v. Page*, 8 Gray [Mass.], 281. An inspection of that case will show that it is founded on the same obsolete reasons. All the cases hold that the presumption is that the consignee is the owner, and all the cases holding that the consignor may sue are based, so far as we can ascertain, on one of three grounds: First, that it was made to appear by pleadings and proof that the consignor was the owner; or second, that the consignor was liable to the consignee or suffered special damage; or third, cases based solely on the doctrine of

privity of contract, which, we think we have demonstrated, does not apply in this state. Our Code requires all actions to be brought by the real party in interest, except in certain cases specified. (Code of Civil Procedure, secs. 29, 32.) The only exception which could possibly be applicable to this case is that one "with whom or in whose name a contract is made for the benefit of another" may bring the action without joining the beneficiary. In Missouri it has been held, under a similar provision, that the consignor falls within this exception, and may maintain the action for the benefit of the owner. But this case was based solely on former adjudications of that court wherein it had been held that assignees of choses in action for the purpose of collection only might sue in their own names. *Hoagland v. Van Etten*, 22 Neb., 681, is contrary to that rule. We cannot see how the consignor can be conceived to be the trustee of an express trust. He may, strictly speaking, be a person with whom a contract is made for the benefit of the consignee. But this is true in every case where a promise is made for the benefit of a third person. Our law permits the third person to sue. Could a judgment in favor of the promisee be pleaded in bar of an action by the real party in interest? We think not. Under the allegations of this petition, ownership not being averred in the plaintiffs, and a consignment to McCourtie, Hill & Co. being pleaded, the presumption is that McCourtie, Hill & Co. were the owners. The defendant was bound to deliver to them. They or their indorsees could maintain an action. Delivery to the true owner was necessary to discharge the carrier from liability. Should McCourtie, Hill & Co. sue the carrier, it would be no defense to plead a former recovery by the consignor, unless such consignor was the owner. The objection to the evidence should have been sustained.

REVERSED AND REMANDED.