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REPORTS OF CASES

IN THE

SUPREME COURT

OF

NEBRASKA.

JANUARY TERM, 1897.

VOLUME LI.

D. A. CAMPBELL,
OFFICIAL REPORTER.

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In behalf of the people of Nebraska.

THE SUPREME COURT

OF

NEBRASKA.

1897.

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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.)

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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.

ANNA L. FISK V. RUSSELL THORP ET AL.

FILED MARCH 17, 1897. No. 7171.

1. **Judgment:** MOTION TO VACATE: NOTICE. On the hearing of a motion to vacate or modify the judgment of a district court after a term at which it was rendered, there must be reasonable notice to the adverse party or his attorney in the action.

2. ———: ———: ———. Reasonable notice is such as is meet and fair in view of the circumstances and conditions existent at the time and with reference to the matter to be presented.

3. ———: ———: ———. *Held*, That if sufficient notice was not given of the hearing of a motion in the present case, it was not prejudicial to the rights of the complaining party, inasmuch as the hearing was adjourned to a subsequent date, which afforded ample time for the preparation to oppose the motion.

4. ———: ———: JURISDICTION. A judge of the district court has no jurisdiction at chambers to hear and decide a motion to vacate a judgment made after the term at which the judgment was rendered.

5. **Jurisdiction.** If a statute, in terms, confers jurisdiction to hear matters on a court as contradistinguished from a judge thereof, as a rule such matters must be heard in court, and not before a judge at chambers or in vacation.

6. **Change of Venue.** Unless expressly or impliedly empowered by statute to change the venue of a trial or hearing on its own motion, a court has no power to do so. (4 Ency. Pl. & Pr., 448.)

7. ———. The statute of this state does not provide that a district court may, on its own motion, order a change of venue in a cause or matter for hearing before it.

ERROR from the district court of Dawes county. Tried below before BARTOW, J. *Reversed.*

Allen G. Fisher, for plaintiff in error.

E. W. Dailey, contra.

HARRISON, J.

On the 10th day of February, 1892, the plaintiff in error herein commenced two actions in the district court of Sioux county, each for the foreclosure of a real estate mortgage and judgment against certain of the parties for any of the amount of debt unsatisfied by the application of the proceeds of the sale of the lands under the mortgage. The actions proceeded to decrees of sale of the mortgaged premises, confirmations of the sales, and deficiency judgments were rendered against certain of the defendants therein, including Russell Thorp and Josephine C. Thorp, defendants in error herein. During a term of court subsequent to the entry of the deficiency judgments there was presented for the Thorps a motion, the object of which was the vacation of the judgments as to the moving parties. This motion was made under the portion of section 602 of the Code of Civil Procedure designated "Third," wherein, as a ground for a district court to vacate or modify its judgment after the term at which it was rendered, it is stated that it may be for "irregularity in obtaining a judgment." This motion was called for hearing May 1, 1894, during a session of a

term of court in Sioux county, and after overruling a challenge to the jurisdiction of the court it was ordered that it be heard at district court in Chadron, Dawes county, on May 28, 1894, to which place and time the hearing was adjourned. The motion and accompanying transcript were transferred to Dawes county, and when the matter came up in court, or before the judge, in accordance with the prior order, the counsel for plaintiff in error challenged the jurisdiction of the court to hear the matter at such place. This objection was overruled and subsequently both parties participated in a hearing on the motion at Chadron, as a result of which the deficiency judgments against the Thorps were vacated.

It is claimed that there was no sufficient notice of the motion. In section 604 of the Code of Civil Procedure it is prescribed that a motion of the character of the one in this case shall be "upon reasonable notice to the adverse party or his attorney in the action." A reasonable notice of the hearing of a motion is such notice as is meet and fair, in view of the circumstances and conditions existent at the time in the matter to be presented. (*Sterling Mfg. Co. v. Hough*, 49 Neb., 618; 2 Nash, Pleading & Practice [4th ed.], p. 1228.) That service of the notice of the hearing of the motion was made upon the attorney who represented the plaintiff in error in this case is not controverted. On the subject of the time of its service it is asserted in the brief of counsel that he was served with the notice five minutes before the matter was called for hearing. The record, by which we should be governed, is not clear in regard to the time of notice, except that it was of the date May 1, 1894. The notice was dated May 1, 1894, and the hearing was set for the same day. This would seem to have probably been rather rapid advancement in the proceedings, but whether sufficient time was thereby afforded for the desired opposition to the motion to be prepared and presented is not very clearly disclosed by the record. But if error to take up the hearing of the motion on such notice, it was, in

this case, without prejudice, for on overruling counsel's objection to its jurisdiction the court adjourned the hearing almost a month's time, amply sufficient to prepare for contesting the motion on its merits.

Another question presented is, did the court have any jurisdiction to hear and determine the motion in Dawes county? If the hearing at Chadron be considered as had at chambers, or in vacation, it was without jurisdiction. Our statute does not confer power upon a judge, as contradistinguished from a court, to hear a motion to vacate or modify the judgment of the court after the term at which it was rendered. Usually a judge has no power to vacate or amend orders and judgments in vacation or at chambers. It may or must be conferred by statute. (4 Ency. Pl. & Pr., 347.) An examination of the provisions of our Code of Civil Procedure on the subject of proceedings to reverse, vacate, and modify judgments, etc., after the term at which they were rendered (see ch. 2, title 16, sec. 602, and a number of other sections immediately following it in relation to the same matters) develops that the authority therein given, and jurisdiction conferred, are upon the court, and not in any sense or to any extent upon a judge thereof at chambers or in vacation. Where this is true, the hearing must be in open court, and cannot be before the judge at chambers or in vacation. It follows that if there existed any jurisdiction to hear the motion at Chadron, in Dawes county, a matter which had its inception in the district court of Sioux county, and which was properly triable there, it must have been by reason of the transfer of the case, or the portion of it to be considered and determined, to the Dawes county district court by a change of venue, and for this there was no application by either party to the action. The order for the change, so far as the record discloses, by the court in Sioux county was of its own motion, and unless the statute on the subject of change of venue expressly or impliedly empowered the court to make the change in the place of trial or hearing, on its

own motion it had no right or authority to do so. (4 Ency. Pl. & Pr., 448.) The statute of this state does not provide that the court may, of its own motion, order a change of venue in a cause or matter before it. (Code of Civil Procedure, sec. 61.) If the transfer of the hearing to Dawes county was without authority, the district court thereof acquired no jurisdiction of the matter, and its orders therein must be reversed and the cause remanded.

REVERSED AND REMANDED.

NATIONAL LIFE INSURANCE COMPANY OF VERMONT v. FREDERICK E. GOBLE.

FILED MARCH 17, 1897. No. 7183.

1. **Insurance:** PAYMENT OF PREMIUM: DRAFTS. In the absence of an express agreement or other circumstances avoiding the operation of the rule, the remittance of a bank draft is not a payment in fact until the draft has been received, presented, and honored.
2. ———: ———: ———: RECEIPT. A written acknowledgment or receipt of payment is not conclusive when the medium of the remittance upon which it was based has failed.

ERROR from the district court of Webster county. Tried below before BEALL, J. *Reversed.*

The facts are stated in the opinion.

Bartlett, Baldrige & De Bord and *J. S. Gilham*, for plaintiff in error:

The sending of the worthless draft and the return of the receipt did not constitute a payment of the premium. (2 Morse, Banks & Banking, sec. 543; 2 Daniel, Negotiable Instruments [ed. 1891], sec. 1262; 3 Randolph, Commercial Paper [ed. 1888], secs. 1534, 1548, 1551; 2 Edwards, Bills & Notes [3d ed.], sec. 748; *Weaver v. Nixon*, 69 Ga., 700; *Holmes v. Briggs*, 131 Pa. St., 233; *Fleig v.*

Sleet, 43 O. St., 53; *Gibson v. Toby*, 53 Barb. [N. Y.], 191; *Johnson v. Weed*, 9 Johns. [N. Y.], 310; *Mordis v. Kennedy*, 23 Kan., 289; *Everett v. Collins*, 2 Camp. [Eng.], 515; *Indig v. National City Bank*, 80 N. Y., 100; *Vail v. Foster*, 4 Comst. [N. Y.], 312; *Hodgen v. Latham*, 33 Ill., 344; *Hopkins v. Detwiler*, 25 W. Va., 748; *Malpas v. Lowenstine*, 46 Ark., 552.)

James McNeny, contra:

The purchase by assured of the draft in accordance with specific instructions of the company, the sending of the draft to the agent, the negotiation thereof by the insurer, the forwarding of the renewal receipt to assured, and the failure to return the dishonored draft amount to a payment of the premium. (*Currier v. Continental Ins. Co.*, 53 N. H., 538; *Gurney v. Howe*, 9 Gray [Mass.], 404; *Warwicke v. Noakes*, 1 Peake [Eng.], 98; *Jung v. Second Ward Savings Bank*, 55 Wis., 364; *Kington v. Kington*, 11 M. & W. [Eng.], 233; *Wakefield v. Lithgow*, 3 Mass., 249; *Palmer v. Phœnix Ins. Co.*, 84 N. Y., 71.)

HARRISON, J.

In this action the defendant in error sought to recover damages of the National Life Insurance Company of Vermont, alleged to have accrued in his favor by reason of the cancellation by the company of a policy of insurance on his life which it had issued and delivered to him. In the trial court the defendant in error was given a verdict and judgment, and the unsuccessful party has prosecuted error proceedings to this court.

It appears that on March 12, 1890, the insurance company, in consideration of payments then made and others promised in accordance with the terms of the contract, issued and delivered to defendant in error its policy of insurance on his life in the sum of $5,000, payable, at his decease, to his wife. It was stated in the policy: "This policy is issued by the National Life Insurance Company of Montpelier, Vermont, where all claims under it are

payable, and accepted by the insured and beneficiary under the following conditions: A premium of $18 shall be paid to said company upon the delivery of this policy, and a sum of $111 on or before the first days of July and January, during the continuance of this contract, in each year for the term of twenty years. Failure to pay any premium or any part thereof, or any note given therefor when due, shall cancel the insurance and this contract; except that after three full annual premiums have been paid the company guaranties—" Here follows an extended statement of what would be done or paid by the company at different dates during the life of the policy, beginning with three years from its date and ending with the twenty-fifth year, in consideration of certain stated acts to be performed by the holder of the policy. The defendant in error made all payments required by the contract to and including the one of $111 due January 1, 1891, by which the policy was continued in force to July 1, 1891. At some date during the month of June, 1891, defendant in error received from the agents of the insurance company at Omaha the following communication:

"*Mr. Fred. E. Goble, Red Cloud, Neb.*—DEAR SIR: The premium of $111 on your life insurance policy number 42899 will fall due July 1, 1891. Kindly give this notice prompt attention, as your insurance, if not paid, expires on that date. Please remit by bank draft, registered letter, express or post-office money order to M. L. Roeder & Bro., 403 Paxton Block, Omaha, Neb."

And on the 26th of that month purchased a draft and forwarded it to the agents. The draft was in the following terms:

"RED CLOUD NATIONAL BANK.

"$111. RED CLOUD, NEB., June 26, 1891.

"Pay to the order of M. L. Roeder & Brother one hundred and eleven dollars. CHAS. CLARY,

"*Cashier.*

"*To the Chase National Bank, New York City.*"

This draft was received by the agents June 27, and on that day deposited in the Omaha National Bank and sent for collection to the Chemical National Bank of New York. On presentation to the Chase National Bank payment was refused, the Red Cloud bank having failed on the 28th of June. On receipt of the draft by the agents at Omaha they forwarded to defendant in error the proper renewal receipt, by which the payment of the premium was in terms acknowledged. The foregoing is a statement of the main and important facts of the transactions, the source of the present controversy, as detailed in the evidence introduced during the trial, and they were practically undisputed. One assignment of error was to the effect that the verdict was contrary to law and the evidence. The inquiry which arises is, were the facts of such a nature as to warrant the verdict and judgment rendered?

The payment of the premium is not claimed except by the draft forwarded to the agents of the company. In regard to this claim it is the established rule that a draft or check is not a payment of a debt in the absence of an express agreement that it is taken or received in payment. It is but a means by which payment may be obtained. It is conditional upon its being honored when presented, and if dishonored when presented it effects no payment of the debt for which it was drawn, unless there was an express agreement that it was to be accepted or received in payment. (2 Greenleaf, Evidence, sec. 520; 2 Daniel, Negotiable Instruments, sec. 1262; 2 Morse, Banks & Banking, sec. 543; 18 Am. & Eng. Ency. Law, 167; *Born v. First Nat. Bank of Indianapolis*, 7 L. R. A. [Ind.], 442; *Mullins v. Brown*, 32 Kan., 312; *National Bank of Commerce v. Chicago, B. & N. R. Co.*, 9 L. R. A. [Minn.], 263; *Holmes v. Briggs*, 131 Pa. St., 233; *League v. Waring*, 85 Pa. St., 244.) The fact that the agent of the company acknowledged the receipt of the draft and forwarded to the defendant in error his renewal receipt was not conclusive. The draft, when presented, was dishonored;

hence there was no payment and the receipt was of no force. (18 Am. & Eng. Ency. Law, 170, note in second column; *Weaver v. Nixon*, 69 Ga., 700; *Fleig v. Sleet*, 43 O. St., 53; *Weddigen v. Boston Elastic Fabric Co.*, 100 Mass., 422.)

We will next give our attention to the notice sent by the agents to defendant in error, by which they informed him of the approaching maturity of the insurance premium and requested that a remittance be made, such request being in terms as follows: "Please remit by bank draft, registered letter, express or post-office money order." It has been argued that this amounted to a direction relative to the manner of the remittance, a compliance with which on the part of defendant in error as to the manner or medium of remittance therein indicated constituted the remittance a payment of the premium, regardless of the ultimate outcome, or whether the agents or company, as a result of such action of defendant in error, subsequently received the money or not. The statement quoted from the notice amounted to a request at most, and was not binding upon the defendant in error. It might have been wholly disregarded, but compliance with it in any one of the ways or means suggested for the transmission of the amount necessary to meet the payment soon to be due was sufficient to entitle the defendant in error to claim such rights as thereby arose in his favor under the rules of business and law applicable thereto, but none other or further. He chose to remit by draft purchased at any bank of his own selection, to be drawn payable by any bank and at any place he chose to designate, and thereby placed the transaction and his rights thereunder within the rule that it was not a payment of the premium until the draft was received, presented, and honored. It is not claimed that there was any unreasonable delay in the presentment of the draft, and what would have been the effect of such fact upon the rights of the parties, respectively, need not be examined or stated.

There are some other errors assigned, but the conclusion which we have reached on this one renders their discussion unnecessary. It follows from what has been determined that the premium had not been paid, and the verdict of the jury was not supported by the evidence. The judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

LININGER & METCALF COMPANY V. GEORGE E. WEBB ET AL.

FILED MARCH 17, 1897. No. 7153.

1. **Guaranty**: INSTRUCTIONS. The liability of a guarantor cannot be extended beyond the exact terms of his contract, and an instruction confining the deliberations of the jury thereto, in an action against a guarantor, is not erroneous.
2. ——: PRINCIPAL AND AGENT: SALES. The contract of agency herein *held* to apply to the indorsement and guaranty of the agent only upon such notes as were received by him in sales of the goods, wares, and merchandise of his principal.
3. **Trial**: VERDICT. Where the evidence shows liabilities in different amounts upon separate defendants, a verdict specifically assessing the amount due plaintiff from each defendant is not ground for reversal of a judgment rendered in accordance therewith.
4. **Contracts**: COST OF WRONGFUL ATTACHMENT. The contract herein *held* not to create a liability to plaintiff from defendant for expenses and fees expended in an action of replevin by plaintiff to recover its property wrongfully taken from defendant under a writ of attachment upon a claim against him individually.
5. **Instructions**: REPETITIONS. It is not error to refuse to instruct the jury upon a point already covered by the instructions of the court.
6. **Guaranty**: SUFFICIENCY OF EVIDENCE. The evidence examined, and *held* to sustain the verdict rendered.

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

S. P. Davidson, for plaintiff in error.

T. Appelget, contra.

HARRISON, J.

The plaintiff commenced this action in the district court of Johnson county to recover certain sums alleged to be due it from the defendants under and by virtue of a written contract entered into by and between the plaintiff and George E. Webb, of defendants, whereby the last named party became the agent of the plaintiff for the sale of articles of merchandise in which it was dealing. The amounts were alleged to be due plaintiff by reason of the alleged failure of the agent to fulfill in certain particulars the conditions of the contract of agency. The liability of J. G. Cowden, of defendants, was predicated upon the following agreement, which appeared on the back of the contract of agency:

"For value received, the undersigned do hereby guaranty the faithful and full performance by the party of the second part to this contract of all the agreements and engagements therein entered into by the said party of the second part."

The portions of the petition in which the causes of action specifically appear are as follows:

"Plaintiff further avers that under and in pursuance of said contract said G. E. Webb began business as the agent of the plaintiff for the sale of plaintiff's goods, wares, and merchandise at Tecumseh, Nebraska, and that as such agent he received a large amount of goods, wares, and merchandise from said plaintiff, which were shipped to him at Tecumseh; that he sold goods from time to time under and in pursuance of said contract, but plaintiff avers that many of the notes which said George E. Webb, as such agent, took for said sales, instead of being given by good responsible parties, as provided by said contract, were signed by parties who were financially

worthless, and that said notes remained wholly uncollectible.

"Plaintiff further avers that among said notes that are wholly uncollectible, and which have not been collected, is one signed by Charles Hollburg, dated November 30, 1889, due March 1, 1890, bearing ten per cent interest, for $8; also a note signed by J. R. Peak, dated October 15, 1889, due April 15, 1890, for $39, bearing interest from its date at ten per cent per annum; also a note signed by G. H. Greer, dated February 1, 1890, for $60, bearing interest at ten per cent per annum from its date; also one note signed by C. J. Ferguson, dated January 29, 1890, due April 1, 1890, for $20.50, bearing interest from its date at ten per cent per annum. All said notes, though long since due, have not been paid, and the same are entirely uncollectible from the makers thereof, as said makers are each and all financially worthless, and there is now due plaintiff from said defendants, in and by virtue of said contract and the guaranty indorsed thereon, the sum of two hundred and twenty-two and nine-100 dollars, and interest thereon from November 19, 1892, at ten per cent per annum.

"As a second and further cause of action, this plaintiff further alleges that said defendants are indebted to said plaintiff, under the provisions of said contract and the guaranty thereon indorsed, in the sum of $7.20, paid by the plaintiff for the collection of the note taken by the said Webb in pursuance of said contract against one Myron Yates, indorsed by said Webb. Said collection was made on the 3d day of June, 1891.

"As a third cause of action, plaintiff further avers that said defendants are indebted to plaintiff in the further sum of two hundred and one 55-100 dollars, being for attorney's fees, costs, and expenses incurred by the plaintiffs in prosecuting a replevin suit against the sheriff of Johnson county, Nebraska, which suit was made necessary by reason of the goods, wares, and merchandise belonging to the plaintiff, in charge of said Webb as said

agent, having been attached at the suit of the creditors of said Webb. That said suit was occasioned and made necessary by the failure of said Webb to comply with his contract and his failure to keep the goods, wares, and merchandise belonging to the plaintiff separate from the goods, wares, and merchandise belonging to said Webb."

The contract, which is made a part of the petition, is quite lengthy and we will not quote it here. This same contract was involved in litigation in the case of *Shaughnessy v. Lininger*, before this court on error from the district court of Johnson county, and in the opinion therein, reported in 34 Neb., 747, the contract was set out in full, to which we now refer the reader here for the precise terms of the contract. Answers and replies were filed, in which issues were joined, of which there was a trial. The jury to which the cause was submitted returned the following verdict: "We, the jury in this case, being duly impaneled and sworn, do find for the plaintiffs and assess their damages against defendant Cowden at the sum of $20.05-100 (twenty dollars and five cents), and against Webb for the sum of $171.80-100 (one hundred and seventy-one dollars and eighty cents)." From a judgment in accordance with the verdict the plaintiff has prosecuted error proceedings to this court.

One assignment of error which is urged in the argument was directed against the action of the trial court in its modification of an instruction asked by counsel for plaintiff. This instruction was as follows: "The court instructs the jury that if the notes mentioned in the first cause of action in the plaintiff's petition were indorsed and turned over to the plaintiff by Webb under the contract sued on, and that said notes are uncollected and uncollectible, then you will find in favor of the plaintiff and against the defendants upon this cause of action, and assess plaintiff's damages at the aggregate amount of said notes, with the interest thereon as provided by the terms thereof." To which the court added, "that you will not include notes not given for the sale of plaint-

iff's property as against the defendant Cowden." The defendant Webb was bound by the terms of his contract to indorse and deliver to the plaintiff all notes taken on sales of its goods. The contract of agency, after providing that all notes taken on sales should be sent to the company, further stated as follows: "The party of the second part agrees to attend to the collection or securing of notes taken by him without extra charge, when requested, and agrees to guaranty the payment, and does hereby guaranty the payment, of any and all notes taken by him or them as agent aforesaid in the following form, viz.: 'For value received, the undersigned guaranty the payment of the within note, and hereby waive notice of protest, demand, and non-payment thereof.' And the party of the second part agrees that all notes or obligations guarantied by him or them, if not paid in two months after maturity, he or they will take up the same and pay the cash to said party of the first part, and to reimburse the party of the first part for all charges they may have to pay in collecting notes taken by the party of the second part." This goes no further than to make it obligatory on the agent to perform the prescribed duties and agreements as to all notes received in sales made of plaintiff's goods. Some of the notes for the payment of which it was sought to charge the defendants in this suit were not taken on sales made by the agent for plaintiff, but were notes which he had received in other business transactions, and which he had turned over to plaintiff in partial adjustment of his account with it. With their payment the surety or guarantor could not be charged. His obligation could not be extended beyond the terms of the agreement by which it was created, and this did not include notes taken in the course of defendant's business as agent other than in sales made for the plaintiff company, and which might for any purpose have been transferred to it by the defendant principal in the contract in suit. The modification of the instruction did no more than to announce that the surety or guarantor

was not to be charged for notes not contemplated by the terms of his agreement; hence was not erroneous, but entirely proper. Instructions numbered 2 and 5 given at the request of defendant's counsel, and the second one given by the court on its own motion, were upon the same subject as the instruction, and its modification, the assignment of error as to which we have just discussed, and were to the same effect as that one, as modified hence what we have said as to that one is applicable here, and the disposition of the assignments of error in regard to instructions 2 and 5 given at request of defendant's counsel, and the second given of the court's motion, will be governed by that made of the former one, and they must be overruled.

It is complained that the verdict was improper in its form; that the action was a joint one against the defendants, and the verdict should not have been allowed which assessed the amount of recovery against one defendant different from that assessed against his co-defendant. In section 295 of the Code of Civil Procedure it is said: "When by the verdict either party is entitled to recover money of the adverse party, the jury, in their verdict, must assess the amount of recovery." From the verdict returned, if it meets the issues submitted, the judgment will be rendered. In relation to judgments it is stated in section 429 of our Code: "Judgment may be given for or against one or more of several plaintiffs. * * * In an action against several defendants the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment may be proper." From the manner in which this action was commenced as to the parties to it, and in which it proceeded without objection in this particular, as well as from the issues as they were presented by the pleadings and evidence and submitted to the jury, the liability respectively fastened upon the defendants was not and could not be the same, and that a judgment might be rendered accurately adjusting the

plaintiff's claim against the defendants, it was necessary that the verdict should respond, as it did, to the issues tried and submitted. It is possible that the agent of defendants might have successfully interposed an objection to any recovery on some of the items of the claim made in suit against him in this action on the contract, but he makes no complaint and we need make none for him; and surely the plaintiff has not been prejudiced by the allowance to it of such recovery. It is also clear that against the other defendant the plaintiff could have neither verdict nor judgment beyond the claim accorded him by the contract on which the suit was based and such relief was accorded. The verdict was proper in the action, both in its form and substance.

It appears that the defendant Webb had other business than that transacted as agent for the plaintiff, and in its course became indebted to certain parties, who commenced an action against him and procured an attachment to issue therein, which was levied on some chattels, a portion of which were the property of the plaintiff in the possession of the defendant Webb as its agent. To recover this property the plaintiff instituted an action of replevin, in which it was successful in its purpose. The burden of the plaintiff's third cause of action in the present case is the amount of attorney's fees, costs, and other expenses alleged to have been necessarily expended in and about the replevin suit, which it sought to recover of the defendants herein. Objections to evidence offered in support of this portion of the claim were sustained by the trial court, and instructions were given in the charge to the jury which precluded its consideration of the demand. To all of which counsel for plaintiff excepted and assigned the same for error. It must here be borne in mind that this is an action on the contract to recover by reason of some of its provisions or agreements, and we have not been able to discover any portion of the contract under which an action for this claim, or any portion or item of it, would accrue or lie; hence the court was not

in error in its rulings in the particular instance to which we have just alluded.

It is claimed that the trial court erred in not giving the sixth instruction asked for plaintiff. The jury was charged to the same effect in the instructions given, therefore the refusal to give the one requested was not error.

It is also urged that the amount of the verdict is too small, especially as against the defendant Cowden. It is clear from a consideration of the verdict, in connection with the evidence, that the jury have assessed against Cowden only such items, together with the interest thereon, as were shown by the evidence to have their origin in transactions of his co-defendant as agent for the plaintiff under the contract. This being true, the amount allowed was as large as was warranted by the evidence, and in this action on the contract the recovery against the principal defendant was as much as was shown to be due, if not more, if the jury had been confined in its assessment to what was shown to be due under the terms and conditions of the contract. The judgment of the district court is

AFFIRMED.

CHARLES KLAMP, APPELLANT, V. ELLEN KLAMP ET AL., APPELLEES.

FILED MARCH 17, 1897. No. 7170.

1. **Resulting Trust: EVIDENCE.** To establish a resulting trust the evidence must be full, clear, and satisfactory.
2. ———: ———. *Held*, That the evidence in this case was insufficient to raise a resulting trust in favor of the plaintiff in the property drawn into controversy.
3. **Homestead: CONVEYANCE.** The question of the validity of the conveyance of a homestead by the husband to the wife, she not joining in the conveyance, *held* not raised in the pleadings or the evidence; hence not presented for adjudication.

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

Lamb, Adams & Scott and *Howard & Bridges*, for appellant.

Sawyer, Snell & Frost, contra.

HARRISON, J.

It appears that the two main parties litigants in this cause,—Charles Klamp, who instituted the suit in the district court of Lancaster county, and Ellen Klamp, of defendants therein,—are husband and wife; that they were married in the city of Chicago on or about the 7th day of February, 1867. After residing in Chicago a few years they removed to the town of Barrington, Illinois, and thence, in the year 1875, to Lancaster county, this state, where a piece of land was purchased of the Burlington & Missouri Railroad Company, on which they settled and it became, or they made it, a home. On the 8th day of August, 1893, a piece of school land in Seward county was purchased of one of the bankers in Seward (the name does not appear in the evidence), who assigned the contract of purchase thereof to Ellen Klamp. On the part of the husband it was asserted in this action that, at the time of the marriage of the parties, he was owner of a house and lot in Chicago, and that the wife had no money or property. It was claimed for appellee that she, at the time last stated, had some money with which she then purchased a lot in Chicago and had erected thereon a house. She further stated that the appellant, who was a carpenter, labored on the house while it was in process of erection. The house was destroyed by fire in the great Chicago fire in 1871. The building was insured, but the company under whose policy it was insured was insolvent or for some reason did not pay the insurance money. Mrs. Klamp both pleaded and introduced evi-

dence to prove that she had some money, specifically stating whence it came, with which she caused another house to be constructed on the lot, and that the appellant contributed his labors in forwarding the building. When the parties left Chicago for Barrington, the Chicago property was exchanged for some property in Barrington, which was subsequently sold for $3,000, a portion of which was in cash, and the balance evidenced by promissory notes of the purchaser. The titles of the Chicago and Barrington properties were claimed, during the trial, to have been in the name of appellee, Ellen Klamp. From the proceeds of the notes given for a part of the price of the Barrington property as they were paid the payments of the purchase price of the Lancaster county farm were made. At the time of its purchase the contract, which was one providing for payment by installments, was issued by the railroad company to Charles Klamp as purchaser. He afterwards assigned the contract to the appellee, to whom, on June 2, 1879, a deed was executed by the railroad company and delivered August 7, 1879. The Seward county land was bought with money derived from the sale of live stock and produce from the Lancaster county farm, together with small contributions of earnings of some of the children of the parties, also money earned by Mrs. Klamp in working for neighbors and some paid to her for services as a midwife. The appellant, during a portion of the time since the family commenced its life on the Lancaster county farm, has spent his time there and assisted in erecting buildings thereon, and in the general labors of the farm; during other portions of the time he was engaged to work as a carpenter, where such work was to be done, and he obtained employment. What he did with any wages he may have received does not appear. It was not shown, however, that any specific amount of them was expended in improvements on the farm or in the support of the wife and children. Mrs. Klamp lived on, and apparently managed the farm, sold, or caused to be sold, the live stock

and produce of the farm, and received the moneys derived from such sales. To this last there were a few exceptions. The appellant is shown to have sold some stock and a large quantity of grain from the farm, and appropriated the proceeds thereof and a team of horses and wagon to his own particular uses and purposes. With these he went down to Kansas, where he stayed several months, and then returned to Nebraska and the farm, with neither money, team nor wagon, bringing back with him one old pony and buggy and a revolver, but the inference may be drawn from the evidence (though possibly it is not material) that he had, while gone, spent the money and probably the proceeds of the property in catering to the satisfaction of his tastes and inclinations in certain directions. The appellee finally sold all the live stock and implements on the farm, also the household goods, and leased the farm to a son-in-law, and thus destroyed the home as it existed, though the appellant, if we give credence to the evidence adduced at the trial, had not shown a very great partiality for the home for some time prior to its disestablishment by the appellee. The appellant asserted that he had furnished the original consideration, from which, with additions thereto, made by the united efforts and labors of his wife and self, combined with the increase in value of accumulated property, had grown, or been derived, all the belongings, either real or personal, of which the parties were owners and which, at the time of the commencement of this action, were, to the extent an examination of the title thereto would disclose the fact, owned by the appellee; that the titles had been placed in her name for the reason that she was contentious and quarrelsome and had demanded of and importuned him that the titles be so placed, to which demands he had finally acceded. Appellant sought in this action to have it decreed that the lands and other property were held by appellee in trust for him; that she convey the lands to him, account for and turn over all moneys received from sales of stock or produce, rents of lands, etc.,

and be enjoined from in any manner, at any time, interfering with his use, occupation or management of the lands. Issues were joined, of which a trial resulted in a decree favorable to the defendant, from which this appeal has been perfected.

It was not and is not claimed that there was the creation of an express trust,—indeed, on oral argument in this court, it was agreed that there was none,—but it was insisted that, from the acts and relations of the parties in respect to the properties involved, there was necessarily evolved an implied or resulting trust in favor of appellant, and with which appellee was charged. In this connection we are cited by counsel for appellant to the decision of this court in the case of *Brownell v. Stoddard*, 42 Neb., 177, in which appears a statement on the subject of resulting trusts, which we deem quite pertinent in the present cause, as follows: "The doctrine of resulting trusts is founded upon the presumed intention of the parties. 'A trust is never presumed or implied as intended by the parties unless, taking all the circumstances together, that is the fair and reasonable interpretation of their acts and transactions.' (2 Story, Equity Jurisprudence, sec. 1195.) The doctrine of resulting trust from payment of the consideration money 'has its origin in the natural presumption, in the absence of all rebutting circumstances, that he who supplies the money means the purchase to be for his own benefit, rather than for that of another.' (2 Story, Equity Jurisprudence, sec. 1201.) 'As the resulting or implied trust is in such cases a mere matter of presumption, it may be rebutted by other circumstances established in evidence and even by parol proofs which satisfactorily contradict it. * * * Thus, for example, if a parent should purchase in the name of a son, the purchase would be deemed *prima facie* as intended as an advancement so as to rebut the presumption of a resulting trust for the parent. But this presumption that it is an advancement may be rebutted by evidence manifesting a clear intention that the son shall take as trustee,'

(2 Story, Equity Jurisprudence, sec. 1202. See 2 Perry, Trusts, sec. 126.) The foregoing statements seem elementary but, in cases where distinctions were not necessary, the general principle has been so often stated that where one pays the consideration, and a title is taken in another, a trust results in favor of the one paying the consideration, that we are apt to regard this as a statement of an absolute legal proposition, and not merely as a rule of evidence. In the more careful statements of the rule, its operation is restricted to transactions between strangers; and it necessarily fails wherever the relationship of the parties is such that a payment of money would be presumed an advancement, rather than a loan. It is always said that, in order to establish a resulting trust, the evidence should be clear, satisfactory, and conclusive. (*Hoehne v. Breitkreitz*, 5 Neb., 110.)" The evidence in the case at bar was not only not satisfactory and conclusive in establishing such a trust in favor of appellant, but was amply sufficient to warrant the conclusion of the trial court that all the property in controversy was the separate and individual property of appellee.

It is urged that it is manifest from the pleadings and the evidence that the appellant conveyed the land and home to the appellee with the intention that she should hold the title and the place be kept and retain its home character for the occupancy and enjoyment of the husband and wife and other members of the family; also that the appellee received the conveyance with full knowledge of appellant's intention and in full agreement thereto and with the like intention; that if there be any technical rule by which the appellee must be allowed to hold the title, she should be charged with the payment to appellant of the value of what he has contributed to its original acquisition and subsequent improvement, and citations are made of opinions in which are expressed doctrines which would apparently warrant, in a proper case, the granting of relief of such a nature as counsel has set forth in the argument, but in the case now under consid-

eration the facts are not of a character to call for the application and enforcement of any such rules.

It is also argued that inasmuch as the farm in Lancaster county was the home or homestead of the parties at the time of the assignment of the contract of purchase by appellant to his wife, it was necessary for the wife to join in the execution of the assignment, and that as she did not do so the assignment is a nullity under the provision of section 4, chapter 36, Compiled Statutes, in which it is stated: "The homestead of a married person cannot be conveyed or incumbered unless the instrument by which it is conveyed or incumbered is executed and acknowledged by both the husband and wife." Suffice it to say that no such question is presented by the record. There was no issue made by the pleadings on this point. It was specifically set forth in the petition that appellant procured the title of the Lancaster county land to be conveyed to the appellee. The manner in which or the proceedings or means by which he effected his purpose in this regard were not questioned or controverted; hence are not raised for consideration and adjudication at this time. It is further urged that the lease of the homestead was void by virtue of the same provision of the statute. This is effectually disposed of by the fact that the appellant joined in the lease of the farm, of which he now complains, apparently, as far as disclosed by the record, of his own free will and accord. The judgment of the district court must be

AFFIRMED.

FIRST NATIONAL BANK OF BROKEN BOW, APPELLEE, V. FRANCIS G. HAMER ET AL., APPELLANTS.

FILED MARCH 17, 1897. No. 7114.

Executions: LEVY ON REALTY: DUTY OF SHERIFF. An officer levying an execution upon real estate must cause an appraisement of the property to be made, and a copy of such appraisement to be de-

posited in the office of the clerk of the district court from which the execution issued, before the sale is advertised. *Burkett v. Clark*, 46 Neb., 467, followed.

APPEAL from the district court of Phelps county. Heard below before BEALL, J. *Reversed.*

F. G. Hamer, for appellants.

NORVAL, J.

This is an appeal from an order confirming the sale of real estate on execution. On the 13th day of November, 1893, the execution was issued and delivered to the sheriff, who on the next day levied the same upon the lands of the judgment debtor. The property was appraised on December 9, 1893, and a copy of the appraisement was not deposited in the office of the clerk of the district court until the 20th day of the same month, which was the day preceding the date of the sale. The first publication of the notice of sale was made on November 15. The sale having been made before there had been any appraisement of the property, and prior to the depositing a copy of the appraisement in the office of the clerk of the district court, under the decision in *Burkett v. Clark*, 46 Neb., 467, the order of confirmation must be set aside.

ORDER REVERSED.

JULIA M. PROUT ET AL. V. WILLIAM BURKE ET AL.

FILED MARCH 17, 1897. No. 7098.

1. Mortgages: PURCHASE MONEY: HOMESTEAD. A mortgage given by the wife, at the time of the purchase of real estate, to secure the unpaid purchase money is valid security, though not signed by the husband, notwithstanding the property was purchased for, and occupied as, a family homestead.

2. ———: EXECUTION. A mortgage upon real estate other than the homestead, executed and delivered, is valid between the parties although not lawfully acknowledged or witnessed. (*Holmes v. Hull*, 50 Neb., 656.

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

J. E. Cobbey, for plaintiffs in error.

J. H. Broady, contra.

NORVAL, J.

This was an action by William Burke against Julia M. Prout and others to foreclose a real estate mortgage, in which there was a decree in favor of the plaintiff, as well as for the defendant Andrew S. Holladay on his cross-petition. The defendants, Julia M. Prout and Frank N. Prout, have brought the case to this court for review.

It is made to appear in the record that the defendant Holladay was the owner of lots 7 and 8, in block 31, of Cropsey's Addition to the city of Beatrice, but the title to the same was held in trust for him by one George H. Collins. In June, 1889, Julia M. Prout purchased said real estate of said Holladay, through one J. C. Fletcher, his agent, for the agreed price of $3,250, of which sum she was to pay $500 in cash, assume a mortgage on the premises for $600, and give her seven promissory notes for the balance of the purchase price, six for $300 each and one for $350, the notes to be secured by a lien upon the premises. She gave notes bearing date June 15, 1889, and to secure the same she executed and acknowledged a mortgage covering the property purchased before the said Fletcher, as a notary public, and which mortgage contained a recitation that it was given to secure the part payment of the purchase money, and it was filed for record August 7. Holladay caused Collins to execute a deed conveying the lots to Mrs. Prout, this deed bearing date of June 1, 1889, and the same was recorded on August 15 following. At the time the mortgage was executed and delivered, Mrs. Prout, her husband, and their daughter were in possession of the premises, and they have ever since occupied the same as their homestead.

Plaintiff, as assignee of two of the notes, instituted this action to foreclose the mortgage, alleging in his petition, *inter alia*, that the notes and mortgages were for the unpaid purchase money on the premises. The defendant Holladay filed a cross-petition in the case praying a foreclosure as to the notes held by himself and secured by the same mortgage. It further appears that whilst the deed and mortgage bear different dates, they were both executed and delivered as parts of one and the same transaction. It is insisted by the unsuccessful defendants that the mortgage is void because it was not executed and acknowledged by Frank N. Prout, the husband of the mortgagor. Sections 3 and 4 of chapter 36, Compiled Statutes, entitled "Homesteads," read as follows:

"Sec. 3. The homestead is subject to execution or forced sale in satisfaction of judgments obtained: First—On debts secured by mechanics', laborers', or vendors' liens upon the premises. Second—On debts secured by mortgages upon the premises, executed and acknowledged by both husband and wife, or an unmarried claimant.

"Sec. 4. The homestead of a married person cannot be conveyed or incumbered unless the instrument by which it is conveyed or incumbered is executed and acknowledged by both husband and wife."

It is perfectly plain that under the foregoing provisions a mortgage on a homestead of a married person is invalid unless the instrument is executed and acknowledged by the husband and wife, and this court has by an unbroken line of decisions so construed the statute. (*Bonorden v. Kriz*, 13 Neb., 121; *Aultman v. Jenkins*, 19 Neb., 209; *Swift v. Dewey*, 20 Neb., 107; *Larson v. Butts*, 22 Neb., 370; *McCreery v. Schaffer*, 26 Neb., 173; *Betts v. Sims*, 25 Neb., 166; *Whitlock v. Gosson*, 35 Neb., 833; *Clarke v. Koenig*, 36 Neb., 572.) It therefore follows that this mortgage is void and of no force and effect whatever, if the homestead right of the Prouts had attached to the property at the time the mortgage was executed and acknowledged, since

it was signed alone by the wife and not by the husband. But no homestead right existed in the complaining defendants at the time the mortgage was given, inasmuch as the purchase of the premises and the execution of the mortgage thereon for the unpaid purchase money were parts of the same transaction, so that Mrs. Prout acquired the title to these lots subject to the lien of this mortgage thereon. Of necessity such lien must have priority over the homestead right, since such right could not exist until after the purchase was effected. In other words, that a homestead is not acquired within the meaning of the statute until the claimant has obtained title of some kind to the land, or, at least, has so complied with the contract of purchase as to be in a position to demand title. It has been held that a mortgage given to secure the unpaid purchase money of land executed simultaneously with the deed takes precedence of a judgment against the mortgagor. (*Curtis v. Root*, 20 Ill., 57; Thompson, Homestead & Exemption Laws, sec. 333.) Upon the same principle a mortgage given by a wife for the purchase money, delivered at the time of the purchase, is not invalid because not executed and acknowledged by the husband. The following authorities so hold: Thompson, Homestead & Exemption Laws, secs. 333, 343, 262; Waples, Homesteads & Exemptions, 352; *Christy v. Dyer*, 14 Ia., 438; *Burnap v. Cook*, 16 Ia., 149; *Pratt v. Topeka Bank*, 12 Kan., 570; *Kimble v. Estworthy*, 6 Bradw. [Ill. App.], 517; *Andrews v. Alcorn*, 13 Kan., 351; *Greene v. Barnard*, 18 Kan., 518; *Amphlett v. Hibbard*, 29 Mich., 298; *Roy v. Clarke*, 75 Tex., 28; 1 Jones, Mortgages, sec. 468.) The notes, mortgage, and deed were executed on different dates; but this is immaterial. They were not effective until delivery. The evidence adduced does not clearly disclose the dates of delivery. Should we accept the dates of recording the mortgage and deed as the true times of delivery, then the mortgage has priority in point of time. However, it is shown that the papers were intended by the parties to be, and were in fact, parts of the same transaction, the mort-

gage must, in legal effect, be regarded as having been executed and delivered simultaneously with the deed of purchase, and therefore it was not necessary that Mr. Prout should have joined in the execution of the mortgage to subject the premises to its payment.

It is also urged that the mortgage is invalid because its execution was witnessed by, and was acknowledged before, J. C. Fletcher, the agent of the mortgagee. If the homestead right had not attached when the mortgage was executed, as we have already determined, it was wholly immaterial whether it was witnessed or acknowledged or not. (*Holmes v. Hull*, 50 Neb., 656.) The decree is

AFFIRMED.

STATE OF NEBRASKA, EX REL. UNION PACIFIC RAILWAY COMPANY, V. COLFAX COUNTY.

FILED MARCH 17, 1897. No. 7136.

Drainage: ROUTE: COUNTY BOARD. In a proceeding to establish a drainage ditch under article 1, chapter 89, of the Compiled Statutes, one of the jurisdictional facts which the county board is required to find and enter upon its journal is whether the line described in the petition for the proposed ditch is the best route for the improvement.

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

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

George H. Thomas and *E. T. Hodsdon, contra.*

NORVAL, J.

The Union Pacific Railway Company and others presented a petition to the board of county commissioners

of Colfax county on April 25, 1892, under article 1, chapter 89, Compiled Statutes, praying the location and construction of a drainage ditch over and across the lands of the petitioners. The commissioners entered the following orders on their record relating to said petition:

"SCHUYLER, NEB., April 26, 1892.

"The board of county commissioners met pursuant to adjournment. All members present, and clerk.

"The clerk having delivered a copy of said petition as provided by statute in the matter of location, construction, etc., of ditches to the board of commissioners, they thereupon took to their assistance E. E. Greenman, county surveyor, and at once proceeded to view the line of the proposed improvement, and after having been out all day viewing said proposed improvement and having returned late, the board adjourned to meet next morning at 9 o'clock A. M."

"SCHUYLER, NEB., April 27, 1892.

"The board of commissioners met pursuant to adjournment. All the members present, and clerk.

"In the matter of the location, construction, etc., of the ditches, the board made the following report:

" 'Whereas the location, construction, and maintenance of the ditch, drain, and excavations therein referred to are necessary to drain the land described in a copy of the petition attached to this report and heretofore recorded, do find, determine, and report that said improvement is necessary and will be conducive to the public good, health, convenience, and welfare, and beneficial to certain lands and property; and we do hereby order the county clerk to enter this our report upon the journal.

" 'Dated this 27th day of April, 1892.

" 'WILLIAM MCROE,

" 'G. FOLKEN,

" 'JAMES LOOGLEY,

" *'The Board of County Commissioners of Colfax Co.'* "

Subsequently, at an adjourned meeting held on May 9, 1892, the board made and caused to be entered on its jour-

nal an order directing the county surveyor to go upon the line described in the petition, and survey, level, and stake the same, and make a report, profile, and plat thereof, and do and perform the other matters and things required by sections 7, 8, and 9 of said article and chapter. The surveyor complied with said order and filed his report with the county clerk on June 27, 1892. A date was fixed for a hearing on said report, and notice thereof was given in accordance with section 10 of said chapter. Claims for damages on account of said ditch were duly filed to the amount of $9,093, and at the time so fixed for the hearing the county commissioners convened in session, and then determined that the requisite notice had been given of the hearing and the report, and after listening to the argument of counsel for certain persons who had filed exceptions and objections against the proposed ditch, the board adjourned to meet the next morning, at which time it made and caused to be entered of record the following:

"SCHUYLER, NEB., August 9, 1892.

"The board of county commissioners met pursuant to adjournment. Present, full board and clerk.

"In the matter of the petition of the Union Pacific Railway Company and others for the opening of drainage ditches, filed on the 25th day of April, 1892, and set down for hearing on the 26th day of July, 1892, and continued to this day, came on for hearing, and after hearing testimony and argument of counsel, and after being fully advised in the premises, the board finds that the ditches described in the said petition are not necessary and would not be conducive to the public health, benefit, and welfare, and that no lots or lands would be benefited thereby. It is therefore ordered that the said petition and action be dismissed, and that no further proceedings be made or had in the premises, and that the costs of this proceeding be charged up and collected from the parties whose names appear on the bond herein filed."

Thereafter the Union Pacific Railway Company, by

proceedings instituted in the district court of Colfax county in the nature of *certiorari*, obtained a reversal and vacation of the said order of the county board last aforesaid, and said commissioners having refused to construct said ditch, relator instituted *mandamus* proceedings to compel them so to do. The district court denied the writ and dismissed the application, for the reason that the decision of the county board of April 27, 1892, is void and invalid, in that it does not find that the line of the proposed improvement was the best route.

It is argued that the omission of the county commissioners to find that the line of the proposed ditch described in the petition is the best route does not render the proceedings void. The determination of this question requires an examination of certain of the provisions of article 1, chapter 89, Compiled Statutes, entitled "Swamp Lands." The fourth section provides for the presentation of a petition to the county board, signed by one or more owners of lots of land which will be benefited by the improvement, setting forth the necessity of the proposed improvement, and describing the route and termini thereof with reasonable certainty; also, that a requisite bond shall accompany such petition. Section 5 declares: "The county clerk shall deliver a copy of said petition to the board of county commissioners at their next meeting, who shall thereupon take to their assistance a competent surveyor or engineer, if in their opinion his services are necessary, and at once proceed to view the line of the proposed improvement and determine by actual view of the premises along and in the vicinity thereof whether the improvement is necessary or will be conducive to the public health, convenience, or welfare, and whether the line described is the best route; and they shall report their finding in writing and order the clerk to enter the same on their journal." It is obvious from a reading of this section that the legislature, in plain and unmistakable language, has made it the duty of the county commissioners, when a petition prescribed by section 4 is

presented, accompanied by the requisite bond, to determine, upon an actual view of the premises, and report in writing, among other matters, whether the line of the proposed ditch described in the petition is the best route to accomplish the object sought, and also to cause their report to be entered upon the record of their proceedings. That this is jurisdictional there is no room to doubt. Such a finding is just as indispensable to the validity of a proceeding under the drainage law as a determination that the proposed improvement is necessary or will advance the public health and welfare. This view is emphasized by the fact that the board is not limited in making the location to the precise route described in the petition; but by section 6 of the act the commissioners are authorized to change the same, not exceeding 160 rods from the proposed line mentioned in the petition. In *County of Dakota v. Cheney*, 22 Neb., 437, it was said that the jurisdictional facts in a proceeding to establish a drain or ditch under said chapter 89 are: "First, a petition signed by one or more owners of land to be affected by the proposed ditch; second, the bond provided by statute; third, that the proposed improvement is necessary and will be conducive to the health, convenience, and welfare of the public; and fourth, the statutory notice." It was not decided in that case that it was unnecessary for the board to find that the line described in the petition is the best route for the ditch, nor could it have been properly determined therein, since the question was not involved. The sole point raised was whether the failure of the county board to find that the signers of the petition for the location and construction of the ditch were the owners of the land to be affected was jurisdictional or not. Nor was the question here under consideration passed upon in *Darst v. Griffin*, 31 Neb., 668, cited by relator. The statute is mandatory that the commissioners shall report "whether the line described is the best route," and it is illogical to say that such finding is not jurisdictional. Until the location of the line is deter-

mined, the board can take no further steps in the matter. County boards possess limited jurisdiction, and the grant of power conferred upon them is to be strictly construed. (*State v. County Commissioners of Lincoln County*, 18 Neb., 283.) They have no authority to construct a ditch under the drainage law, unless all the jurisdictional steps have been taken.

It is argued in the brief of counsel for relator that the finality of the determination and finding of the commissioners was adjudicated in the proceeding brought in the district court to obtain a reversal of the order of the board of August 9 dismissing the petition for the location and construction of the ditch. The judgment vacating the order of said date was not a determination that the findings of April 27 were sufficient, but was *res judicata*, at most, as to the validity of the action of the county board dismissing the petition for the ditch, because no steps were ever taken to review the decision of the district court in the *certiorari* proceedings, and hence such judgment stands in full force. For the reasons stated the judgment of the trial court is

AFFIRMED.

JAMES J. MCINTOSH, TREASURER OF CHEYENNE COUNTY, NEBRASKA, V. FRANK B. JOHNSON.

FILED MARCH 17, 1897. No. 7211.

1. Statutes: CONSTRUCTION. Statutes remedial in their nature should receive a liberal, and not a restrictive, construction.

2. ———: ———. An imperative rule of construction is that effect, if possible, must be given to every clause and part of the statute.

3. ———: ———. A legislative enactment will be given a prospective operation unless a contrary intent is clearly expressed.

4. ———: ———: COLLECTION OF PUBLIC MONEY. *Held*, That the act of the legislature of 1879, entitled "An act to provide for the collection of public funds and money" (Compiled Statutes, ch. 8, secs. 40, 41), operates prospectively as well as retroactively.

5. ———: ———: ———. *First Nat. Bank of South Bend v. Gandy*, 11 Neb., 433, disapproved.

6. Payment: ACCORD AND SATISFACTION. A payment of a part only of a liquidated past-due debt, in full settlement, is not good as an accord and satisfaction.

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

L. F. Crofoot, Breckenridge & Breckenridge, and *W. P. Miles,* for plaintiff in error.

Wharton & Baird, contra.

NORVAL, J.

During 1888, and a part of 1889, the defendant, Frank B. Johnson, and one S. C. Morgan were partners engaged in a general banking business at Sidney, Cheyenne county, under the firm name and style of the State Bank of Sidney. In the latter part of June, 1889, Mr. Morgan died, leaving the defendant the sole surviving partner, and the bank being insolvent at the time, closed its doors, and did not afterwards resume business nor pay its depositors. From January 7, 1888, to June 26, 1889, both dates inclusive, Adam Ickes, the treasurer of Cheyenne county, in his official capacity deposited in said bank, on open account, large sums of money belonging to the county, and withdrew a portion thereof as required for use. On the day the bank suspended payment Mr. Ickes, as such county treasurer, had upon deposit therein county funds to the amount of $17,357.40. Plaintiff is the successor in office to the said Adam Ickes, and as such instituted this suit to recover from the defendant, as surviving partner, the sum of $11,857.40, alleged to be the balance due the county of Cheyenne on account of the moneys so deposited in said State Bank of Sidney. A trial of the issues raised by the pleadings was had to the court, resulting in a finding and judgment against the plaintiff. Two defenses are relied upon by the defendant to defeat the action, to-wit: (1.) Neither the county of Cheyenne nor the plaintiff ever had any

legal claim against the defendant or the State Bank of Sidney on account of the funds deposited by Treasurer Ickes. (2.) Accord and satisfaction. These propositions will receive attention in their order.

The first contention is to a greater or less extent sustained by two decisions of this court, viz., *State v. Keim*, 8 Neb., 63, and *First Nat. Bank of South Bend, Ind., v. Gandy*, 11 Neb., 431. The first case was an action by the state to recover certain public funds belonging to it which had been deposited with the defendants, who were engaged in the banking business at Falls City, under an agreement that it should be delivered upon demand. It was held there could be no recovery, since the deposit was unauthorized, and there had been no ratification of it by public law. The writer by no means concedes that an illegal or unauthorized deposit of state moneys in a bank constitutes no cause of action in favor of the state to recover such moneys; but accepting the decision in *State v. Keim* to be sound, is it decisive of the question before us? We do not think so. After it was rendered the legislature, in 1879, passed the following act, which received the approval of the executive:

"An act to provide for the collection of public funds and moneys.

"*Be it enacted by the Legislature of the State of Nebraska:*

"Section 1. That in all cases in which public moneys, or other funds belonging to this state, or to any county, school district, city, or municipality thereof, have been deposited or loaned to any person or persons, corporation, bank, copartnership, or other firm or association of persons, it shall be lawful for the officer or officers making such deposit or loan, or his or their successors in office to maintain an action or actions for the recovery of such moneys deposited or loaned, and all contracts for the security or payment of any such moneys or public funds made shall be held to be good and lawful contracts binding on all parties thereto; *Provided*, Nothing herein contained shall be construed to in any manner affect the

liability of any surety or signers of any official bond heretofore or hereafter given or made in this state.

"Sec. 2. All actions heretofore brought by any public officer, either in his own name or officially, for the recovery of any public moneys heretofore loaned or deposited shall be sustained, and all remedies allowed in other cases, by attachment or otherwise, shall be admissible and allowed in such actions as in other cases." (Compiled Statutes, ch. 8, secs. 40, 41; Session Laws, 1879, p. 156, secs. 1, 2.)

It was the decision in *State v. Keim, supra*, doubtless, which prompted the legislature to enact this law, for the purpose of authorizing the collection by suit of public moneys illegally loaned or deposited by their custodian,—a remedy which this court had ruled did not theretofore exist in this state. If the act above quoted is to be given prospective operation, and not a retroactive effect merely, then it is very evident that the present action is maintainable. It is argued by the defendant that the purpose of the act of 1879 was to legalize prior contracts made by treasurers for the depositing or loaning of public funds and to empower the treasurer making such loan or deposit, or his successor in office, to collect the same by suit, and that this law has no prospective application. The case of the *First Nat. Bank of South Bend, Ind., v. Gandy*, 11 Neb., 433, is authority for such interpretation. The question there involved was whether county moneys deposited in a bank by county treasurers prior to the enactment of the present depository law are subject to garnishment process in a suit to recover a debt of the officer depositing the same. It was held that they were, since it did not lie in the mouth of Mr. Gandy, or any of his privies, of which the depository bank was one in respect to the funds, to assert that they were not the individual moneys of Mr. Gandy, which alone he had a right to deposit in bank, and the latter might lawfully receive from him on deposit. The only reference made in the opinion in that case to the law of 1879 above quoted is the follow-

ing: "I do not deem it necessary to make any reference to the act of February 24, 1879, cited by counsel for defendants in error, further than to say that by its own terms said act only covers cases of loans of public funds made before the passage of said act, and so does not apply to the case at bar." We are persuaded that the author of that opinion either misread the statute, or had not in mind three well recognized rules which should have obtained in ascertaining the meaning, scope, and effect of the act. The statute is in some respects a remedial one, and therefore should receive a liberal construction. (*Rogers v. Omaha Hotel Co.*, 4 Neb., 58; *Swearingen v. Roberts*, 12 Neb., 336; *Harmon v. Omaha*, 17 Neb., 551; *Wright v. Chicago, B. & Q. R. Co.*, 19 Neb., 182; *State v. Fremont, E. & M. V. R. Co.*, 22 Neb., 328.) Again, an imperative rule of construction is that effect, if possible, must be given to every clause and part of a legislative enactment. (*Hagenbuck v. Reed*, 3 Neb., 24; *McCann v. McLennan*, 2 Neb., 288; *King v. State*, 18 Neb., 380; *State v. Babcock*, 21 Neb., 599.) Another familiar canon governing the interpretation of statutes is that they will be given a prospective operation unless a contrary intention is plainly expressed. (*State v. City of Kearney*, 49 Neb., 337, and cases cited.) There is nothing, either in the title or the body of the act, which indicates the least intention on the part of the legislature that the law should operate retroactively alone. On the contrary, it is manifest that it cannot be so construed if effect is given to each word and clause of the statute in question. That it was the purpose to legalize actions then pending for the recovery of public moneys brought by any officer either in his individual name or officially, and also to legalize prior contracts for the deposit of such money cannot be successfully disputed; but that the law was intended to have a retroactive effect alone we deny. The interpretation contended for by defendant renders meaningly the words "or hereafter" used in the proviso clause of section 1, which declares that "nothing herein contained shall be construed to in any

manner affect the liability of any surety or signers of any official bond heretofore or hereafter given or made in this state." Construing the words "heretofore or hereafter given" in connection with the rest of the section in which they appear shows that the act was to have both a prospective and retroactive effect, and was intended to apply to, and cover, contracts or deposits made after the passage of the act, as well as those made prior to its adoption. The act in unmistakable terms empowered the bringing of suits upon contracts which should thereafter be made for the deposit of public funds, and not merely actions upon contracts which had been made before the passage of the law. To construe the act so as to give it both a retroactive and prospective application, effect can be given to every word therein contained, while the language of the law, without a forced or arbitrary construction, will not support a mere retroactive effect. The decision in *First Nat. Bank of South Bend, Ind., v. Gandy, supra*, is disapproved.

The facts upon which the defense of accord and satisfaction is predicated are these: In December, 1889, after the death of Mr. Morgan, the defendant entered into an agreement with Mr. Ickes, the county treasurer of Cheyenne county, by the terms of which Mr. Ickes, as county treasurer, accepted certain real estate in the city of Omaha of the agreed value of $6,000, owned by Mr. Johnson, and the promissory note of the latter for $3,000 in settlement of the amount due from the bank for the county funds which had been deposited therein. Mr. Ickes at the time executed and delivered to Mr. Johnson a receipt, of which the following was a copy:

"OMAHA, NEB., Dec. 11, 1889.

"Received of F. B. Johnson his note for three thousand dollars, bearing even date herewith, payable in one year, with interest at seven per cent per annum, which, when paid, will be in full of all claims against him in connection of State Bank of Sidney. ADAM ICKES,

"Co. Treas. Cheyenne County."

That the above mentioned note was subsequently paid by the defendant is conceded. Whether the county commissioners accepted the benefits of said settlement and ratified the same with full knowledge of the facts, in our view it is unnecessary to determine, since the compromise is not binding for want of a consideration. It was admitted by the defendant upon the trial that he was a partner of Mr. Morgan in the State Bank of Sidney, and that at the time of the death of the latter there was on deposit in said bank, to the credit of the county treasurer of Cheyenne county, the sum of $17,357.40. No payments had been made upon this indebtedness at the date of the compromise. There was therefore at that time a liquidated amount due from the defendant as sole surviving partner of over $17,000, and this admitted liability was settled by the acceptance of property and note of the defendant of the actual and agreed value of over $6,000 less than the amount of the indebtedness. The acceptance of part of a liquidated demand past due, in full settlement, is not a bar to an action on such demand. In this case the amount of the indebtedness was admitted, and the defendant being the sole surviving partner, there was no room for dispute that he was liable for the payment. There was no consideration for the agreement to accept a lesser sum than the amount due; hence there is no complete accord and satisfaction. The proposition is too plain to require the citation of authorities in support of it. The judgment must be reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

JAMES H. ROGERS V. HEADS IRON FOUNDRY ET AL.

FILED MARCH 17, 1897. No. 7077.

Chattel Mortgages: REGISTRATION: DELIVERY. A chattel mortgage delivered by the mortgagor unconditionally to an unauthorized third person, by whom, under the directions of the mortgagor, it was

filed for record and subsequently accepted by the mortgagee, takes effect, as between the mortgagor and mortgagee, from the time of the first delivery; but not so as to persons who have acquired title to, an interest in, or a lien upon, the property, before the actual acceptance by the mortgagee.

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

The opinion contains a statement of the case.

Munger & Courtright, for plaintiff in error:

The only question for determination is as to the priority of mortgage liens. The plaintiff claims the prior lien because of the fact that his lien attached before there was any valid delivery of the defendants' mortgages; and that, in this case, the subsequent acceptance by defendants of the mortgages previously delivered to a stranger for them did not relate back as against the intervening lien of the plaintiff. (*Masterson v. Cheek*, 23 Ill., 72; *Rivard v. Walker*, 39 Ill., 415; *Lessee of Mitchell v. Ryan*, 3 O. St., 387; *Jackson v. Bodle*, 20 Johns. [N. Y.], 187; *Bullitt v. Taylor*, 34 Miss., 741; *Boardman v. Dean*, 34 Pa. St., 252; *Wilsey v. Dennis*, 44 Barb. [N. Y.], 359; *Younge v. Guilbeau*, 3 Wall. [U. S.], 641; *Tuttle v. Turner*, 28 Tex., 759; *Bell v. Farmers Bank of Kentucky*, 11 Bush [Ky.], 34; *Hulick v. Scovil*, 4 Gilm. [Ill.], 159; *Welch v. Sackett*, 12 Wis., 265; *Bowman v. Griffith*, 35 Neb., 365; *Townson v. Tickell*, 3 B. & Ald. [Eng.], 31; *Jackson v. Phipps*, 12 Johns. [N. Y.], 422; *Foster v. Beardsley Scythe Co.*, 47 Barb. [N. Y.], 513; *Woodbury v. Fisher*, 20 Ind., 387; *Johnson v. Farley*, 45 N. H., 505; *Parmelee v. Simpson*, 5 Wall. [U. S.], 86; *Renfro v. Harrison*, 10 Mo., 411; *Hibberd v. Smith*, 67 Cal., 547; *Pierce v. Hall*, 41 Barb. [N. Y.], 142; *Kingsbury v. Burnside*, 58 Ill., 310; *Van Court v. Moore*, 26 Mo., 100; *Derry Bank v. Webster*, 44 N. H., 264; *Oxnard v. Blake*, 45 Me., 602; *Day v. Griffith*, 15 Ia., 104; *Denton v. Perry*, 5 Vt., 382; *McPherson v. Featherstone*, 37 Wis., 632; *Samson v. Thornton*, 44 Mass., 275; *Goodsell v. Stinson*, 7 Blackf.

[Ind.], 437; *McCutchin v. Platt*, 22 Wis., 561; *Cravens v. Rossiter*, 22 S. W. Rep. [Mo.], 736; *Deere v. Nelson*, 34 N. W. Rep. [Ia.], 809; *Colb v. Chase*, 54 Ia., 253.)

Frick & Dolezal, contra:

The delivery of the mortgages to defendants was such as to give them a lien upon the property superior to that of plaintiff. (*Lessee of Mitchell v. Ryan*, 3 O. St., 377; *Jones v. Swayze*, 42 N. J. Law, 279; *Merrills v. Swift*, 18 Conn., 257; *First Nat. Bank, Emporia, v. Ridenour*, 27 Pac. Rep. [Kan.], 150; *Ensworth v. King*, 50 Mo., 477; *Ferguson v. Miles*, 3 Gilm. [Ill.], 358; *Thompson v. Candor*, 60 Ill., 244; *Bryan v. Wash*, 2 Gilm. [Ill.], 565; Devlin, Deeds, secs. 287-289 *et seq;* Jones, Real Estate Mortgages [2d ed.], sec. 540.)

NORVAL, J.

This proceeding was instituted in the court below to determine the priority of liens of certain chattel mortgages executed in the firm name of Nesbit & Rogers. The controversy was submitted, and determined by the court adversely to the plaintiff, upon a written stipulation of facts. He prosecutes error.

The facts, so far as they are necessary to an understanding of the question involved, are briefly these: On and prior to the 6th day of February, 1894, Fred L. Nesbit and William E. Rogers were engaged in the mercantile business in the city of Fremont, under the name and style of Nesbit & Rogers; that on said date, said firm being insolvent and unable to pay its debts, it was mutually agreed between the partners to discontinue said business and to turn over the firm assets to its creditors, and each partner for the firm, but without the knowledge of his copartner, undertook to secure such creditors as he thought best to prefer; that on said 6th day of February the said Fred L. Nesbit, in the name of the firm, executed chattel mortgages to the Heads Iron Foundry, Great

Western Stove Company, and Estate of P. D. Beckwith, for the several amounts then actually due and payable to them, upon the merchandise owned by said Nesbit & Rogers, and delivered the said chattel mortgages to J. E. Frick for the use and benefit of the said mortgagees, respectively, and the said Nesbit intended to, and thereby did, part with all right, dominion, and control over, or with reference to, every one of said mortgages, and requested said Frick to file the same for record, who immediately deposited the same in the office of the county clerk of Dodge county, at not later than 3:33 P. M. of said day, and paid the clerk the legal fees for filing and indexing the same; that said Frick at the time said mortgages were delivered to him for the use of said mortgagees did not have authority from said creditors to receive said mortgages, but assumed to act for them generally as an attorney for the purpose of protecting their claims against Nesbit & Rogers, and had no authority to represent the mortgagees until the receipt from them of the telegrams hereafter mentioned; that at 5:04 P. M. of said 6th day of February the said Frick caused to be sent to each of said several mortgagees, all of whom were non-residents of the state, a telegram apprising each of the failure of Nesbit & Rogers, and what had been done, and an answer thereto was received by said Frick early the next morning from each of said mortgagees assenting to and ratifying his action in the premises; that on the said 6th day of February the said William E. Rogers, in the name of, and acting for, said firm of Nesbit & Rogers, made and delivered to the plaintiff, James H. Rogers, a chattel mortgage to secure the payment of a *bona fide* indebtedness due him from said firm, covering the same stock and merchandise included in the said mortgages heretofore mentioned; that plaintiff filed his said mortgage in the office of the county clerk of Dodge county at 4 o'clock P. M. of the said 6th day of February; that immediately thereafter plaintiff, by his attorney, W. J. Courtright, took possession of the mort-

gaged chattels under and by virtue of his said mortgage, and closed the store of said firm; that plaintiff subsequently ascertained for the first time the existence of the other mortgages upon the property; that at 5:30 P. M. of said day said J. E. Frick, for and on behalf of the said Heads Iron Foundry, Great Western Stove Company, and Estate of P. D. Beckwith, demanded of the said Courtright the possession of the goods mortgaged to them, which demand was at first refused, but subsequently, at about 7 o'clock P. M., was complied with, by said Courtright turning over the possession of the goods in controversy to said Frick, who has ever since and now holds the same under and by virtue of said mortgages; that said plaintiff and his attorney, W. J. Courtright, at the time the possession of the property was delivered to said Frick, each acted in full belief that said Frick was at the time of the filing of the mortgages to the Heads Iron Foundry, Great Western Stove Company, and Estate of P. D. Beckwith, respectively, the duly authorized attorney for each and all of them, and that the mortgages to said mortgagees had been actually delivered to and accepted by their duly constituted representatives, and that the several mortgagees, prior to the giving of the several mortgages mentioned, at various times demanded payment of their claims from Nesbit & Rogers, and were anxious and desirous of obtaining the money owing to them by said firm.

The question arising upon the foregoing facts is whether the defendants or the plaintiff acquired the first or superior lien upon the mortgaged chattels. It is disclosed that the defendants' mortgages were given and placed upon record before the making, delivering, and filing for record of plaintiff's mortgage, from which the defendants claim the paramount lien; while upon the other hand the plaintiff confidently asserts that he has the superior lien upon the property, because it attached before there had been a legal delivery and acceptance of

the defendants' mortgages. None of the mortgages were delivered to the defendants, or either of them, in person at or prior to the time of the depositing of the same with the registering officer, or to any one authorized by the mortgagees to represent them. The defendants were not aware that the mortgagors contemplated or were giving mortgages to their creditors. There can be no doubt that the delivery and acceptance of a mortgage are essential to its validity. Such an instrument, like a deed, becomes effective only from its delivery. The proposition is too plain to require the citation of authorities to sustain it. Delivery may be made to the mortgagee himself, or to some one authorized to receive it for him, or to a stranger for the use and benefit of the mortgagee, without the latter's authority, under certain circumstances, as where the mortgagee is under some legal disability, as in the case of a minor or an insane person. Thus, in *Brown v. Westerfield*, 47 Neb., 399, a conveyance to a minor was upheld where the grantor delivered the deed to a stranger unconditionally for the grantee, and no control over the instrument was reserved in the grantor. Doubtless, the delivery of a mortgage to a stranger will suffice, if the mortgagee subsequently assents to or ratifies the act. In the case at bar there is no pretense that the defendants' mortgages were delivered to any one of the mortgagees, or to one authorized to act for them in accepting a delivery of the instruments, but they rely upon the delivery of the mortgages to Mr. Frick, his depositing of them in the recorder's office, and the subsequent acceptance of the instruments by the mortgagees. Defendants' attorneys insist, *arguendo*, that the presumption of law arising from these facts is that the mortgagees accepted the mortgages. This court has held that where a deed beneficial to the grantee is voluntarily executed and placed upon record by the grantor, the acceptance of the grantee will be presumed. (*Bowman v. Griffith*, 35 Neb., 361; *Issitt v. Dewey*, 47 Neb., 196.) And upon principle the delivery of a mortgage by the mortgagor, or by his direction, as in

the case at bar, for record, is sufficient, in the absence of proof to the contrary, to justify a finding of its delivery by the mortgagor and acceptance by the mortgagee. But the presumption of delivery and acceptance is not a conclusive one, but is *prima facie* alone. It may be shown, if such be the fact, that the mortgagee never accepted the instrument, but rejected the same when apprised of its existence. (*Jackson v. Phipps*, 12 Johns. [N. Y.], 418; *Wilsey v. Dennis*, 44 Barb. [N. Y.], 354; *Foster v. Beardsley Scythe Co.*, 47 Barb. [N. Y.], 505; *Young v. Guilbeau*, 70 U. S., 636; *Tuttle v. Turner*, 28 Tex., 760.) Possibly upon the delivery of a mortgage to a stranger for the use and benefit of the mortgagee, but without authority from him to receive it, acceptance of the mortgage may be presumed, where the mortgagor has parted entirely with all the control over the instrument. There are authorities which so hold, but even in such case the presumption of acceptance as of the date of the delivery to the third person may be rebutted. In the case in hand, the acceptance of the mortgages by the defendants, or rather their ratification of the action of Mr. Frick in receiving the instruments for and in their behalf, was not until after the plaintiff's mortgage was executed, delivered, filed for record, and he had taken possession of the property thereunder. The defendants insist that the acceptance of the mortgages by them related back to the time of the delivery to Mr. Frick. Such, unquestionably, is the rule as between the mortgagor and mortgagee, but it does not obtain where an innocent third party has, between the date of the delivery and the acceptance, acquired rights to the mortgaged chattels. The doctrine of relation cannot be invoked to the injury of the third persons. Their rights cannot be destroyed by a fiction of the law. The correct rule is laid down in Jones, Chattel Mortgage, sec. 104, in the language following: "A mortgage executed by a debtor to his creditor without the knowledge of the latter, and without authority from him, and delivered to a stranger or to the mortgagor's attorney for his use, does

not vest the title to the property in the mortgagee as of the time of such delivery, as between him and a creditor of the mortgagor who has acquired an interest in it by attachment or levy of execution between the time of such delivery and the mortgagee's acceptance of the mortgage after receiving notice of it." The same doctrine, in somewhat different language, is stated in Herman, Chattel Mortgages, sec. 168, and Boone, Mortgages, sec. 238.

The case of *Bell v. Farmers Bank of Kentucky*, 11 Bush [Ky.], 34, was a controversy between attaching creditors and a mortgagee of real estate. The mortgage was acknowledged, delivered to an unauthorized third person, and placed on record without the knowledge of the mortgagee. Before he was apprised of the execution and registry of the mortgage, and prior to the time he accepted or could have accepted the mortgage, the attachments were levied upon the property and the attachment liens created. The court ruled that the attachments were superior liens to that of the mortgage, and in passing upon the question said: "A deed delivered to the registering officer or to an unauthorized third person, and subsequently accepted by the grantee, will take effect as between the grantor and the grantee from the time of the first delivery, and in such cases volunteers claiming under and through the grantor and ordinary creditors who have acquired no lien upon nor interest in the estates conveyed are entitled to no greater consideration than the grantor. Yet, until the grantee is informed of the execution of the deed and does some act equivalent to an acceptance of it, it is manifest that he may refuse to accept it, notwithstanding the fact that by a fiction of law the presumption of an actual acceptance had all the while existed for his benefit as against the grantor, his heirs, devisees, and ordinary creditors. But this fiction will not be allowed to prevail to the prejudice of persons who have acquired title to, an interest in, or a lien upon the property before the date of the actual acceptance. As in the case of an escrow, whenever it becomes necessary for the purposes

of justice that the true time of the acceptance of a deed so delivered shall be ascertained, the legal fiction will be disregarded, and the intervening claimant or lien-holder allowed to show the actual facts of the transaction."

In *Goodsell v. Stinson*, 7 Blackf. [Ind.], 437, a real estate mortgage executed by F. L. Goodsell to Peter Goodsell to secure a *bona fide* debt, in the absence and without the knowledge of the latter, was delivered by the mortgagor to the recorder of the proper county for record. Subsequently, but before the mortgagee was informed what had been done and he assented to the mortgage, one Stinson obtained a judgment against the mortgagor. It was ruled that the judgment was entitled to the preference. The court in delivering the opinion observed: "The delivery of a deed is an essential requisite to its validity, and it is from the delivery that the deed takes effect. A deed may be delivered to a third person, even a stranger, for the benefit of the grantee, and if he afterwards assent to the act, the deed will take effect from the date of its delivery, unless the rights of the third persons should be affected by it. In that event the doctrine of relation would not apply, for it is a general rule that it shall not be permitted to apply so as to do wrong to strangers; as between the parties to the deed, it may be adopted for the advancement of justice." The same doctrine was held and applied in *Woodbury v. Fisher*, 20 Ind., 387; *Johnson v. Farley*, 45 N. H., 505; *Derry Bank v. Welster*, 44 N. H., 264.

In the syllabus to *Hibberd v. Smith*, 67 Cal.,547, it is said: "Where a deed presumptively beneficial to the grantee is delivered to a third person for his use, without his knowledge or prior authorization, the subsequent assent of the grantee to the delivery will not operate to defeat the lien of a judgment creditor of the grantor which attached to the premises sought to be conveyed after the date of the delivery, and before the assent of the grantee."

In *Day v. Griffith*, 15 Ia., 104, it was decided that the delivery of a deed by a grantor to the recorder for the use

and benefit of the grantee, but without his knowledge or consent, and without any previous agreement between them, is not such a delivery as will defeat the rights of an attaching creditor acquired prior to the assent of the grantee to such delivery. To the same effect are *Deere v. Nelson*, 34 N. W. Rep. [Ia.], 809; *Denton v. Perry*, 5 Vt., 382; *McPherson v. Featherstone*, 37 Wis., 632; *Samson v. Thornton*, 3 Met. [Mass.], 275; *Cravens v. Rossiter*, 22 S. W. Rep. [Mo.], 736.

The case of *McCutchin v. Platt*, 22 Wis., 561, was replevin to recover possession of property seized by the defendant, as sheriff, under an attachment against William H. and James F. Winser. The Winsers executed a bill of sale of the property to plaintiff without his knowledge and deposited the same in the post-office, directed to him, before the levy of the attachment. Plaintiff did not receive the bill of sale until after such levy. It was held that the attachment had priority.

It has been frequently decided by the courts that a chattel mortgage executed in the absence and without the knowledge of the mortgagee, and delivered to a third person for his use, or deposited by the mortgagor with the proper registering officer for record is inoperative as to another creditor of the mortgagor who acquired an interest in the property by attachment or otherwise, subsequent to the giving of the mortgage, but prior to the time the mortgagee received notice of and ratified the instrument. Of the cases so holding are *Wadsworth v. Barlow*, 68 Ia., 599; *National State Bank of Burlington v. Morse*, 73 Ia., 174; *Wallis v. Taylor*, 67 Tex., 431; *Oxnard v. Blake*, 45 Me., 602; *McCourt v. Myers*, 8 Wis., 91; *Miller v. Blinebury*, 21 Wis., 676; *Welch v. Sackett*, 12 Wis., 270.

Counsel for defendants have cited in their briefs several cases which are directly opposed to the doctrine last above stated, but we shall not attempt now a review of them. That has been already admirably done in some of the foregoing authorities. The ablest discussion of the subject which has come under the observation of the

writer is by Dixon, C. J., in his opinion in *Welch v. Sackett*, *supra*, from which the following excerpts are taken:

"All agree that it is necessary to the validity of every deed or conveyance that there be a grantee, who is not only willing, but who does in fact accept it. It is a contract, a parting with property on the part of the grantor and an acceptance of it by the grantee. Like every other contract, there must be a meeting of the minds of the contracting parties, the one to sell and convey and the other to purchase and receive, before the agreement is consummated. If there be anything in legal principles, or in common sense, it is an unpardonable absurdity to say that a contract can be completed in the absence and utter ignorance of one of the contracting parties; that he can or does, under such circumstances, assent to or agree to become bound by it. The idea that a contract could be thus made, and that title to property could pass into a party without his knowledge or consent, and out of him without any motion or act of his signifying his willingness, but merely by his refusal to receive it all, had its origin at a period in the history of the common law when the legal mind, instead of being governed in its conclusions by a steady application of the clear and rational principles of the law to plain matter of fact, and by arguments to be drawn therefrom, was too frequently influenced by mysterious and fanciful logic that depended for its support upon artfully devised fictions and falsehoods, which, for the most part, were as repugnant to reason as they were unnecessary to the proper administration of justice. The discovery that such things could be done is, I believe, attributable to the inventive skill of Justice Ventris, as exhibited in the case of *Thomson v. Leach*, 2 Vent. [Eng.], 198, decided about the year 1690; at least several courts and judges since that time, with many compliments, have agreed in giving him the credit of having proved something on this subject which none of them could understand. The substance of his proposition is that a deed of lands made to a party without his

knowledge or consent, and placed in the hands of a third person for his use, is a medium for the transmission of the title to the grantee, and takes effect so as to vest it in him the instant the deed is parted with by the grantor, and if the grantee, upon receiving knowledge of it, rejects it, such rejection has the effect of revesting the title in the grantor by a species of remitter. * * *

"Assent or acceptance on the part of the grantee or other party to a deed, or other instrument, by means of which the title to property, whether real or personal, is to be transferred to him, or by which he is in any other manner to become bound, is a fact, the truth of which is to be established by competent evidence before such deed or other instrument can be adjudged to have a legal existence. Like every other fact, it may be established by direct evidence, or its existence may be inferred or presumed from other facts already in proof. But I deny that the existence of one fact is to be inferred or presumed from the existence of others, when the connection between the former and the latter is such that according to the course of nature it plainly appears that the former cannot exist. In other words, I deny that the existence of any fact may be shown by proving others which conclusively show its non-existence, or that the legitimate mode of establishing the truth of a matter is by indubitably proving its falsehood. Justice does not require, nor does the law tolerate such an absurdity. The learned justice says that where a deed is executed by the grantor and delivered to a stranger for the use of the grantee, without the previous advice, direction, or authority of the grantee, and without his knowledge, the law will presume that the grantee assents to it the moment it is delivered to the stranger. Assent is an act of the mind—that intelligent power in man by which he conceives, reasons, and judges, and of which it is a primary, invariable, and most familiar law that it cannot act with reference to external objects until, through the medium of the senses, it is impressed with or knows their existence.

Hence, without such impression or knowledge there can be no assent, no *actus contra actum;* and to presume it in opposition to the facts is to presume that which is impossible; which the law, the rules and precepts of which are in conformity with the unchanging truths of nature, will never do. * * *

"The mistake of the learned justice consisted in his carrying the presumption of law so far as to say that it presumes that a person has consented to that of which he knows nothing, which is an impossibility; instead of saying what was more truly said by the more logical and cautious courts and judges of his time, and by Lord Ellenborough in *Stirling v. Vaughn*, 11 East, 623, namely, that, if nothing appears to the contrary, the law presumes that he will accept that which is for his benefit, when he is informed of it, which assent, in the absence of intervening rights or equities, will have relation back to the time of delivery for his use, and make his title good as from that date. * * *

"All agree that neither the grantor nor the stranger who consents to receive and hold the deed can, by their acts, bind the grantee, and that the latter may, on receiving notice of it, repudiate it altogether. If the title vests in the grantee at once it must, of course, vest according to the terms of the conveyance, and in the case of an absolute conveyance he would have an absolute title. If, after delivery to the stranger, and before notice to the grantee, a creditor of the latter should fasten upon the property by execution or attachment, no reason can be given why he could not hold it. If it is the property of the grantee it follows, as of course, that the creditor would have this right, and that he would at once acquire a lien to the extent of his demand. Suppose, after this is done, that the grantee, on receiving notice, refuses to accept the conveyance, what becomes of the property? Does the refusal unbind and set the property free from the seizure of the creditors, and remit the title at once back to the grantor? Or does the intendment of Justice Ventris

step in, in behalf of the creditor as well, and say, because the grant is presumed beneficial to the grantee, and he might at some future period accept it, that therefore he shall be deemed to have accepted it before the seizure, and at a time when he was utterly ignorant of it, and thus enable the creditor to withhold the property from the grantor, by which means it would happen that, although it was neither bought nor sold, the grantor would, without consideration, lose it, and the grantee enjoy the full benefit of it on the same terms? Knowing of no rational or satisfactory answers which can be given to these and various similar questions which will readily suggest themselves to the reader, I leave them to be replied to by those who maintain that the title to property, real or personal, may, without words written or spoken or other act of transfer, be thus mysteriously passed and repassed between parties by contract. I deny that it may be. It seems to me very plain that it does not pass in fact until the grantee has actually consented to receive it; and, as of course, that it remains with the grantor, who is unable without such consent to vest it in the grantee. No other conclusion is consistent with the doctrine that a grant is a contract, and that the assent of the grantee is necessary to give validity."

The reasoning of the learned chief justice is unanswerable, and fully discloses the fallacy of the doctrine upon which the opposing authorities rest.

Although this opinion has now been extended to an unusual length, the importance of the question involved will justify a reference to *Parmelee v. Simpson*, 72 U. S., 81, a case which arose in Nebraska, and in some respects is like the one at bar. That was a suit brought in the district court of Douglas county by one Parmelee, for the foreclosure of a real estate mortgage executed by Megeath and Bovey on April 17, 1858, and duly recorded the same day. The defendant Simpson claimed under a deed from Bovey acknowledged and recorded by him on the 15th day of the same month. Simpson was wholly

ignorant of the existence of the deed until April 19, four days after its date, when Bovey pointed out the land to Simpson, stating that he had conveyed it to him in consideration of certain money previously obtained, and at the same time delivered the deed to Simpson. The district court held the mortgage was entitled to priority, and entered a decree of foreclosure. An appeal was prosecuted to the supreme court of the territory, where the cause was docketed as No. 131, and on July 25, 1864, the decree of the district court was reversed, although no report of the case is to be found in our official law reports. On appeal to the supreme court of the United States, the decree of the supreme court of the territory was reversed and the cause remanded with directions to enter an order affirming the decree of the district court. Mr. Justice Davis, in delivering the opinion of the court (72 U. S., 86), says: "And there is not a particle of evidence that any one was authorized to receive the deed for him. The placing the deed on record was Bovey's own act, and was done without the assent of Simpson. Under this state of facts there was manifestly no delivery. The execution and registration of a deed and delivery of it to the register for that purpose does not vest the title in the grantee. If Simpson had agreed to accept the deed in liquidation of his debt, and constituted the register his agent to receive it, then the delivery of the deed to the register would have been in legal contemplation a delivery to him. But it is said that he could ratify the acts of Bovey and the register. This is true, but he did not do this until after the execution and registration of the mortgage; and this ratification cannot relate back so as to cut out the mortgage. Simpson acquired no title until after the rights of the mortgagee had accrued, and he holds it incumbered with the lien of the mortgage." In pursuance of the mandate issued in said cause, the supreme court of this state, on February 5, 1868, affirmed the decree of the district court of Douglas county, thereby recognizing that the doctrine of relation will not be per-

mitted to operate against the rights and interests of any innocent third party, and that the law will not presume the acceptance of an instrument, although beneficial in character, where the transaction rebuts such presumption.

The stipulation of facts in this case shows that there had been no actual acceptance of the mortgages by the defendants when plaintiff's mortgage was delivered to and accepted by him; in fact, that they had no knowledge then of the existence of the mortgages and could not assent to the attempted securing of their claims. Had the execution of the mortgages, their delivery to Mr. Frick, and the depositing of them in the county clerk's office alone been established, the presumption of acceptance of the mortgages by the defendants from the date of such delivery would be indulged. But such presumption must yield when the facts disclose the contrary to be true; *i. e.*, the defendants had assented to the giving of the security. To hold that the defendants have the prior and superior liens upon the property would be to make contracts for the parties, which the law does not do. It merely enforces those legally entered into. It is true defendants' mortgages were the first on record, but until acceptance by the mortgagees, the record was not effectual as notice against plaintiff. (*Dole v. Bodman*, 3 Met. [Mass.], 139.)

It is finally insisted that the defendants' mortgages have priority from the fact that plaintiff surrendered possession of the property to Mr. Frick, on the evening of the same day they were executed, for the use and benefit of the defendants. If the lien of plaintiff's mortgage first attached, as we have already shown, it was not lost or relinquished by the turning over of the property to Mr. Frick, no more than would a first mortgagee lose his lien by merely delivering the property to a subsequent mortgagee. If Mr. Frick could not accept the mortgages for the defendants, because not authorized by them so to do, it is very evident he could not lawfully demand for

and receive possession of the chattels on their behalf. The delivery of mortgaged property to a stranger by a mortgagee is not an abandonment of the lien of the mortgage. We are satisfied, upon reason as well as authority, that plaintiff's mortgage is the prior lien. The judgment of the district court is accordingly reversed and the cause remanded with instructions to render a judgment for plaintiff.

REVERSED.

CHARLES W. MOSHER ET AL. V. FARMERS & MERCHANTS NATIONAL BANK OF GALVA, ILLINOIS.

FILED MARCH 17, 1897. No. 7179.

1. **Attachment:** ACTIONS. An action may be prosecuted to judgment when therein a writ of attachment has been allowed under which property has been seized. (*Cox v. Peoria Mfg. Co.*, 42 Neb., 660.)
2. **Evidence:** EXECUTION OF NOTE. When there is no other disputed question the signatures of defendants are sufficiently proved to allow of the receipt in evidence of a note alleged to have been signed by them when a witness, duly qualified to testify on that question, gives it as his opinion that the alleged signatures are genuine.
3. ———: ———: DIRECTING VERDICT. After a note had been introduced in evidence under the circumstances above indicated it was not erroneous for the court to direct a verdict in favor of plaintiff for the amount evidenced by such note, there being no evidence contradictory of that indicated.

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

Charles O. Whedon and *C. E. Magoon*, for plaintiffs in error.

Ricketts & Wilson, contra.

RYAN, C.

On January 26, 1893, the Farmers & Merchants National Bank filed its petition in the district court of Lancaster county against C. W. Mosher and R. C. Outcalt. In this petition it was alleged that the defendants above named had, on January 17, 1893, executed to plaintiff their promissory note, whereby they agreed, six months after date, to pay to plaintiff the sum of $5,000, with ten per cent interest thereon from maturity; that no part of said note had been paid, and that on July 17, 1893, there would become due and be owing the sum of $5,000, with ten per cent interest thereon. Contemporaneously with the filing of said petition there was filed an affidavit such as is required by statute to justify the issuance of an attachment, which attachment accordingly was authorized by the judge of said district court. The prayer of the petition was for an order of attachment, and that the property of defendants might be held to answer for the judgment which finally might be recovered, and that, after the maturity of the note, plaintiff might have judgment in the sum of $5,000, with interest thereon as above indicated. To this petition a general demurrer was sustained. On September 19, 1893, there was filed a supplemental petition, by which it was alleged that the above described note had been made as hereinbefore stated, and that said note had fallen due on July 21, 1893; that no part of said note had been paid, and that there was due at the time of the filing of said supplemental petition the sum of $5,000, with interest thereon at ten per cent from July 17, 1893. There was a prayer for judgment for the amount of the principal and interest above alleged to be due. To this supplemental petition there was an answer in general denial. There was subsequently filed an amended petition *nunc pro tunc* as of date January 26, 1893, but this pleading requires no extended consideration. On the trial of the issues above indicated there was a verdict in accordance with a peremptory instruction to find for

plaintiff in the full amount claimed. There was a judgment on this verdict, and by their petition in error the judgment defendants assail this judgment on various grounds, which shall now receive our attention.

It is first insisted that a challenge should have been sustained to a juror for cause, and that there was error in admitting in evidence the affidavit and order of attachment. We confess our inability to see any good ground for submitting to the jury this affidavit and order, but the question in the case which overshadows and dwarfs all others is whether or not the peremptory instruction given was justifiable under the pleadings and proofs. If a verdict in view of these could not properly have been different from that directed, it would have been useless to consider mere matters of detail, which, in any event, must be controlled by the solution of the paramount question above indicated.

It is urged that by the original petition it was not alleged that the note was due, but, on the contrary, that it thereby appeared that in fact it had not yet matured. As this action was begun aided by an attachment, its commencement before the cause of action declared upon had matured was authorized by statute. (*Cox v. Peoria Mfg. Co.*, 42 Neb., 660.) The supplemental petition was filed after the note had matured, and distinctly averred that said note meantime had fallen due and that there was due and unpaid the amount of principal and interest which was evidenced by said note. Issues were duly joined on these averments and the condition of the pleadings entitled plaintiff to a judgment if the proofs were sufficient to sustain its averments of fact. The question of fact as to which it is claimed reasonable men might honestly differ was whether Mosher and Outcalt had signed the note sued on. Only one witness testified as to these signatures, and his testimony was as follows:

Q. Are you acquainted with the signatures of these two gentlemen?

A. Yes, sir.

Q. State if you know now whose signatures those are.

A. There is one signature which is not exactly as I have seen it written, and I would not like to swear to that signature. The last name is perfect and identical, but of the signing of one letter there I find an objection.

Q. To which signature?

A. That is the first on the note.

Q. Do you know whose handwriting that is in?

A. Yes, sir.

Q. Well, you may state whose handwriting that is in.

A. The handwriting is that of C. W. Mosher. The letter "W" is not made the way he usually made that letter in his signature.

Q. Well, you stated in whose handwriting it is?

A. Yes, sir; the handwriting is perfect, except in that "W".

Q. That is not the way he usually made his "W"?

A. No, sir.

Q. Now look at the second signature and state if you know whose handwriting that is in. Is that Mr. Outcalt's signature?

A. I think it is.

On his cross-examination the witness would not swear positively that the name C. W. Mosher was signed by that defendant. The handwriting of R. C. Outcalt seemed perfect, he said, though he would not swear positively that he wrote it. The witness was shown to be well acquainted with the handwriting of the defendants, and, as appears from the above examination, he gave it as his opinion that the signatures were genuine, though there was a variation from the general way of making one letter in the name of one of the parties. His unwillingness to swear positively to the signatures as established facts tended to show that he testified with caution, yet nevertheless his opinion was that Mosher and Outcalt had signed the note in suit. There was no other evidence on the point and we think this testimony was sufficient to justify the court in assuming that these signatures had

been sufficiently proved to entitle the note to be received in evidence. This being done, there could be no reasonable difference of opinion with respect to the liability; and hence the court properly instructed the jury as it did. The judgment of the district court is

AFFIRMED.

S. WYMAN, APPELLANT, V. JOHN CONNERY, APPELLEE.

FILED MARCH 17, 1897. No. 7149.

1. **Conflicting Evidence: REVIEW.** Where the evidence is such as to justify impartial minds in reaching different conclusions, the finding of fact thereon by the trial court will, on appeal, be assumed to be correct.

2. ———: ———. The evidence in this case examined, and *held* to be within the rule above stated.

APPEAL from the district court of Dixon county. Heard below before NORRIS, J. *Affirmed.*

W. G. Sears and *W. E. Gantt*, for appellant.

J. J. McCarthy and *J. V. Pearson, contra.*

RYAN, C.

This action was brought in the district court of Dixon county for the foreclosure of a mortgage made by the defendant to secure payment of his three promissory notes for $400 each; both the mortgage and the said notes being of date April 20, 1892. The principal sum of $400 on one note and the interest, at seven per cent per annum, on all three notes fell due April 20, 1893. It was provided in the mortgage that a failure to make any of the payments above noted should render the entire sum secured by the mortgage subject to collection, at the election of the mortgagee. The plaintiff alleged that neither

the principal sum of $400 above referred to nor the interest had been paid; that by this failure the entire sum secured had fallen due at plaintiff's option; that plaintiff elected to avail himself of the provision above noted, and there was accordingly a prayer for foreclosure. The defendant denied that he had failed to pay the principal and interest which fell due on April 20, 1893, and upon his plea of payment of this principal sum of $400 and the interest on the entire sum secured by the mortgage, denied by plaintiff's reply, there was a trial, which resulted in a judgment for the defendant, from which judgment plaintiff has appealed.

The defendant, during the time covered by the transactions described herein, had resided near Newcastle, in this state. During the same period the plaintiff had resided in or near Belle Plaine, Iowa. The notes were given for a part of the purchase price of the land described in the mortgage as being situated in Nebraska. They were, by their own terms, payable at Belle Plaine, Iowa. There was no bank at Newcastle, and therefore, on April 15, 1893, the defendant went to the First National Bank at Ponca and arranged with its cashier to pay the note coming due to plaintiff in a few days, as well as the interest, which would be due at the same time as the maturity of the note. The defendant had a certificate of deposit, which had been issued to him by the First National Bank of Ponca, for the sum of $500. The bank took up this, its certificate of deposit, and, as its cashier testified, made its draft payable to S. Wyman for the sum of $484, the principal and interest which would be due him on April 1, 1893, from Mr. Connery. The difference between the amount of the draft and the certificate of deposit Mr. Connery was paid in cash. There is no room for question that up to this time the First National Bank of Ponca was the agent of Mr. Connery, the defendant. About April 11, 1893, plaintiff left with the Citizens National Bank of Belle Plaine, Iowa, for collection, the note which would fall due in a few days. He retained in his own

possession the notes on which at the same time interest would mature. The Citizens National Bank of Belle Plaine, Iowa, at once notified Mr. Connery that it held his note for collection. About April 19, 1893, Mr. Wyman received a letter from the First National Bank of Ponca, of date April 15, 1893, which, omitting formal parts, was in this language: "John Connery has deposited money to pay off $400 note you hold and interest on balance for one year. Send notes here to us and we will indorse interest on back and remit your money free of cost to you." Mr. Wyman, as soon as he had received the letter, took it to the Citizens National Bank and showed it to the cashier of that institution, who, to overcome his objections to complying with the request contained in the letter, assured him there would be no trouble and that it was perfectly safe to send the note as requested. Mr. Wyman indorsed in blank the note about to fall due. The Citizens National Bank of Belle Plaine then placed upon the note the following indorsement: "Pay First Natl. Bank, Ponca, Neb., cashier or order, for collection for account of Citizens National Bank, Belle Plaine, Iowa. Chas. A. Blossom, cashier." The note, thus indorsed, was forwarded at once to the First National Bank of Ponca. The bank last named seems, very soon after having received the above note, to have sent its draft for $484, of date April 15, 1893, to Mr. Wyman, by whom the matured interest was credited on each of the two notes in his possession. This was on April 24, at which time Mr. Wyman received in cash from the Citizens National Bank of Belle Plaine the amount of said draft. The draft was drawn on the Security National Bank of Sioux City, Iowa, to which bank it was, through other banks, forwarded by the Citizens National Bank of Belle Plaine. The First National Bank of Ponca closed its doors for business on April 25, and when its draft reached the drawee at Sioux City on the 27th of the same month payment was refused and there was a protest for non-payment. Between the time when Mr.

Wyman received this draft and the day of its presentment at Sioux City the First National Bank of Ponca had an overdrawn account with the drawee of the draft. Between the time the draft was sent to him and the time Mr. Wyman received it there was to the credit of the drawer with the drawee only a fraction of the amount of this draft. After the draft had been protested Mr. Wyman repaid the amount he had obtained on it from the Citizens National Bank and is now the holder of it in his own name. As we have already said, the credit on April 15 was solely that of the First National Bank of Ponca in favor of the defendant. This bank at that time, instead of forwarding the amount to Mr. Wyman, wrote him that the money was in said First National Bank of Ponca for the payment of the note about to come due and the interest on the other two notes, and requested him to send the notes, whereon the interest would be indorsed, at the same time promising to make remittance of the total amount free of cost. Mr. Wyman thereupon directed the $400 note to be sent by the Citizens National Bank, substantially as requested. This note was surrendered to Mr. Connery as paid before the draft was presented in Sioux City. Upon receipt of the draft Mr. Wyman cashed it and indorsed an acknowledgment of payment of the interest due on each note in his hands. It is quite a material fact in this connection that Mr. Wyman has not tendered to Mr. Connery the draft sent him by the First National Bank of Ponca. If the bank last named should be able to pay any dividend, Mr. Connery ought to be placed in such a situation that, if the default of the bank is to be charged to him, he could receive such dividend as possibly may be paid. The questions presented were whether the First National Bank of Ponca, in forwarding the payment of the note and interest, was the agent of the plaintiff or the defendant. The proofs were of such a nature that impartial minds might fairly draw different inferences from them, and when such a condition is presented the question is not one of

law, but of fact, for the examination and the determination of the trier of the facts. The finding of the district court, under these circumstances, will not be disturbed. (See *Thomson v. Shelton*, 49 Neb., 644, and authorities therein cited.) The judgment of the district court is

AFFIRMED.

CENTRAL NEBRASKA NATIONAL BANK ET AL., APPELLANTS, V. W. H. CLINE ET AL., APPELLEES.

FILED MARCH 17, 1897. No. 7151.

Review: CONFLICTING EVIDENCE. A judgment will not be reversed when, on appeal, there is presented only a question of fact determined by the district court on consideration of fairly conflicting evidence.

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

F. B. Tiffany and *D. M. Vinsonhaler*, for appelants.

J. S. Kirkpatrick, contra.

RYAN, C.

The Tarrytown National Bank claims its right under the Central Nebraska National Bank, so that only the contentions of the latter need receive attention. This action in the district court of Custer county was brought by the bank last above named for the enforcement of a lien against lot 16, block 97, Railroad Addition to the town of Broken Bow. Originally this lot was owned by the Lincoln Land Company, whose agent at Broken Bow was the firm of Collman & Inman. W. H. Cline purchased this lot and a deed accordingly was sent to Collman & Inman by the Lincoln Land Company to be deliv-

ered to Cline. Collman & Inman, as a firm, was engaged in the business of banking at Broken Bow. W. H. Cline was largely indebted to this firm for moneys loaned, in part, to improve the aforesaid lot 16. The banking firm was afterward succeeded by the Central Nebraska National Bank, and the indebtedness of Mr. Cline thereby became an indebtedness owing this national bank. The sole question presented by this appeal is whether or not the deed of lot 16 aforesaid was, by agreement between Collman & Inman and W. H. Cline, to be held as security for the indebtedness owing said firm by Cline. The judgment of the district court was adverse to the national bank's claim through Collman & Inman, and, impliedly therefrom, there must be assumed a corresponding finding upon the question above indicated, as one of fact. There was sharply conflicting evidence upon this fact proposition, and we must therefore assume, conclusively, that there was no agreement by Cline that his deed should be held as security. Whether such an agreement would be enforced in this state if established by proof we are not called upon to determine. The judgment of the district court is

AFFIRMED.

CHARLES W. STAHLHUT, APPELLANT, V. MIKE BAUER ET AL., APPELLEES.

FILED MARCH 17, 1897. No. 9064.

1. **Municipal Corporations: REMOVAL OF OFFICERS: COUNCIL.** A statutory provision that the mayor and council of a city of a designated class are authorized to provide for removing officers of such city for misconduct does not clothe the council with power to remove the mayor, and any attempt to exercise such power is null and void.

2. ———: ———: **INJUNCTION.** Under the circumstances above indicated, the mayor is not required to wait until the council has actually ejected him from his office, but may, by injunction, prevent such removal.

3. Review: QUESTION NOT RAISED BELOW. A defendant who has answered to the merits and submits to the jurisdiction of a court of equity cannot object for the first time on appeal in this court, on the ground that the plaintiff had an adequate remedy at law. (*Dorsey v. Nichols*, 43 Neb., 241.)

APPEAL from the district court of Otoe county. Heard below before RAMSEY, J. *Reversed.*

The facts are stated in the opinion.

M. L. Hayward, John C. Watson, and *C. W. Seymour,* for appellant:

The city council acted without authority of law, and its action in attempting to remove the mayor is void. (*State v. Jersey City*, 25 N. J. Law, 530; *State v. Milwaukee Chamber of Commerce*, 20 Wis., 68; *People v. Hurlbut*, 24 Mich., 69; *Dullam v. Willson*, 53 Mich., 392; *Stockwell v. White Lake Township Board*, 22 Mich., 341; *People v. Stuart*, 74 Mich., 411; *Charles v. Hoboken*, 3 Dutch. [N. J.], 203; *Commonwealth v. Shaver*, 3 W. & S. [Pa.], 338; *State v. Hastings*, 37 Neb., 97.)

An injunction may be granted to prevent the enforcement of an invalid ordinance. (*Armitage v. Fisher*, 26 N. Y. Supp., 364, 24 N. Y. Supp., 650; *Wheeler v. Board of Fire Commissioners*, 15 So. Rep. [La.], 179; *Charles v. Hoboken*, 27 N. J. Law, 203; *South Covington & C. S. R. Co. v. Berry*, 93 Ky., 43; *Rushville v. Rushville Natural Gas Co.*, 132 Ind., 575; *Sylvester Coal Co. v. City of St. Louis*, 32 S. W. Rep. [Mo.], 649; *Deems v. City of Baltimore*, 30 Atl. Rep. [Md.], 648; *City of Austin v. Austin City Cemetery Ass'n*, 28 S. W. Rep. [Tex.], 528; *Baltimore v. Radecke*, 49 Md., 217; *Grand Island Gas Co. v. West*, 28 Neb., 852.)

Edwin F. Warren and *Paul C. Jessen, contra:*

A court of equity has no jurisdiction over the appointment and removal of public officers. The right to a municipal office cannot be determined by a bill in equity.

A court of equity has no jurisdiction to entertain a bill in equity, filed by the mayor, to prevent his removal from office of mayor, and cannot in such suit restrain by injunction the officers of the city. (*In re Sawyer*, 124 U. S., 200; *Cochran v. McCleary*, 22 Ia., 75; *Delehanty v. Warner*, 75 Ill., 185; *Sheriden v. Colvin*, 78 Ill., 237; *Dickey v. Reed*, 78 Ill., 261; *Hagner v. Heyberger*, 7 W. & S. [Pa.], 104; *Updegraff v. Crans*, 47 Pa., 103; *State v. Sheldon*, 10 Neb., 453; *Minkler v. State*, 14 Neb., 181; *State v. Meeker*, 19 Neb., 444; *State v. Wakeley*, 28 Neb., 431; *State v. Judges*, 35 La., 1075; *State v. Jersey City*, 25 N. J. Law, 539; *Fawcett v. Charles*, 13 Wend. [N. Y.], 473; *Evans v. Club*, 50 Pa. St., 107; *Richards v. Clarksburg*, 30 W. Va., 491; *Willard's Appeal*, 4 R. I., 597.)

RYAN, C.

This action was brought in the district court of Otoe county by Charles W. Stahlhut to restrain the councilmen of Nebraska City from depriving him of his office as mayor of that city by a trial for alleged improper exercises of the functions of his office. There are presented but two questions, and without unnecessary preliminaries we shall address ourselves to a statement and discussion of each of them. The first of these propositions involves the power of councilmen to try the mayor, and, if satisfied of the truth of the allegations against him, to remove him from office. The other proposition is based upon the assumption that the first is answered in the negative, and involves the right of the mayor, under such circumstances, to enjoin the prosecution of the proceedings instituted and in progress against him.

Subdivision 21, of section 68*, chapter 13*a*, article 2, Compiled Statutes, 1895, provides that the mayor and city council of any city of the class in which Nebraska City is embraced shall have certain authority. Subdivision 28 of the same section does not in terms mention who shall possess the powers therein defined, but refers back to subdivision 21 for that statement. By supplying the neces-

sary language implied in subdivision 28 that subdivision, in effect, in so far as this case is concerned, provides that the mayor and council are hereby authorized "To provide for removing officers of the city for misconduct whose offices are created and made elective by this act, and shall have power to create any office which they may deem necessary for the good government and interests of the city, and to provide for filling such vacancies as may occur in any elective office by appointment by the mayor, by assent of the council, to hold until the next general election." The appellees justify their proposed action with reference to the removal of the mayor by an ordinance by the council passed under sanction of the above statutory provision. It is noticeable that the removal which is to be provided for is to be by the mayor and council. In *Charles v. City of Hoboken*, 3 Dutch. [N. J.], 203, it was held that the power conferred upon the mayor and council to remove a water commissioner could not be exercised by the council independently of the mayor. In *Hutchinson v. Ashburn*, 5 Neb., 402, there was considered by this court section 106, chapter 13, General Statutes, which provided that, for certain enumerated causes, all county officers were subject to removal by the board of county commissioners. Acting, as claimed, under this language, two county commissioners had removed the third on account of an alleged misdemeanor. Judge MAXWELL, in the course of the delivery of the opinion of this court, said: "Under our statute the board of county commissioners consists of three persons. Can two members of the board try the third for an alleged misdemeanor? We think not. The entire board is constituted a tribunal and must hear the case, although a majority may pronounce a valid judgment. It is evident that the legislature did not intend this act to apply to county commissioners, although its terms include 'all county officers.' That portion of the act is copied verbatim from that of Iowa, which provided an independent tribunal for the trial of such causes. Here, from the nature of the case, county commissioners

must be excepted from the operation of the act." The statute in the case at bar differs from that just noted, in providing that the trial may be had by the mayor and council, instead of a board described as an entirety, but the principle which is applicable to both provisions is the same. The mayor is a necessary constituent element of the body which is to consider and pass upon the evidence, and without him the trial body is incomplete. When he is required to appear to answer to a charge he is not a part of the tribunal required to act, for if he was his vote in the negative would prevent the concurrence required to effect his removal. We are of the opinion that the members of the council have no power to remove the mayor from office, and that, therefore, the proceedings based upon the assumption of such a power are illegal and void.

It is insisted, however, by the appellees that even though the council has no authority to remove the mayor, such action cannot be prevented by injunction, and *In re Sawyer*, 124 U. S., 200, is relied upon to sustain this contention. In the case cited it was not claimed that the council and mayor were without jurisdiction to remove the police judge upon a proper showing. The injunction was obtained upon averments that the mayor and council were proceeding to try the police judge under an ordinance constituting certain previous omissions and acts sufficient grounds for his removal from office. It was held that the United States circuit court, as a court of equity, had no jurisdiction to prevent a trial being had, and this was certainly proper, for any other conclusion must have been reached on the assumption that the mayor and council, if not restrained, would unjustly exercise their powers of removal. If this happened, there was an adequate remedy at law; hence there was no justification for the interposition of a court of equity to restrain any action whatever. The case of *Delahanty v. Warner*, 75 Ill., 185, is to the same effect as *In re Sawyer*, *supra*. In *Sheridan v. Colvin*, 78 Ill., 237, the theory upon which

the case was decided is indicated by the following paragraph of the syllabus: "In this case it was sought to enjoin the city council of a city from enforcing an ordinance, on the sole ground that, if the ordinance was enforced, it would deprive the complainants of the functions of offices which they held in the city. Held that a court of chancery had no jurisdiction." In *Hagner v. Heyberger*, 7 W. & S. [Pa.], 104, it was sought to restrain a school director from acting as such because when elected he held another office. It was held that *quo warranto* would afford an ample remedy, and, therefore, that the injunction would not lie. In *Dickey v. Reed*, 78 Ill., 261, it was held that a court of equity should not interfere to prevent an alleged illegal canvass of election returns in progress. These cases cited by appellees afford no justification, by analogy or otherwise, for the assumption, where the members of a city council are proceeding to remove the mayor without warrant of law, that such mayor must submit to such action and test its legality by a *quo warranto* proceeding against whomsoever may assume to act as his successor in office. In *Armitage v. Fisher*, 26 N. Y. Supp., 364, it was held that the president of a city council is entitled to an injunction to restrain the council from removing him, without authority, from his office, as such removal would be an irreparable injury to him. The case of *Armitage v. Fisher*, 24 N. Y. Supp., 650, was to the same effect.

It is quite doubtful, to say the least, whether the appe lees ought to be heard to assert that the mayor had mistaken his remedy, for the reasons which we shall now state. There was filed a petition and an answer in the district court. In this condition of the pleadings the plaintiff filed this motion: "Comes now the plaintiff and moves the court to enter judgment herein on the petition and answer filed." The transcript of the journal entries in this case contains this language: "And thereupon the said cause came on further to be heard upon the motion of the said plaintiff for judgment upon the petition and an-

swer filed, to which said motion the said defendants make no objection, but join therein, and the court being well advised in the premises, doth find the issues in said cause in favor of the defendants and against the plaintiff upon the said petition and answer," and there was judgment accordingly. In *Dorsey v. Nichols*, 43 Neb., 241, the following rule was laid down and enforced: "A defendant who has answered to the merits and submits to the jurisdiction of a court of equity cannot object for the first time on appeal in this court on the grounds that the plaintiff had an adequate remedy at law." (See, also, *Sherwin v. Gaghagen*, 39 Neb., 238; *Grand Island Banking Co. v. Costello*, 45 Neb., 119; *Tulleys v. Keller*, 45 Neb., 220.)

The judgment of the district court is reversed and a decree in accordance with the views above expressed will be entered in this court.

REVERSED.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY V. J. A. GARDINER ET AL.

FILED MARCH 17, 1897. No. 7056.

1. Instructions: HARMLESS ERROR. An instruction which, though technically inaccurate in some respects, nevertheless correctly states the principles really involved, *held* not prejudicially erroneous.

2. Carriers: SHIPPING CONTRACTS: LIMITATION OF LIABILITY. A limitation of the liability of a common carrier contained in a shipping contract will not be recognized or enforced in this state, though valid in the state where made, when such attempted restriction of liability is illegal and contrary to the public policy of this state.

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

The opinion contains a statement of the case.

A. W. Agee, J. W. Deweese, and *F. E. Bishop,* for plaintiff in error:

The contract is valid under the laws of Illinois, where it was made, and is enforceable in this state. (*Hazel v. Chicago, M. & St. P. R. Co.,* 48 N. W. Rep. [Ia.], 926; *Fairchild v. Philadelphia, W. & B. R. Co.,* 24 Atl. Rep. [Pa.], 79; *Chicago & N. W. R. Co. v. Chapman,* 30 Ill. App., 504; *Black v. Wabash, St. L. & P. R. Co.,* 111 Ill., 350; *Wendall v. Osborne,* 18 N. W. Rep. [Ia.], 709; *German Ins. Co. v. Davis,* 40 Neb., 701.)

The provision of the contract limiting the liability of the carrier to the agreed value of the horse is valid and binding. (*Hart v. Pennsylvania R. Co.,* 112 U. S., 331; *Pacific Express Co. v. Foley,* 26 Pac. Rep. [Kan.], 665; *Coupland v. Housatonic R. Co.,* 23 Atl. Rep. [Conn.], 870; *Ballou v. Earle,* 22 Atl. Rep. [R. I.], 1113; *Boorman v. American Express Co.,* 21 Wis., 154; *Abrams v. Milwaukee, L. S. & W. R. Co.,* 58 N. W. Rep. [Wis.], 780; *Starnes v. Louisville & N. R. Co.,* 19 S. W. Rep. [Tenn.], 675; *Louisville & N. R. Co. v. Wynn,* 14 S. W. Rep. [Tenn.], 311; *Zouch v. Chesapeake & O. R. Co.,* 15 S. E. Rep. [W. Va.], 185; *Durgin v. American Express Co.,* 20 Atl. Rep. [N. H.], 328; *Moulton v. St. Paul, M. & M. R. Co.,* 31 Minn., 85; *Hutchinson v. Chicago, St. P., M. & O. R. Co.,* 35 N. W. Rep. [Minn.], 433; *Louisville & N. R. Co. v. Sherrod,* 4 So. Rep. [Ala.], 29; *Johnstone v. Richmond & D. R. Co.,* 17 S. E. Rep. [S. Car.], 512; *Zimmer v. New York C. & H. R. R. Co.,* 33 N. E. Rep. [N. Y.], 642; *Richmond & D. R. Co. v. Payne,* 10 S. E. Rep. [Va.], 749; *Harvey v. Terre Haute & I. R. Co.,* 74 Mo., 538; *Brehme v. Adams Express Co.,* 25 Md., 329; *Baltimore & O. S. W. R. Co. v. Ragdale,* 42 N. E. Rep. [Ind.], 1106; *Hill v. Boston, H. T. & W. R. R. Co.,* 10 N. E. Rep. [Mass.], 836; *Smith v. American Express Co.,* 66 N. W. Rep. [Mich.], 479; *Albers v. Western Union Telegraph Co.,* 66 N. W. Rep. [Ia.], 1040.)

The provision requiring notice of damage to be given to the carrier within ten days is binding. (*Sherrill v.*

Western Union Telegraph Co., 109 N. Car., 527; *Young v. Western Union Telegraph Co.*, 65 N. Y., 165; *Massengale v. Western Union Telegraph Co.*, 17 Mo., App., 259; *Gulf, C. & S. F. R. Co. v. Frawick*, 68 Tex., 314; *Chicago & A. R. Co. v. Simms*, 18 Ill. App., 68; *Black v. Wabash, St. L. & P. R. Co.*, 111 Ill., 351; *Southern Express Co. v. Caldwell*, 21 Wall. [U. S.], 264; *Hart v. Western Union Telegraph Co.*, 6 Pac. Rep. [Cal.], 637; *Heimann v. Western Union Telegraph Co.*, 57 Wis., 564; *Goggin v. Kansas P. R. Co.*, 12 Kan., 416; *Western Union Telegraph Co. v. Meredith*, 95 Ind., 93; *Cole v. Western Union Telegraph Co.*, 33 Minn., 227; *Hill v. Western Union Telegraph Co.*, 85 Ga., 425; *Western Union Telegraph Co. v. Dunfield*, 11 Colo., 335; *Weir v. The Express Co.*, 5 Phila. [Pa.], 355; *Sprague v. Missouri P. R. Co.*, 34 Kan., 347; *Rice v. Kansas P. R. Co.*, 63 Mo., 314; *Western Union Telegraph Co. v. James*, 16 S. E. Rep. [Ga.], 83; *Western Union Telegraph Co. v. Phillips*, 21 S. W. Rep. [Tex.], 638; *Armstrong v. Chicago, M. & St. P. R. Co.*, 54 N. W. Rep. [Minn.], 1059; *Gulf, C. & S. F. R. Co. v. Wright*, 21 S. W. Rep. [Tex.], 80; *Western Union Telegraph Co. v. Dougherty*, 15 S. W. Rep. [Ark.], 468; *Beasley v. Western Union Telegraph Co.*, 39 Fed. Rep., 181; *Western Union Telegraph Co. v. Yopst*, 20 N. E. Rep. [Ind.], 222.)

The shipment of live stock is peculiarly a matter of contract fixing the terms, rates, and liabilities, in absence of express statute. The contract is not immoral, criminal, or in violation of any rule of public policy which should deny its being effective. (*Griswold v. Illinois C. R. Co.*, 57 N. W. Rep. [Ia.], 843; *Coupland v. Housatonic R. Co.*, 61 Conn., 531; *Black v. Chicago, B. & Q. R. Co.*, 30 Neb., 197; *Heller v. Chicago & G. T. R. Co.*, 3 Am. & Eng. R. Cas., n. s. [Mich.], 602; *Hart v. Pennsylvania R. Co.*, 18 Am. & Eng. R. Cas. [U. S.], 608; *Sharer v. Pennsylvania Co.*, 71 Fed. Rep., 937; *State v. Julow*, 31 S. W. Rep. [Mo.], 781; *Forepaugh v. Delaware, L. & W. R. Co.*, 40 Am. & Eng. R. Cas. [Pa.], 78; *Western & A. R. Co. v. Exposition Cotton Mills Co.*, 35 Am. & Eng. R. Cas. [Ga.], 603; *Fonseca v. Cunard Steamship Co.*, 27 N. E. Rep. [Mass.], 665; *O'Regan v. Cunard Steamship Co.*, 160 Mass., 356.)

The contract is valid in Illinois and should be held valid in Nebraska. (*Liverpool & Great Western Steam Co. v. Phenix Ins. Co.*, 129 U. S., 397; *Heller v. Chicago G. T. R. Co.*, 3 Am. & Eng. R. Cas., n. s. [Mich.], 599; *Hart v. Pennsylvania R. Co.*, 112 U. S., 331; *Ryan v. Missouri P. R. Co.*, 23 Am. & Eng. R. Cas. [Tex.], 706; *Grand v. Livingston*, 38 N. Y. Sup., 490; *Fairchild v. Philadelphia, W. & B. R. Co.*, 24 Atl. Rep. [Pa.], 79; *Hazel v. Chicago, M. & St. P. R. Co.*, 82 Ia., 477; *Pennsylvania R. Co. v. Fairchild*, 69 Ill., 260; *Texas & P. R. Co. v. Davis*, 2 Tex. App., 156; *Hartmann v. Louisville & N. R. Co.*, 39 Mo. App., 88; *Gibson v. Connecticut Fire Ins. Co.*, 77 Fed. Rep., 565; *The Majestic*, 60 Fed. Rep., 627; *Wupperman v. The Carib Prince*, 63 Fed. Rep., 267; *Otis Co. v. Missouri P. R. Co.*, 112 Mo., 622; *Merchants Dispatch Co. v. Furthman*, 61 Am. & Eng. R. Cas. [Ill.], 145; *International & G. N. R. Co. v. Moody*, 35 Am. & Eng. R. Cas. [Tex.], 607; *Meuer v. Chicago, M. & St. P. R. Co.*, 2 Am. & Eng. R. Cas., n. s. [S. Dak.], 493.)

J. A. Gardiner and *J. B. Cessna, contra.*

RYAN, C.

This action was brought in the district court of Adams county for the value of a horse alleged to have been injured so as to have been rendered worthless on the line of railway of plaintiff in error while in transit between Peoria, Illinois, and Hastings, in this state. There was a verdict against the railroad company in the sum of $650. To reverse the judgment thereon rendered the railroad company has prosecuted this proceeding in error.

The matters in defense will now be separately considered. The contract of shipment provided that in cases where no rate was expressly inserted therein the value of each horse was agreed to be $100, and in this connection was the following language: "And that the above rate of transportation is based upon the agreement that in case of loss or damage, whether resulting from accident or negligence of said railroad company or its servants, said

railroad company does not assume a liability for such loss or damage to exceed the valuation of each animal." There was a further provision that in case of damage sustained, a written claim therefor, verified by affidavit, should be presented to the railroad company's general freight agent at Chicago or to the station agent, in this instance at Hastings, within ten days after the removal of the animal from the car in which it had been shipped. There was evidence of an oral notice of the character above indicated, within the time fixed, to the local agent at Hastings, through whose procurement an examination was at once made of the condition of the horse, and thereupon immediate steps were taken by the railroad company for the relief of the injuries which the horse had sustained. It was not shown that if there had been a technical compliance with the terms above prescribed there would have been taken any other steps than those which were taken. Under these circumstances we do not think that the failure to give a written notice, based upon an affidavit, was an indispensable condition precedent to a right of recovery. (*Wabash R. Co. v. Brown*, 39 N. E. Rep. [Ill.], 273.)

Plaintiff in error contended by its answer in the district court, as it does in argument in this court, that by the decisions of the courts of Illinois, introduced in evidence, the restriction of the liability of a common carrier to the value fixed in the contract of shipment was enforceable in that state, and consequently should be enforced in this state. In *Chicago, R. I. & P. R. Co. v. Witty*, 32 Neb., 275, there was under consideration very much the same circumstances as are now under consideration, except that there was in that case no averment or proof as to the law of Illinois being different from that of Nebraska with respect to the right of a common carrier, by contract, to limit its liability for negligence. It was held that no such restriction could be made under the laws of this state, and this ruling has been followed and approved in *Atchison, T. & S. F. R. Co. v. Lawler*, 40 Neb., 356.

The question now presented is whether or not our conclusion thus announced should be held to be subject to a modification on account of the alleged difference between the laws of Illinois and those of Nebraska. The defendant in error, to show that there is no difference between the holding of the courts of Illinois and the holding of this court in *Chicago, R. I. & P. R. Co. v. Witty, supra*, in the respect indicated, offered in evidence, among other language of the appellate court of Illinois, that found on page 523 of the case of *Chicago & N. W. R. Co. v. Chapman*, 30 App. Ct. Rep. From this language offered in evidence we quote the following: "We hold that while common carriers cannot, under the law, be permitted to fix, arbitrarily, the prices on freight they ship at prices below the real value, without the full, free, and voluntary consent of the shipper, fairly and understandingly entered into, and with the purpose of fixing its value, yet we also hold that common carriers have a lawful right to demand and require of the shipper a correct and honest statement of the actual value of his merchandise, and to insert such value in the bill of lading, and then to charge the shipper a just and reasonable compensation in proportion to the risk they assume in transporting his property. By such value when so fixed the shipper should be bound in case of loss or injury to his property, although the carrier might show the property to be of less value than stated by the shipper. Such a rule would be reasonable and just to both parties. There is no hardship in the law requiring common carriers to demand a correct and truthful statement from shippers of the real value of their property; nor is there any hardship or injustice in requiring the shipper to pay a full and fair compensation to have his merchandise shipped, in proportion to its value." The defendant in error also offered in evidence page 418 of the case of *Chicago & N. W. R. Co. v. Chapman*, 24 N. E. Rep., which we take to be the same case decided by the appellate court, from the opinion in which the above quotation was made. On the page of the North Eastern

Reporter offered in evidence we find this language of the supreme court of Illinois: "By the strict rule of the common law the carrier was liable for injuries resulting from causes beyond his control, and which were not the result of his act or the omission of his duty; the exception being that he was not liable for injury or loss resulting from the act of God or the public enemy. Thus, he must account for goods received for transportation even though they be destroyed by fire without his fault. The rule has generally been so far relaxed that the carrier may, by special contract, exempt himself from this strict liability imposed by the common law, but the weight of authority, in our judgment, holds, as this court has uniformly held, that he may not exempt himself from liability for damages resulting from the gross negligence or willful misconduct of himself or of his servants. The law does not authorize common carriers to fix arbitrarily the value of goods delivered to them for transportation, and thereby limit their liability in case of loss. If a value should be fixed by the carrier as before stated, and the contract of shipment was based thereon, the amount thus fixed would ordinarily fix the liability of the carrier." The syllabus of the case from which the above quotation was made was introduced in evidence. It was as follows: "A common carrier cannot, by contract, limit its liability for injury to property during transportation, caused by its gross negligence." Section 4, article 11, entitled "Railroad Corporations," in our constitution contains this language: "The liability of railroad corporations as common carriers shall never be limited." In this state, therefore, the liability of railroad corporations is that of common carriers, which may not be limited by the courts or by the legislature. A comparison of the language above quoted as having been introduced in evidence in this case with that of NORVAL, J., in *Chicago, R. I. & P. R. Co. v. Witty, supra*, and with the above constitutional provision, indicates very clearly that the courts of Illinois do not hold railroad corporations to the strict liability of common carriers enforced in this state.

On request of the defendant in error the district court gave the jury the following instruction: "The court instructs the jury that the defendant cannot limit its liability by contract for negligence, but that it is liable for all damage resulting from its carelessness or negligence in the transportation of said stallion by defendant as a common carrier. The fact that this contract was made in the state of Illinois makes no difference, for the reason that the law and decisions of the supreme court of that state are similar to the law and decisions of the supreme court of Nebraska upon the principles that are given in this case, that in neither state can a common carrier limit his liability, either by express contract or otherwise, against negligence or the use of reasonable care and diligence. Therefore, the plaintiffs are entitled to recover the full value of said stallion at what he was worth when he was shipped; provided, that you believe that while he was being shipped over the railroad of the defendant he received injuries resulting in his death, from the carelessness or negligence of said railroad company in his transportation." The court, it seems to us, erred in giving the construction which he did to the opinions of the courts of Illinois which had been offered in evidence, for in each of these there was distinctly recognized the right to limit by contract the liability of the carrier, under certain conditions, to the value stated in the shipping bill. This is in direct conflict with the views of this court as expressed in the Witty case. The recovery was in the sum of $650, while the value fixed in the shipping bill was about $100, so that we cannot avoid the conclusion that the jury was controlled by the instruction quoted. Again, there seems to be a difference held with respect to the degree of negligence which may be contracted against, which difference was not noted by the district court. Among these misapprehensions, however, there was recognized the controlling principles recognized in this state, that a common carrier cannot limit his liability for negligence, and that the value of the horse as

it was proved, and not as stated on the shipping contract, must govern the amount of the recovery. Since these two propositions correctly embody the law of this state, the verdict should be sustained notwithstanding the errors noted in the instruction, unless, as plaintiff in error contends, the law of Illinois must prevail. Ordinarily the law of the place of shipment should be held to be the law with reference to which the shipper and carrier have contracted, in the absence of direct evidence of an intention to be governed by some other rule. The cases cited by the plaintiff in error, for our present purposes, may be conceded to establish this proposition. As a general rule the proposition may be also accepted as correct that where parties, in good faith, have entered into a contract valid and binding in the state where made, it will be enforced in another state. This enforcement is a matter of comity, however, and not of absolute right. As was said by Chief Justice Taney in *Bank of Augusta v. Earle*, 13 Pet. [U. S.], 519: "The comity thus extended to other nations is no impeachment of sovereignty. It is the voluntary act of the nation by which it is offered, and it is inadmissible when contrary to the policy or prejudicial to its interests." To the same effect is the language of Story—that no state will enforce a foreign law if it be "repugnant to its policy or prejudicial to its interests." (Story, Conflict of Laws, sec. 38.) The restrictions under which comity between states should be allowed to control was very fully discussed in *Armstrong v. Best*, 17 S. E. Rep. [N. Car.], 14, wherein the above quotations will be found. In Massachusetts the liability of common carriers has been permitted, by contract, to be restricted with respect to interstate commerce as, and perhaps more uniformly, than in any other state, but this restriction has always been conditioned that the contract creating it must be neither immoral nor illegal, tested by the law of that commonwealth. (*Fonseca v. Cunard Steamship Co.*, 153 Mass., 553; *Greenwood v. Curtis*, 6 Mass., 358; *Milliken v. Pratt*, 125 Mass., 374.) It may be of advantage to illustrate the

application of this rule by the use of adjudicated cases not treating of or involving the liability of common carriers.

In *Oscanyan v. Arms Co.*, 103 U. S., 261, there was involved the right of a Turkish consul to recover a commission agreed to be paid to him for recommending to his government certain supplies. This agreement, not enforceable in the United States, was valid in Turkey, yet the principle of comity was held insufficient to overcome the repugnance with which such a transaction is viewed in this country.

The syllabus of *Lemonius v. Mayer*, 14 So. Rep. [Miss.], 33, is as follows: "Act March 7, 1882, entitled 'An act to prohibit the purchase and sale of "futures" in the state of Mississippi' (Acts, 1882, p. 140), section 1, made it unlawful to deal in contracts commonly called 'futures' 'in this state,' and prescribed a punishment for dealers therein. Section 2 provided 'that no money advanced for the purchase of futures, nor any agreement for the payment of any sum for such purchases, shall be enforced in any court in this state.' Held, that the contracts between purchasers of 'futures' and their brokers made without the state while such statute was in force cannot be enforced in Mississippi, though valid where made."

In *Dammert v. Osborn*, 35 N. E. Rep. [N. Y.], 1088, it was held by the New York court of appeals as follows: "Where the courts of this state cannot give effect to testamentary dispositions of personal property in foreign wills without violating the laws or public policy of the state, the property should be remitted to the jurisdiction of the domicile, to the end that it may administer its own laws; but if there is no law or public policy here that forbids the execution of the purpose that the testator had in view, then the courts of this state will give effect to the disposition according to the law under which it was made."

In *Sheldon v. Blanvelt*, 7 S. E. Rep. [S. Car.], 593, Blanvelt, a citizen of New York, had executed a general as-

signment for the benefit of his creditors, providing for the payment of all wages and salaries of his employes in preference to all other creditors, as required by the statute of New York. The assignment was executed and recorded in all respects as required by the statutes of that state. The principal part of the assignor's property was in New York, though he owned some real estate and personal property in South Carolina. Before possession of the property in South Carolina had been taken by the assignee, it was seized by virtue of writs of attachment sued out at the instance of creditors residing in New York and Connecticut. A statute of South Carolina provided that any assignment for the benefit of creditors made by an insolvent debtor containing a preference of one creditor over another should be absolutely void. It was held that the deed of assignment was void so far as the property located in South Carolina was concerned, and that it was immaterial that none of the attaching creditors resided in that state.

In the United States district court of the southern district of New York, in the case of *Schulze-Berge v. The Guildhall*, 58 Fed. Rep., 796, there was under consideration a stipulation in favor of a carrier entered into at Rotterdam, whereby said carrier was exonerated from liability for negligence in the transportation of certain merchandise to New York, and it was held that such a stipulation, valid where made, was contrary to the public policy of this country and therefore would not be enforced.

The question intended to be illustrated by the analogies afforded by the above quotations is whether or not the restriction of the liability of a common carrier in this case, though valid in Illinois, is illegal or so contrary to the public policy of this state that it should not be enforced on the principle of comity between states.

In *Texas & P. R. Co. v. Davis*, 2 Tex. App. (Civil Cases), 156, the statutory inhibition was with reference to restrictive contracts by carriers in that state; hence that case throws no light on the question involved in this.

The language of our constitution, "that the liability of railroad corporations as common carriers shall never be limited," is very clear and comprehensive. The legislature of this state, in the face of this provision, is powerless to provide a restriction on the liability which was enforced in *Chicago, R. I. & P. R. Co. v. Witty, supra.* The courts of this state are equally bound by this constitutional provision and, by a construction given legislative enactment or otherwise, cannot limit the liability of a railroad company as a common carrier. The supreme law forbids the exercise of these powers, legislative or judicial, and, as was held in the Witty case, the power by contract in this state to restrict the liability of a common carrier does not exist. The statement that such a restriction is illegal in this state is, therefore, a mere truism. To ask that the law of this state, on principles of comity, shall give way to the law of Illinois is to ask that the courts of this state shall sanction what by the constitution has been declared illegal and against the public policy of this commonwealth. To this we can never assent. The instruction, while it embodied an error as to the identity of the law of Illinois with that of this state, nevertheless correctly stated the principles which should govern the jury in its deliberations. For this reason it was not prejudicially erroneous. The judgment of the district court is

AFFIRMED.

ELIZABETH M. GREENMAN, APPELLANT, V. JOHN B. SWAN ET AL., APPELLEES.

FILED MARCH 17, 1897. No. 7192.

Mortgages: PAYMENT TO ONE WITHOUT AUTHORITY TO RECEIVE IT: FORECLOSURE. The evidence in this case examined, and *held* to entitle the plaintiff to a decree as prayed.

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

Simpson & Sornborger, for appellant.

Good & Good and *Frick & Dolezal, contra.*

RYAN, C.

This action was brought in the district court of Saunders county for the foreclosure of a mortgage made by John B. Swan and his wife to Liberty Powell. There was a decree for the defendant, whereby was sustained the plea of payment. Since the appeal was taken to this court Mrs. Greenman died, and the action has been duly revived in the name of her representative. The note secured by the mortgage, as well as the mortgage itself, was dated December 2, 1885. The principal note was for $1,000, due five years after date. The semi-annual payments of interest required to be made were evidenced by ten coupons for $35 each. G. W. Dorsey was doing a loan business at Fremont, in this state, for some time previous to and until the year 1882. In that year the Farmers & Merchants State Bank was organized, and, as Mr. Dorsey testified, took up that business. In 1884 this bank was reorganized under the name of the Farmers & Merchants National Bank, which bank is still doing business. After the national bank was organized the farm loan business with eastern parties was conducted in the name of G. W. Dorsey and C. H. Toncray, until some time in the year 1888, when there was organized the Nebraska Mortgage & Investment Company. From its organization until the latter part of 1891, when it passed into the hands of a receiver, this company transacted the loan business above indicated. From this statement it may be noted that the loan to John B. Swan was made through the agency of the Farmers & Merchants National Bank of Fremont, Nebraska. Between this bank and

the Nebraska Mortgage & Investment Company there was no connection whatever, except that the latter was a depositor of the former. G. W. Dorsey was president of both corporations, and C. H. Toncray was, at the same time, cashier of the bank and a director and vice president of the Nebraska Mortgage & Investment Company. The bank and said company were transacting business in the same block, and through the directors' room of the bank a person could pass from the public business office of one institution into that of the other. From the fact that Mr. Dorsey and Mr. Toncray held at the same time official positions in the investment company and in the bank, coupled with the further fact that Mr. Swan speaks of the persons to whom he paid coupons as "they" and "them," it has resulted that there exists considerable confusion as to the party in each instance to whom he paid his coupon. It may be assumed, however, that after the mortgage and investment company came into existence he made the payments to the cashier of that corporation. Just before the loan fell due the premises mortgaged were transferred by Swan to O. S. Christian, and by him the payment of the principal note was made to the Nebraska Mortgage & Investment Company. The dispute between the litigants is as to whether the company's failure to pay over the amount thus received by it is chargeable to plaintiff or defendant; in other words, whether this company was the agent of the mortgagee or of the transferee of the mortgagor.

The loan was made through Mr. Dorsey and Mr. Toncray of moneys which had been collected for Liberty Powell. The note and mortgage were made directly to him. Mr. Powell was never seen or consulted with by either Mr. Dorsey or Mr. Toncray with reference to the making of this loan. Mr. Calder, who lived near the place of residence of Mr. Powell, transacted this business in the state of New York, where Mr. Powell lived. In reference to the loan now under consideration Mr. Dorsey testified on cross-examination as follows:

Q. Did you ever have any communication with Liberty Powell concerning this matter of John B. Swan?

A. No, sir.

Q. Mr. Calder was your agent in New York for the negotiation of loans?

A. Yes, sir.

Q. He authorized you to make loans?

A. Yes, sir; sent us money and sold loans.

Q. He was your fiscal agent in that region down there for both of your corporations when they had these matters in hand?

A. Yes, sir.

Q. Your bank and your company were agents for negotiating the loans of Mr. Calder?

A. Yes, sir.

On the same subject Mr. Toncray, by deposition, testified as follows: "Loans were sent John Calder for sale. When disposed of by him proceeds would be sent to me. We were authorized, when a loan matured, to receive payment on the same and credit it to this account, and he would exchange it for some loan that he had in his possession, or would instruct us to forward the proceeds to him. Sometimes money would remain in our hands several months without being applied to the purchase of another loan called for by him. We were never accustomed to remit him the principal of loans until asked to do so, it being understood that the same should remain with us for reinvestment. We made monthly and semi-monthly remittances of interest only." Being asked what authority, if any, the Nebraska Mortgage & Investment Company had to collect money for Liberty Powell, and how and from whom such authority had been obtained, and how much money was collected, if collected, Mr. Toncray said: "It simply had the authority that comes from a custom and practice which had been in force for fourteen years, and that had always proved satisfactory. No other system was ever offered or suggested in its place. We felt authorized to collect it for

the account of John Calder because all correspondence concerning the loan had been made with him. All coupons as they matured had been received from him, and we looked to him, or rather to his successor, F. M. Calder, to procure for us the mortgage and note, together with a proper release, when final payment should be made."

Before this action was begun John Calder had died. Much earlier, Liberty Powell had died, and the note and mortgage in this case had been bequeathed to his daughter, Elizabeth M. Greenman, by whom these foreclosure proceedings were instituted. We shall not consider to what extent these deaths should be held to have so interrupted the continuous course of dealings that a doubt might be held properly to arise as to whether, against plaintiff, any inference of a custom was at all deducible from the acts or acquiescence of Powell or Calder. We shall rather consider the matter as argued by appellees,—that is, as though Powell and Calder, to the end of these transactions, had acted as each did up to the time of his death. Their deaths will be taken into consideration only as far as that fact excuses the failure of each to testify. John B. Swan testified as follows:

Q. You may state whether or not you paid the interest on that note accruing from time to time.

A. Yes, sir.

Q. To whom?

A. There was a part of the time before my interest coupons would come due I would get a statement from the Nebraska Mortgage & Investment Company, I would get a statement from them there when my interest was becoming due, and also when they sent that statement they would also send a letter or envelope with the firm's name and address on it. Sometimes I sent the money direct in that envelope, other times I would not have the money, knew I would not have the money, and I would write them so. My interest payments were semi-annual and sometimes it was June 14 when the payments became due and it was a bad time to have money on hand,

and I wrote to Mr. Toncray several times asking to get an extension on my time, and when I sent the money to pay these coupons I sent it to Mr. Toncray and I did all my business with C. H. Toncray.

Mr. Swan was with Mr. Christian when Mr. Christian paid the note, and it appears from the testimony of both these gentlemen that Mr. Christian paid the note to the Nebraska Mortgage & Investment Company on the faith of the fact that interest coupons had always been paid to Mr. Toncray. When this payment was made Mr. Christian received the following receipt:

"FREMONT, NEBR., December 1st, 1890.

"Received from O. S. Christian fourteen hundred dollars, in payment of two mortgages of J. B. Swan.

"NEBR. MT'GE & INVT. CO. L."

It is important to note carefully, before entering upon a further discussion of the facts, that Mr. Swan further testified that he never paid a coupon before it was due, but the payment was generally some time after the maturity of the coupon on which payment was made. After the execution of the note and mortgage in this case they were sent to Liberty Powell and remained in his possession, or in the possession of the agent of Mrs. Greenman, until after Mr. Christian had made the above noted payment. This agent and attorney, Addison C. Miller, put in evidence a power of attorney made by Mrs. Greenman, whereby he was constituted her attorney in fact, among other things, to look after her loans. He testified as follows: "I collected and received the interest on said note and mortgage, commencing with the coupon or payment due thereon June 1, 1887, down to and including the coupon due thereon June 1, 1890. This interest was all of it paid to me by Mr. John Calder, who then resided at New York Mills, a distance of three miles from my office. Said payments were made to me by Mr. Calder as follows: Coupon due June 1, 1887, was paid to me May 14, 1887. Coupon due December 1, 1887, was paid to me November 12, 1887. Coupon due June 1, 1888, was paid to me May

16, 1888. Coupon due December 1, 1888, was paid to me November 10, 1888. Coupon due June 1, 1889, was paid to me May 15, 1889. Coupon due December 1, 1889, was paid to me November 6, 1889. Coupon due June 1, 1890, was paid to me May 14, 1890. Mr. Calder came into my office upon each occasion and paid me the money, and I surrendered to him the coupon so paid and he took the same away. Mr. Calder represented upon each occasion that he had the money in hand to pay the coupons." There was no evidence which was not in harmony with these statements of this witness. This evidence shows that Mr. Calder was never entrusted with the coupons to obtain the collection to be made on them, but that the coupons were surrendered to him because he had paid them just before with money which he claimed he had in hand to pay the coupon about to mature. When Mr. Calder obtained each coupon in this way he sent it to his correspondent at Fremont. There is, therefore, in this case no proof from which it can properly be inferred that Mr. Toncray, Mr. Dorsey, or the Nebraska Mortgage & Investment Company was in fact, or had ever been held out, as the agent of the holder of the note and mortgage involved in this litigation. The judgment of the district court is therefore reversed, and this cause is remanded with directions to enter a decree of foreclosure as prayed.

REVERSED.

JOHN WILSON, SHERIFF, V. CITY NATIONAL BANK.

FILED MARCH 17, 1897. No. 7237.

1. **Judgments: FINDINGS: REVIEW.** Within the meaning of section 314 of the Code of Civil Procedure, a judgment is contrary to law when the finding on which it is based is not responsive to the issues made by the pleadings.

2. Replevin: PLEADING: ISSUES: EVIDENCE. A plaintiff in replevin alleged in his petition that he was the owner and entitled to the immediate possession of the property. The answer was a general denial. All the plaintiff's evidence tended to show that he had a special interest in, or lien upon, the property replevied, and the court so found. *Held*, (1) That the evidence was irrelevant under the issues; (2) that the finding did not respond to the issues; (3) that the judgment based on such finding was contrary to law.

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

Marston & Nevius, for plaintiff in error.

Calkins & Pratt, contra.

RAGAN, C.

From the record before us we gather the material facts of this case, as follows: W. L. Cook was engaged in mercantile business in the city of Kearney, and to secure a debt he owed to the City National Bank of that city (hereinafter called the bank) he executed and delivered to it a chattel mortgage upon his stock of merchandise. This mortgage the bank did not file for record. Some months after this he made a bill of sale of his stock of merchandise to a man named Shur and put him in possession. Soon after this Shur surrendered the stock of merchandise to the bank and it took possession and held possession of the stock by virtue of its mortgage thereon. Creditors of Cook attached the stock, and the bank brought an action in replevin, alleging that it was the owner and entitled to the possession of the stock of merchandise. The sheriff, from whom the stock of goods was replevied, answered by a general denial. The court to which the case was tried without a jury found that at the commencement of the action the bank had a special ownership in, and was entitled to possession of, the replevied property. To reverse the judgment rendered on this finding the sheriff prosecutes here a petition in error.

We have looked in vain for some ground on which to

affirm this judgment. The finding made by the district court was not responsive to the issue made by the pleadings, and the judgment pronounced on that finding the pleadings do not support. It was said on the argument of the case by counsel for the bank that the plaintiff in error did not make the point on the trial of the case that the mortgage from Cook to the bank was irrelevant evidence under the issues, and therefore he should not be heard to urge that point here for the first time. But the bill of exceptions does not disclose that the bank offered or put in evidence on the trial of this case the mortgage made to it by Cook. The mortgage is not in the bill of exceptions, though frequently mentioned. The record shows that the bill of sale from Cook to Shur was offered in evidence, but it is not in the bill of exceptions and there is no evidence whatever to show that the bank claimed to be the owner of the replevied property by virtue of a purchase or gift from Shur or Cook. The evidence, and all the evidence, tends to show that the bank was claiming these goods by virtue of its chattel mortgage. After Shur had turned over the goods to the bank Cook executed and delivered to the bank the following:

"*To the City National Bank:* I hereby consent that you may sell the goods this day taken by you under chattel mortgage at private sale, wholesale or retail, at such prices as you may be able to obtain.

"Dated Feb. 18, 1890. W. L. COOK."

This is not a bill of sale from Cook to the bank. Evidently the object and purpose of this paper was to authorize the bank to sell the mortgaged property without advertising it as provided by the statute. We are unable to find any evidence in the record which even tends to show that at the time this suit was brought the bank was the owner of the property it replevied, and the finding of the district court was in exact conformity with the evidence that the bank had a special interest in the property.

One of the grounds of the motion for a new trial filed

by the sheriff was that the finding was contrary to law, and this is one of the assignments of error in the petition in error filled here. We have already seen that the record does not disclose that the chattel mortgage was offered in evidence. Had it been, the plaintiff in error might then have objected to it as irrelevant under the issues, and had he failed to do so, it may be that he could not have been heard to raise the question afterwards; but that point we do not decide. But he did make the point on his motion for a new trial, and has made it again in his petition in error here and argued at the bar, that the finding of the court and the judgment pronounced thereon are contrary to law. Now we understand that a judgment is contrary to law when the finding on which it is based is not responsive to the issues made by the pleadings. If the finding here then is based upon the evidence of the chattel mortgage made by Cook to the bank, such finding, while supported by sufficient evidence, is contrary to law, because not responsive to the issues. There can be no doubt but that Cook was largely indebted to the bank, and that the merchandise turned over to the bank by Shur was to secure the payment of Cook's debt to the bank; and if the court treated the written consent given by Cook to the bank on the 18th of February, 1890, to sell the goods at private sale as a pledge of the goods to the bank by Cook, it was still only a pledge; and when this written consent was introduced in evidence the sheriff objected to it as evidence on the ground that it was irrelevant.

Under any view of the case then that we can take, it comes to this: that the bank claimed in its pleading to be the absolute owner of these goods; that all the evidence introduced by it on the trial tended to show that it had only a special ownership in or lien upon the goods. The finding made by the court then is supported by the evidence; but the evidence, and all the evidence in the case, was irrelevant under the issues, and the finding made is not responsive to the issues and not supported by the

pleadings, and the judgment is erroneous. (See *Robinson v. Kilpatrick-Koch Dry Goods Co.*, 50 Neb., 795.) The judgment of the district court is

REVERSED.

AMBROSE AFFHOLDER ET AL. V. STATE OF NEBRASKA, EX REL. PETER MCMULLEN.

FILED MARCH 17, 1897. No. 7180.

1. **Constitutional Law:** TITLES AND SUBSTANCE OF BILLS. Section 11, article 3, of the constitution should be so liberally construed as to admit of the insertion in a legislative act of all provisions which, though not specifically expressed in the title, are comprehended within the objects and purposes of the act as expressed in its title, and to admit all provisions which are germane, and not foreign, to the provisions of the act as expressed in its title.

2. **Schools and School Districts:** PURCHASE OF TEXT-BOOKS: VALIDITY OF STATUTE. Chapter 46, Session Laws of 1891, contains no subject that is not germane to the object of the act as expressed in its title, and, therefore, does not violate the provisions of section 11, article 3, of the constitution, that "No bill shall contain more than one subject, and the same shall be clearly expressed in its title." Said act is complete in itself and does not violate the requirement of section 11, article 3, of the constitution, that "No law shall be amended unless the new act contain the section or sections so amended, and the section or sections so amended shall be repealed."

ERROR from the district court of Burt county. Tried below before AMBROSE, J. *Affirmed.*

H. H. Bowes, for plaintiffs in error.

Charles T. Dickinson, contra.

John H. Barry and *H. Gilkeson, amici curiæ.*

RAGAN, C.

In the district court of Burt county Peter McMullen made application for a peremptory writ of *mandamus* to

compel Ambrose Affholder and others, constituting the school board of school district No. 58 of said county, to purchase and furnish to the children of school age of said district necessary text-books in accordance with the provisions of chapter 46 of the Laws of 1891, being subdivision 18 of chapter 79, Compiled Statutes. An alternative writ was issued, and for a return thereto the school board interposed the defense that said act was unconstitutional. The writ was issued as prayed, and the school board has prosecuted here a petition in error.

1. The first argument is that the act under consideration violates section 11, article 3, of the constitution, which provides: "No bill shall contain more than one subject, and the same shall be clearly expressed in its title." The title of the act in question is, "An act to provide cheaper text-books, and for district ownership of the same." (Session Laws, 1891, ch. 46, p. 334.) Section 10 of this act also provides: "The provisions of this act shall include all school supplies." The argument is that the object of the act, as expressed by its title, is to require school boards to provide text-books for their districts, and that the subject "supplies," mentioned in the tenth section of the act, is not included in nor germane to the term "text-books," the subject of the act under consideration. In other words, it is insisted that the act in question contains two subjects, viz., "text-books," which is provided for in the title of the act, and "school supplies," which is not mentioned in the title of the act. But this constitutional provision should be liberally construed, and so construed as to admit of the insertion in a legislative act of all provisions which, though not specifically expressed in the title, are comprehended within the objects and purposes of the act as expressed in its title; and to admit all provisions which are germane, and not foreign, to the purposes of the act as expressed in its title. (*Barnhill v. Teague*, 96 Ala., 207; *State v. Madson*, 45 N. W. Rep. [Minn.], 856.) In *Kansas City & O. R. Co. v. Frey*, 30 Neb., 790, it was held: "A bill which has but one general ob-

ject that is clearly expressed in the title thereof is not objectionable on the ground that it contains two or more subjects." The general object of the act under consideration was to require school districts, at public expense, to furnish text-books for the use of the children attending school. This object is clearly expressed in the title of the act, and the question is whether the words "school supplies," found in the tenth section of the act, is embraced within the meaning of the term "text-books." "School supplies," as used in this act, means maps, charts, globes, and other apparatus necessary for use in schools, and we think that a chart or a map or a globe is as much a text-book as a reader or speller within the purposes and intention of the act under consideration. Section 6, article 8, of the constitution of Nebraska provides: "The legislature shall provide for the free instruction in the common schools of this state of all persons between the ages of five and twenty-one years." What methods and what means should be adopted in order to furnish free instruction to the children of the state has been left by the constitution to the legislature. Prior to the passage of the act under consideration instruction in all public schools was gratuitous, and by this act the legislature has seen fit to require the various school districts to purchase text-books necessary to be used in the schools. We do not think the term "text-books" should be given a technical meaning, but that it is comprehensive enough to and does include globes, maps, charts, pens, ink, paper, etc., and all other apparatus and appliances which are proper to be used in the schools in instructing the youth; and we conclude, therefore, that the act under consideration is not broader than its title, and that the term "school supplies," found in the tenth section of the act, is not foreign to the term "text-books" found in the title of the act, but is germane to, and comprehended and included within, the term "text-books."

2. A second contention is that the act under consideration violates said section 11, article 3, of the constitution,

because it in effect modifies or amends certain sections of the general school law, and that these sections modified or amended are not contained in the act under consideration, and the amended sections of the general school law are not by this act repealed. We do not decide whether the act under consideration modifies or amends any provision of the general school law, for if it does, it is not for that reason unconstitutional. The act under consideration is a complete act in itself, and such an act is not inimical to the constitutional requirement that no law shall be amended unless the new act contains the section or sections so amended, although such complete act may be repugnant to, or in conflict with, the prior law not referred to nor in express terms repealed by the later act. (*State v. Cornell*, 50 Neb., 526, and cases there cited.) The judgment of the district court is right and is

AFFIRMED.

SENECA G. DORR, APPELLEE, V. LOUIS MEYER ET AL., IMPLEADED WITH A. W. JANSEN, APPELLANT.

FILED MARCH 17, 1897. No. 7195.

1. **Mortgages:** SUBSEQUENT PURCHASER. A subsequent mortgagee of real estate is a subsequent purchaser thereof within the meaning of section 16, chapter 73, Compiled Statutes.

2. ———: ———. One who takes a real estate mortgage to secure a pre-existing debt actually and justly owing to him, without notice, actual or constructive, of the existence of an outstanding unrecorded mortgage against such real estate, is a subsequent purchaser in good faith within the meaning of section 16, chapter 73, Compiled Statutes.

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

Daniel F. Osgood, for appellant.

Roscoe Pound, Burr & Burr, and *Davis, Hibner & Whitmore, contra.*

RAGAN, C.

This is a suit in equity brought in the district court of Lancaster county by Seneca G. Dorr to foreclose a real estate mortgage against Louis Meyer and wife and others. Lionel C. Burr, Nelson C. Brock, and Albert W. Jansen were made defendants to the action and filed cross-petitions claiming liens upon the property described in Dorr's petition. Jansen claimed a lien upon the property by virtue of a mortgage made thereon by Meyer and wife in 1888, but not recorded until August, 1893. Both Burr and Brock claimed liens upon the property by virtue of mortgages made by Meyer and wife in 1893, but recorded before the record of Jansen's mortgage. The district court, by its decree, postponed the lien of Jansen's mortgage to the mortgages of Burr and Brock, and Jansen has appealed.

1. The court found—and the evidence sustains the finding—that the mortgages made by Meyer and wife to Burr and Brock in 1893 were made and accepted in good faith to secure debts actually and justly owing by Meyer at that time to Burr and Brock; and that neither Burr nor Brock had any knowledge or notice of the existence of Jansen's mortgage until after their mortgages had been recorded. The record presents two questions, the first of which is whether Burr and Brock are subsequent purchasers of the real estate within the meaning of section 16, chapter 73, Compiled Statutes. This section provides: "All deeds, mortgages, and other instruments of writing which are required to be recorded shall take effect and be in force from and after the time of delivering the same to the register of deeds for record, and not before, as to all creditors and subsequent purchasers in good faith without notice; and all such deeds, mortgages, and other instruments shall be adjudged void as to all such creditors and subsequent purchasers without notice whose

deeds, mortgages, and other instruments shall be first recorded; *Provided*, That such deeds, mortgages, or instruments shall be valid between the parties." The Code of Iowa, like ours, provides that the mortgagor of real estate, in the absence of a stipulation to the contrary, retains the legal title and the right to the possession of the real estate mortgaged; and the registry law of the state of Iowa provides: "No instrument affecting real estate is of any validity against subsequent purchasers for a valuable consideration without notice, unless recorded in the office of the register of deeds of the county in which the land lies, as hereinafter provided." Construing this registry act and the Code, the supreme court of Iowa, in *Porter v. Greene*, 4 Ia., 571, held that a mortgagee of real estate is a purchaser within the meaning of the laws of this state respecting the recording of instruments. This case was followed and approved in *Seevers v. Delashmutt*, 11 Ia., 174. But section 45 of chapter 73, Compiled Statutes, provides: "The term 'purchaser,' as used in this chapter, shall be construed to embrace every person to whom any real estate, or interest therein, shall be conveyed for a valuable consideration." Leaving out of consideration, then, the adjudicated cases bearing upon the point under consideration, and looking only to the statute, there seems to be no doubt that a subsequent mortgagee of real estate is a subsequent purchaser thereof within the meaning of said section 16 of chapter 73.

2. The mortgages of Meyer and wife to Burr and Brock were given to secure a pre-existing debt, and the second question presented is whether Burr and Brock were purchasers in good faith within the meaning of said section 16 of said chapter 73. A diversity of opinion exists among the courts as to whether one who takes security for a pre-existing debt is a good-faith holder of such security within the meaning of the law-merchant, or within the meaning of the registry acts. But the question is no longer an open one in this state. Section 14, chapter 32,

Compiled Statutes, provides that a chattel mortgage, unless the same or a copy thereof is filed, or unless the property mortgaged should be accompanied by an immediate delivery and followed by an actual and continued change of possession thereof, "shall be absolutely void as against the creditor of the mortgager and as against subsequent purchasers and mortgagers in good faith." Construing this statute in *State Bank of Lashton v. Kelley*, 47 Neb., 678, it was held that a mortgagee in good faith within the meaning of this section was one who took his mortgage to secure a debt actually and justly owing to him without notice, actual or constructive, of other existing claims against the mortgaged property. This ruling was adhered to on rehearing of the same case in 49 Neb., 242. To the same effect see *Turner v. Killian*, 12 Neb., 580; *Beagle v. Miller*, 37 Neb., 855; *Chaffee v. Atlas Lumber Co.*, 43 Neb., 224; *Henry v. Vliet*, 33 Neb., 130; *Babcock v. Jordan*, 24 Ind., 14; *National Bank v. Whitney*, 103 U. S., 99. And for a discussion of the same principle see *Barker v. Lichtenberger*, 41 Neb., 751; *Brooklyn & N. R. Co. v. Republic Nat. Bank*, 102 U. S., 14. It is true that section 14 of said chapter 32 in express terms protects subsequent mortgagees in good faith, while section 16, chapter 73, by its terms protects only creditors and subsequent purchasers, but this section must be read in connection with section 45 of the same chapter, and when so read there can be no doubt that the intention of the legislature was to extend the protection of the recording acts to good-faith subsequent mortgagees of real estate. Since, therefore, Burr and Brock took their mortgages without knowledge or notice of the existence of Jansen's mortgage, and took them to secure a debt honestly and justly owing, they must be held to be subsequent purchasers in good faith within the meaning of said section 16 of said chapter 73. The decree of the district court is right and is in all things

AFFIRMED.

WOODBRIDGE BROTHERS V. H. A. DE WITT ET AL.

FILED MARCH 17, 1897. No. 7096.

1. **Replevin:** PLEADING: PROOF. The ordinary rules of pleading do not apply in replevin. A party may prove fraud under general allegations of ownership and right of possession.
2. ———: ———: ———: INTERVENTION. The foregoing rule applies equally to intervenors in a replevin suit.
3. **Estoppel:** WRITING: DECEIT. The doctrine that the negligence of a party in signing a writing estops him from afterwards urging that it does not contain the true agreement of the parties is not applicable in a suit between the original parties thereto or their privies, where the party seeking enforcement practiced fraud or deception in order to induce the other to sign without reading.
4. **Rulings on Evidence:** REVIEW. An assignment that the court erred in permitting the introduction of evidence must specifically designate the ruling complained of.

ERROR from the district court of Douglas county. Tried below before WALTON, J. *Affirmed.*

John O. Yeiser, for plaintiffs in error.

I. J. Dunn, contra.

IRVINE, C.

This was an action in replevin by Woodbridge Bros. against H. A. De Witt to recover possession of a piano to which the plaintiffs claimed title under a so-called lease, which was more properly a contract of sale reserving title in the vendors until full payment should be made, with a right to take possession on default of payment. The property was taken under the writ and delivered to the plaintiffs. H. A. De Witt made no appearance. Pauline De Witt intervened, claiming ownership and right of possession in herself. The suit was brought before a justice of the peace, resulting in judgment in her favor. The plaintiffs appealed to the district court,

where a trial to a jury again resulted in a judgment in Pauline De Witt's favor, and the plaintiffs prosecute error to this court.

Plaintiffs in the first place contend that the district court erred in overruling their motion to strike the intervenor's answer from the files because it presented an issue not tried before the justice. The petition of intervention before the justice alleged generally that the intervenor was the owner of the property; that she had paid therefor in full; that she was entitled to the possession thereof, and that H. A. De Witt was not the owner and claimed no interest therein. In the district court she alleged in addition that the lease under which plaintiffs claim was procured by false representations made by plaintiffs to the mother of H. A. De Witt, who acted as his agent, to the effect that the lease was only a matter of form, and that no interest would be charged on the purchase price. Further, she alleged that Mrs. De Witt had no authority to execute the lease on behalf of H. A. De Witt in such manner as to charge him with interest. We think the pleadings in the district court present no departure from the issues before the justice. The rules of pleading in replevin cases are specially provided by statute and constitute an exception to the ordinary rules governing other cases. It is sufficient for the plaintiff to allege generally ownership and right of possession in himself. A denial of these averments is generally a sufficient answer to admit evidence of any character defeating the plaintiffs' right of possession, and under issues so made the parties may prove fraud. (*Phœnix Iron Works Co. v. McEvony*, 47 Neb., 228, and cases there cited.) If as between the original parties fraud may be proved under such general averments, there is no reason why an intervenor should be held to greater strictness in pleading. Fraud in procuring the contract of lease or conditional sale was therefore admissible under the petition of intervention before the justice, and pleading the fraud specifically in the district court did not inject a new issue. It

simply restricted the pleader to the proof of certain facts which might have been proved under more general allegations.

It is next assigned that the verdict is not supported by the evidence. The evidence on behalf of the intervenor tends to show that Mrs. De Witt, Pauline De Witt, and the latter's sister resided together. H. A. De Witt was the son of Mrs. De Witt, and brother of Pauline. Some negotiations had taken place for the sale of a piano, and it seems, although the evidence is not conclusive, that H. A. De Witt was to become the responsible purchaser. He authorized his mother to select the piano, and we think the evidence is such as to conclusively show that she was generally authorized to purchase it on his behalf. She went to the place of business of Woodbridge Bros., selected a piano, and agreed to pay therefor $250 in monthly installments of $10 each. No interest was to be charged on the unpaid purchase money. After the negotiations were completed, and as they were about to leave the store, a member of the plaintiff firm presented Mrs. De Witt with a written instrument and requested her to sign it. In the language of the witness he told Mrs. De Witt "it was of no importance, but a matter of form." Mrs. De Witt then, without reading, signed the instrument simply "De Witt." It turned out to be a so-called lease or contract of conditional sale, providing for interest on deferred payments at ten per cent per annum. The purchase was made in 1886. The final payment of the $250 was made, according to some witnesses, in 1888; according to the testimony of the plaintiffs early in 1889. This suit was not instituted until March, 1893, plaintiffs claiming merely that about $28 of interest remained unpaid. It is elementary that where a contract is reduced to writing, parol evidence is not admissible to contradict it or vary its terms. It is also true that a party cannot generally avoid the effect of a written contract by showing that he signed it without reading it or in ignorance of its terms, but he may avoid it for fraud. The general rule

referred to is not applicable in a suit between the original parties to the contract where the defense is that the writing by reason of fraud does not embrace the contract actually made. (*Ward v. Spelts*, 39 Neb., 809; *Cole Bros. v. Williams*, 12 Neb., 440; *Aultman v. Finck*, 36 Neb., 680.) Pauline De Witt claims under a transfer from her brother, and while there is no evidence that this was a transfer for a valuable consideration, and she obtained no greater rights than her brother, she stands in privity with him and her rights are as great as his would be. In the light of the authorities cited we conceive the rule to be that where a party, to induce another to sign a contract which the other does not read, practices any misrepresentation or artifice in order to prevent a reading of the contract and secure its execution, relief may be had on the ground of fraud. The testimony on the part of the intervenor tends to show that the plaintiffs, after a complete oral contract, represented to Mrs. De Witt that the document handed to her for signature was of no importance, but merely a matter of form. This might not be sufficient in a case between two men of affairs to excuse a critical examination of the instrument, but the fact that the representation was made to a woman, probably unused to business transactions, in the course of as ordinary an event as the purchase of chattels in a retail shop, was proper for the consideration of the jury, and whatever we might think of the case if originally proposed to us for solution, we think there was sufficient to go to the jury on an issue of fraud and sufficient to sustain a verdict. The further fact that the principal had been paid in full about four years before the plaintiffs undertook to assert any rights under the written contract was also a circumstance for consideration by the jury. The plaintiffs contend that in any event interest should be allowed on delinquent installments of the purchase money; that the evidence shows that all payments were not promptly made, and that there was therefore something due the plaintiffs by way of interest aside from the contract. But this argu-

ment disregards the fact that if the written contract was unenforceable, for fraud in its procurement, the contract made was the oral one for a sale of the piano, title passing to the vendee, and the remedy of the vendors was by action for interest, and not replevin for the piano.

It is assigned that "the court erred in permitting defendant to introduce evidence of the physical condition of Mrs. De Witt, mother of defendant." This assignment is evidently directed to certain evidence introduced to show that Mrs. De Witt was an invalid and unable to give her deposition, and it was probably offered on the theory that her testimony lying more properly in the control of the intervenor, and she being a principal actor in the transaction, a presumption against the intervenor would lie unless the failure to produce her as a witness was explained. We need not inquire into the admissibility of this evidence because the assignment of error as we have quoted it, is too indefinite for review. It does not call attention to any particular ruling of the trial court.

Complaint is made of the second instruction given by the court. In the motion for a new trial the assignment is made as to all the instructions of the court *en masse*. Under the familiar rule this assignment is bad if any of the instructions complained of be good. No complaint is made of any other.

AFFIRMED.

MRS. J. B. FLANDERS V. LYON & HEALY ET AL.

FILED MARCH 17, 1897. No. 7175.

Replevin: SUBSTITUTION OF PLAINTIFF. In a replevin suit, where the plaintiff has taken the property, it is error to permit a stranger to be substituted for the original plaintiff over defendant's objection.

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

E. R. Duffie, for plaintiff in error.

Daniel L. Johnson, contra.

IRVINE, C.

Lyon & Healy, a corporation, brought this action in replevin before a justice of the peace for a piano, piano stool and cover, claiming the same under a chattel mortgage. The plaintiff gave bond and the property was delivered to it under the writ. Subsequently a motion was filed by Lyon & Healy for leave to substitute P. J. Healy as plaintiff, "for the reason that the note and mortgage on which this action is based have been assigned to said P. J. Healy, who now owns the same." A motion was also filed by P. J. Healy asking on his part that he be made plaintiff instead of Lyon & Healy. These motions were sustained over the objection and exception of the defendant, and Healy substituted for the corporation of Lyon & Healy as plaintiff. The defendant made no further defense and judgment was rendered for the plaintiff. Defendant took error to the district court, assigning as error the substitution of Healy for the corporation. The district court affirmed the judgment of the justice, and the defendant seeks by these proceedings to reverse the judgment of affirmance rendered by the district court. On the one side it is argued that the substitution was made because it appeared that the note and mortgage never had belonged to Lyon & Healy, but to P. J. Healy. On the other it is assumed that there had been a transfer of interest after the institution of the suit. Certain depositions appear in the transcript as filed in the district court, but there was not, and could not at that time have been, any bill of exceptions embodying the evidence before the justice on the hearing of the motion. (*Moline, Milburn & Stoddard Co. v. Curtis*, 38 Neb., 520.) We must therefore proceed upon the assumption that the evidence was such as to justify the action of the justice, if such

an order be under any circumstances proper, and the sole question presented is, therefore, whether under any circumstances a court may properly, against the objection of the defendant, substitute a new party for the plaintiff in an action of replevin where the property has been delivered to the plaintiff under the writ.

Section 144 of the Code provides: "The court may, either before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process, or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party." Under similar provisions it has generally been held that the object of this provision is to cure misjoinders, or non-joinders, and mistakes in the names of parties, and that it does not permit a sole party plaintiff to be dismissed and a new plaintiff substituted. To permit this would be to create a cause of action, perhaps, in the new plaintiff, where none existed in the original plaintiff when the suit was begun. (*Davis v. Mayor of New York*, 14 N. Y., 506; *Leaird v. Moore*, 27 Ala., 326; *Dubbers v. Goux*, 51 Cal., 153; *Gresham v. Webb*, 27 Ga., 320.) There are some cases stating a different rule, but under this the substitution of parties is held not to be a matter of right, but a power to be exercised in the discretion of the court, and it is clear that it should not be exercised where it would operate to the prejudice of the adverse party. (*Strickland v. Bridges*, 21 S. Car., 21; *Hubler v. Pullen*, 9 Ind., 273; *Hanlin v. Baxter*, 20 Kan., 134.) What it was sought to do in this case was not merely to correct a mistake whereby the proper plaintiff had been improperly designated, or to remedy a non-joinder by adding a new plaintiff, but to substitute actually a party claiming ownership to the replevied property for an entirely different party who had seized it under the writ of replevin, and to dismiss the former party from the case. This right is claimed under section 45 of the Code, which provides: "An action does not abate by the death, marriage, or other disability of a party, or by the transfer of any in-

terest therein, during its pendency, if the cause of action survive or continue. In the case of the marriage of a female party, the fact being suggested on the record, the husband may be made a party with his wife; and in the case of the death or other disability of a party the court may allow the action to continue by or against his representative or successor in interest. In case of any other transfer of interest the action may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action." This language is general in its terms, but it does not follow for that reason that it is applicable to a plaintiff in replevin who has taken the property under the writ. Section 430 of the Code is equally general in its terms in permitting a dismissal by the plaintiff without prejudice, but a plaintiff in replevin who has taken the property cannot so dismiss the action without defendant's consent. (*Garber v. Palmer*, 47 Neb., 699.) An action in replevin is peculiar, in that when the plaintiff obtains possession of the property both parties become actors, and a verdict adverse to the plaintiff entitles the defendant to an affirmative judgment against the plaintiff for a return of the property, or for its value if a return cannot be had. The plaintiff in replevin must recover on the strength of his own title. (*Goodman v. Kennedy*, 10 Neb., 270; *Bardwell v. Stubbert*, 17 Neb., 485; *Kavanaugh v. Brodball*, 40 Neb., 875.) If, therefore, one not entitled to the possession of the property takes the same by writ of replevin from the defendant, the defendant not only is entitled in that action to an affirmative judgment against the plaintiff, but that right cannot be defeated by a transfer to a stranger and the substitution of that stranger for the original plaintiff. To permit such a proceeding would be equivalent in all respects to permitting in an ordinary civil action a new defendant to be substituted for the original defendant, without consent of plaintiff, upon a showing that between the old and new defendants there had been made a contract by

which the new had assumed the liability of the old. If Healy was in fact entitled to the possession of the property, he might, under section 50*a* of the Code, intervene and assert his rights as against both plaintiff and defendant. But the plaintiff, who had taken the property and become liable to defendant therefor, if it should result that it was wrongfully taken, cannot dismiss himself from the case and substitute a stranger without defendant's consent.

The judgment of the district court is reversed and the cause remanded, with directions to the district court to reverse the judgment of the justice of the peace, and for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

QUILLER BECK V. STATE OF NEBRASKA.

FILED MARCH 17, 1897. No. 9022.

1. **Criminal Law**: ALIBI. In a criminal case it is error to instruct that the burden of proof is upon the accused to establish an alibi by a preponderance of the evidence. (*Casey v. State*, 49 Neb., 403.)
2. **Conflicting Instructions.** Where the law is incorrectly stated in one instruction, the error is not cured by another which correctly states the law upon the same subject.

ERROR to the district court for Otoe county. Tried below before RAMSEY, J. *Reversed.*

Bane & Altschuler and *L. F. Jackson*, for plaintiff in error.

C. J. Smyth, Attorney General, and *Ed P. Smith, Deputy Attorney General*, for the state.

IRVINE, C.

The plaintiff in error was convicted of grand larceny and sentenced to imprisonment for four years. He brings the judgment here for review.

Among the errors assigned is the giving of the fifth instruction, which is as follows: "You are instructed that one of the defenses interposed by the defendant in this case is what is known in law as an alibi; that is, that the defendant was at another place at the time of the commission of the crime charged in the information, and you are instructed in this connection that such a defense is as proper and legitimate, if proved, as any other, and all the evidence bearing on that point should be carefully considered by the jury; and in this connection you are further instructed as a matter of law that where the state makes out such a case as would sustain a verdict of guilty, and the defendant offers evidence of an alibi, the burden is upon the defendant to prove this defense by a preponderance of the evidence; and when the proof is in, the question for you to determine from all the evidence, both that given for the state and for the defendant, is, is the defendant guilty beyond a reasonable doubt, as charged in the information? And if from all the evidence on the part of the state, and upon the part of the defendant, touching the question of an alibi, then if you have any reasonable doubt of the guilt of the defendant in this case as he stands charged in the information, your verdict should be not guilty." It will be observed that this instruction, among other things, told the jury that with regard to an alibi "the burden is upon the defendant to prove this defense by a preponderance of the evidence." This was error. (*Casey v. State*, 49 Neb., 403; *Gravely v. State*, 38 Neb., 871.)

It is suggested that the instruction as a whole states the law correctly. It is true that in another part of the instruction it is said that if from all the evidence, including that relating to the alibi, there is any reasonable

doubt of the guilt of the defendant, he should be acquitted; but the most that can be said is that the instruction in its different parts is conflicting. An inaccurate or incomplete instruction may be cured if by reference to the rest of the charge the defect is supplied or the law accurately stated; but an absolute misstatement of the law is not cured by a correct statement elsewhere in the charge. (*Wasson v. Palmer*, 13 Neb., 376; *Ballard v. State*, 19 Neb., 609; *Barr v. State*, 45 Neb., 458.)

REVERSED AND REMANDED.

A. B. SLATER ET AL., APPELLANTS, V. JAMES SKIRVING ET AL., APPELLEES.

FILED MARCH 17, 1897. No. 8565.

1. **Res Judicata**: EFFECT OF JUDGMENT: ESTOPPEL. There is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action upon a different claim or cause of action. In the former case a judgment on the merits constitutes an absolute bar to a subsequent action, not only as to every matter offered and received to sustain or defeat the claim but as to any other admissible matter which might have been offered for that purpose. But where the second action is upon a different claim or demand, a judgment in the prior action operates as an estoppel only as to those matters in issue upon the determination of which the finding or verdict was rendered. *Cromwell v. County of Sac*, 94 U. S., 351, followed.

2. ———: EVIDENCE OF ISSUES. Where the record leaves it uncertain as to what issues were adjudicated, extrinsic evidence is admissible in another action for a different object to show on what issue or issues the first case was determined. But extrinsic evidence is not admissible to contradict the record.

3. ———: ESTOPPEL: EVIDENCE. A party may not present issues for determination and avoid the effect of an estoppel by withholding proof thereof.

4. ———: ———: ———. Therefore, where a plaintiff alleges several facts the proof of any one of which entitles him to judgment, and there is a general finding against him, it will be conclusively presumed that each fact so averred was determined against him.

5. ———. Judgment by default was rendered against A and others. At a subsequent term they filed a petition under section 602 to vacate the judgment on the ground that it had been irregularly obtained; that the petition stated no cause of action, and that it had been procured through a fraud upon the jurisdiction of the court. This petition was dismissed on a general finding against petitioners. They then brought an original action to enjoin against the enforcement of the judgment on the ground that it was void, alleging the same matters. *Held*, That each of the matters pleaded in the former proceeding being pertinent to such a proceeding, the judgment in that case made them *res judicata* here.

6. Default: JUDGMENT. Where a defendant is in default the allegations of the petition are to be taken as true against him, except allegations of value and amount of damage; and if the petition states a cause of action, the plaintiff is entitled to judgment without proof except as to the quantum of damages.

APPEAL from the district court of Holt county. Heard below before KINKAID, J. *Affirmed.*

H. M. Uttley and *W. S. Summers*, for appellants.

M. F. Harrington and *J. J. Harrington, contra.*

IRVINE, C.

Skirving brought an action in the district court of Holt county against Slater, Savage & Kelley and one Kemp. A summons was served on Kemp in Holt county, and another, issued to Douglas county, was there served on Slater, Savage & Kelley. Kemp appeared and answered. Slater, Savage & Kelley, who had been sued as a copartnership, appeared specially and procured the service as to them to be quashed. Skirving then amended his petition so as to make the individuals composing the firm of Slater, Savage & Kelley parties defendant, and another summons was issued to Douglas county and there served upon them. Subsequently judgment was rendered by default against Slater, Savage & Kelley, the cause being continued as to Kemp. Slater, Savage & Kelley at the following term of court filed a petition to vacate the judgment under section 602 of the Code of Civil Procedure.

The court dismissed this petition and the case was brought to this court by petition in error, where the judgment of the district court was affirmed. (*Slater v. Skirving*, 45 Neb., 594.) The statement of the case in that opinion is quite full, and reference may be made to it for further facts. After the affirmance of that judgment the present action was instituted as an original action to enjoin the enforcement of the first judgment, on the ground that it is void. The former petition alleged, in brief, as reasons for vacating the judgment, that it was irregularly obtained, that the petition stated no cause of action, and that jurisdiction was obtained by fraud upon the court and upon these plaintiffs. The present petition alleges these same matters, simply with more detail; and further, that the original judgment was procured by perjury. The defendants in this action, by their answer, among other things plead *res judicata*, the judgment dismissing the petition to vacate the original judgment being relied on as an adjudication of the matters here pleaded. It is on this question that the argument chiefly turns.

A circumstance on which some stress is laid in one brief, and of which complaint is made in the other, is that this court in its opinion in the former case referred to the petition as "a petition in equity." This phrase was inadvertently used. An examination of the opinion shows that the case was treated as it was in fact, a proceeding under section 602 of the Code to vacate the judgment. That is a proceeding in the original action, and not a distinct action. (*Iler v. Darnell*, 5 Neb., 192.) We therefore consider this case from the standpoint of the plaintiffs, regarding it not as a proceeding for the same object as the former, instead thereof treating the former proceeding as one supplementary to the original case, merely to vacate the judgment, and this as an original action appealing to the general equity powers of the court to relieve against a void judgment. In another point, also, we proceed from the standpoint of the plaintiffs,

and adopt as a correct expression of the law the language of Mr. Justice Field in *Cromwell v. County of Sac*, 94 U. S., 351: "It should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. * * * But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered." In considering this case in the light of that rule we shall assume for present purposes, without now deciding, first, that the purpose and object of this proceeding are so far different from the purpose and object of the former proceeding that this is to be regarded as an action based on another cause; second, that, therefore, no matter not actually litigated in the former proceeding was adjudicated thereby by implication so as to prevent its determination here. On the other hand, it follows from the rule stated that any issue in fact litigated and adjudicated between the parties in the former proceeding was so adjudicated therein as to estop the parties from relitigating it here. Proceeding on these lines, it will be observed by reference to the former opinion that in that proceeding there were actually litigated and therein determined the questions now presented as to whether the original judgment was rendered during term time or at a time when the court

was actually in session, and whether there was presented such a case of casualty or surprise as to justify relief against the judgment. These matters having been in fact litigated, their determination in the former case adversely to the plaintiffs here bars them from again presenting such matters for determination, because there can be no doubt that the matters complained of justified an order vacating the judgment under the powers conferred by section 602 of the Code, and such matters were not only litigated in the former proceeding, but they were pertinent to that proceeding and properly there determined.

In the former proceeding these plaintiffs also pleaded the facts which they now claim operated as a fraud upon them and upon the jurisdiction of the court. While, perhaps, such a fraud would render the judgment void, and, therefore, open to collateral attack, and if so, perhaps the plaintiffs were not compellable to assert such facts in their former petition, and might have reserved them for use in a collateral attack, still there can be no doubt that they constituted "an irregularity in obtaining the judgment," and "fraud practiced by the successful party in obtaining the judgment." These are both grounds for vacating a judgment under section 602 of the Code. The facts now pleaded with regard to the fraud were, therefore, properly pleaded in the former proceeding, and had they been proved, would have compelled a judgment in favor of these plaintiffs.

The proof offered in this action in support of the plea of *res judicata* consists merely of the pleadings, the judgment having been admitted by the reply in form as pleaded in the answer. This judgment recites that evidence was adduced and contains a general finding "that the facts alleged in the petition of plaintiffs are not true." The general principles governing the pleading and proof of former judgments as estoppels are now quite well settled by so long a line of authorities that it is useless to review them. Generally speaking, in order that a judg-

ment in one action shall operate as an estoppel in a second action, it must be made to appear not only that there was a substantial identity of issues, but that the issue as to which the estoppel is pleaded was in the former action actually determined; and where the record is uncertain, parol evidence is admissible to show what issues were determined in the former suit (see the learned note of Messrs. Hare & Wallace to the Duchess of Kingston's case, in their edition of Smith's Leading Cases), and we think that while the authorities are conflicting, their greater weight is in favor of the view that the burden of proof is upon the party pleading the estoppel to establish the fact of the adjudication by extrinsic evidence if necessary, and not upon the other party to show that an issue which might have been adjudicated was not. But we conceive that sound principle requires that the record should be conclusive so far as it goes, and that extrinsic evidence must be confined to supplementing the record. No evidence is admissible to contradict it. To illustrate: If in the former action the defendant interposed two different pleas and recovered a general verdict, extrinsic evidence would be admissible to show that the verdict was based on one only of these pleas, and that the matter involved in the other plea was not adjudicated, because such evidence merely explains the record, the defendant being entitled to judgment if either of his pleas was good. Again, if the plaintiff sues on two counts stating different causes of action, and the judgment is of such a character that it may have been based on only one count, it is proper to show upon which it was in fact based. But, on the other hand, if the defendant files two pleas, either of which would be good if proved, and the judgment was for plaintiff, then the record shows that both pleas must have been determined adversely to defendant, and to permit extrinsic evidence to show that one plea was abandoned would not supplement the record, but would contradict it. Now, in this case the plaint-

iffs alleged several facts. If they proved any one of these the original judgment should have been vacated. Therefore, a general finding against them necessarily involved a determination adversely to the plaintiffs of each one of those facts. The plaintiffs could not avoid the effect of the estoppel merely by failing to introduce evidence in support of the particular averment in question. If they did not desire an adjudication of that issue they should have amended their petition and struck out the averments in support thereof. But the record on these facts requiring an adjudication of this issue in order to justify the judgment rendered, the plaintiffs are bound, whether or not they saw fit to offer evidence in the former action. (*Ramsey v. Herndon*, 1 McLean [U. S.], 450; *Fisk v. Miller*, 20 Tex., 579; *People v. Supervisors of San Francisco*, 27 Cal., 655; *Underwood v. French*, 6 Ore., 66; 2 Smith, Leading Cases [8th ed.], p. 924; Freeman, Judgments, sec. 272.) In the text-book cited the author intimates that the English rule is to the contrary, and that a party may avoid the effect of an estoppel merely by showing that while he pleaded facts which, if proved, would have resulted in a different judgment, he withheld all evidence tending to prove such facts. The cases cited do not support that view. The leading case is *Seddon v. Tutop*, 6 Term Rep. [Eng.], 607. In that case reliance was not placed on a former determination of the same issue in the pleader's favor. The plea was a former recovery by the adverse party. It clearly appeared that while the plaintiff had taken a default in an action of assumpsit, wherein he had declared in one count upon a promissory note and in another for goods sold and delivered, he had on the inquisition proved only the note. The second action was for the goods. The court held that the first judgment was not a bar. It needs no argument to point out the distinction between pleading a former recovery by one's adversary and pleading a former adjudication in one's favor, but notwithstanding this distinction, *Seddon v. Tutop* has been severely criticised in later cases, and the

opinion of Lord Kenyon in that case discloses that he was striving for a technical reason to support what he states to be the clear justice of the case. *Hadley v. Green*, 2 Tyr. [Eng.], 390, and *Deacon v. Great Western R. Co.*, 6 U. C. C. P., 241, are also cases where the plea was former recovery, and are distinguishable upon the same grounds as *Seddon v. Tutop.* We hold that inasmuch as these plaintiffs in the former proceeding pleaded the facts they now allege, and inasmuch as proof of those facts would have resulted in a determination in their favor, the finding and judgment having been against them, the record conclusively establishes an adjudication of the present issues whether or not any evidence was offered in the former case in support of the issues.

This leaves for consideration merely the allegation that the former judgment was procured by perjury. This was not pleaded in the former proceeding, and assuming as we do, that this is an action for a different object and that it comes within the second branch of the rule in *Cromwell v. Sac County*, the plea of *res judicata* will be assumed not well taken on this issue. But it appears from the record that the original judgment was rendered against these plaintiffs by default. It was held in the former case that the petition stated a cause of action against them. There was, therefore, nothing in issue except the amount of damages, while the perjury now pleaded relates not to the amount of damages, but to the cause of action. The cause of action stood confessed when the judgment was rendered, and while perhaps testimony was taken in support thereof, still the judgment could not have been procured by perjury, because no evidence was necessary to entitle the plaintiff to judgment. There is no implied denial of the allegations of the petition except as to the allegations of value. If an answer had been filed, every averment in the petition not controverted by the answer would be taken as true. (Code of Civil Procedure, sec. 134.) While we are aware that in some quarters an impression prevails that on default

it is necessary for the plaintiff to prove his cause of action, this impression is unfounded in law. If it were true, a failure to answer would operate as a general denial and a party answering would be in a worse plight than one in default. The necessity for proof on default arises only from the last provision of section 134, that allegations of value or of amount of damages shall not be considered as true by failure to controvert them. Except as to the amount of damages Skirving was, on the default of the defendants in the original action, entitled to judgment without evidence, and the record therefore shows that judgment could not have been based on false or perjured testimony except as to its amount, to which it is not alleged that the perjury related. It follows that the judgment of the district court must be

AFFIRMED.

IN RE STATE TREASURER'S SETTLEMENT.

FILED MARCH 18, 1897. No. 9020.

1. **Parliamentary Law:** PROCEEDINGS OF BOARDS. The rule is well settled that, where authority is conferred by law upon three or more persons to execute a public trust or agency, and in the execution thereof all are assembled to deliberate, or had notice and opportunity to be present, the act of a majority is binding unless the statute expressly requires the concurrent action of all.

2. **State Depositories:** BONDS: APPROVAL. To constitute a bank a state depository of public funds it must give a bond for the safe keeping and payment of such deposits and the accretions thereof, conditioned as required by law, and approved by the governor, secretary of state, and attorney general, or any two of them, where all were present and conferred upon the subject.

3. ———: EXCESSIVE DEPOSIT: LIABILITY OF SURETIES. The depositing by a state treasurer of public funds in a state depository bank in excess of one-half of the amount of the penalty of the bond given by said bank will not have the effect to release either the princi-

pal or sureties from their obligation to repay the moneys deposited to the amount of fifty per centum of the bond and the accretions thereof.

4. ———: DEPOSIT BY TREASURER. A deposit of public moneys by a state treasurer in a legally constituted depository for public funds, in compliance with the provisions of the depository law, is in substance and legal effect a loan of the moneys so deposited.

5. ———: ———: TURNING OVER FUNDS. Public funds so deposited and remaining in a state depository at the termination of the office of a state treasurer, he is not required to withdraw therefrom and physically deliver the possession thereof to his successor in office.

6. ———: VALIDITY OF STATUTE. The state depository law is not amendatory of subdivision 8, section 2, article 4, chapter 83, Compiled Statutes, in such a sense as to render it inimical to section 11, article 3, of the constitution.

SUBMISSION of controversy relating to settlement between the outgoing state treasurer and his successor in office. *Opinion.*

John H. Ames, for J. S. Bartley.

C. J. Smyth, Attorney General, and *Ed P. Smith, Deputy Attorney General*, for J. B. Meserve.

NORVAL, J.

This is a submission to this court without action, under the provisions of section 567 of the Code of Civil Procedure, upon an agreed statement of facts, accompanied with the necessary affidavit of merit, of a controversy between J. S. Bartley, late state treasurer, and J. B. Meserve, his successor in office, to determine matters of difference relating to the settlement between the outgoing treasurer and the incoming officer. The stipulation of facts discloses that at the expiration of said Bartley's term of office certain of the current funds belonging to the state were on deposit in a number of state and national banks, all but four of which then, as well as at and prior to the depositing of the moneys therein by said Bartley, it is conceded, were duly constituted state depositories under and in pursuance of the provisions of the

act of the legislature entitled "An act to provide for the depositing of state and county funds in banks," the same being chapter 50, Laws, 1891 (Compiled Statutes, ch. 83, art. 13, secs. 3*a*-3*g*); that the other four banking institutions doing business within the state, to-wit, First National Bank of Plattsmouth, First National Bank of Lincoln, First National Bank of Greenwood, and the Buffalo County National Bank of Kearney, for the purpose of complying with the provisions of said law and constituting them state depositories to hold state moneys, each had given to the state a bond in due form, which had been approved by the secretary of state and attorney general alone and not by the governor, although he was present at the time the decision to approve said bonds was made; that said Bartley deposited in each of certain of the state depositories which had given bonds as required by law more than fifty per centum of the amount of the bond given by it, and that said Bartley refuses to withdraw from each and all of the several state depositories, and physically deliver to said Meserve, any of the current funds of the state on deposit therein.

The following questions are presented for our consideration and adjudication:

1. Is a bond conditioned and signed as by law required, which has been approved by the secretary of state and attorney general alone, and afterwards deposited in the office of the auditor of public accounts, sufficient to constitute the bank giving such bond a state depository, within the meaning of the act to which reference has been had, or is the approval of the governor indispensable to the validity of such bond, he having met with the secretary of state and attorney general for the purpose of considering, and did consider, such bond, and was present when the decision to approve the bond was reached, but dissented therefrom?

2. Did the fact that said Bartley deposited in a lawful state depository moneys of the state in excess of fifty per centum of the penalty of the bond given by such bank

release the principal or sureties on said bond as to the fifty per centum thus deposited?

3. Are the current funds duly deposited by a state treasurer, in accordance with law, in regularly constituted state depositories, and which remained on deposit therein at the time of the expiration of the term of such officer, to be considered and regarded as in the state treasury in such a sense as that the said funds are not required by law to be produced by the outgoing treasurer and the physical possession thereof delivered to his successor in office?

Attention will be given to these propositions in the order in which they have been stated. Section 1 of the legislative enactment already mentioned, known as the "Depository Law," provides, *inter alia*, for the depositing and keeping on deposit, in banks of approved standing, moneys belonging to the several current funds in the state treasury. Section 3 declares that "for the security of the funds so deposited under the provisions of this act the state treasurer shall require all such depositories to give bonds for safe keeping and payments of such deposits and accretions thereof, which bond shall run to the people of the state of Nebraska, approved by the governor, secretary of state, and attorney general." The section prescribes the conditions which the bond shall contain, and sets out the form of the bond, after which the section reads thus: "The treasurer shall not have on deposit in any bank at any one time more than one-half of the amount of the bond, given by said bank, said bond shall be deposited with and held by the state auditor." It will not escape notice that by the portion of the section above quoted the governor, secretary of state, and attorney general are the three persons designated by their names of office to approve the bonds of state depositories, and that as to the bonds given by four of the banks claimed to be such depositories, but two of the three officers designated in the law joined in their approval. The present state treasurer insists that it was

indispensable to a valid execution of the authority conferred, that all three of the officers named should act together and all concur in exercising such power. It is a familiar rule of law, and one which has been applied in numerous cases, that where a body or board is constituted by law to decide upon matters of public interest, in the absence of a provision to the contrary, a majority of its members may act, if all were present and consulted, or at least were duly notified of the time and place of meeting. In such case the act of the majority is the act of the body. (*People v. Coghill*, 47 Cal., 361; *State v. Wilkesville Township*, 20 O. St., 288; *Ex parte Rogers*, 7 Cow. [N. Y.], 526; *State v. James*, 4 Wis., 408; 19 Am. & Eng. Ency. of Law, 465, and numerous authorities there cited.) In note 1 on page 466 of the last authority it is said: "The dispatch of public business is not to be prevented, and the interest of the public is not to suffer, because one or more members after being notified are unable to attend. If all have been duly notified, it is a meeting of all the persons, and if a majority of the whole number attend, it is competent for that majority to do any act, or exercise any power conferred by law to the body collectively, as respects those who cannot, who neglect to, or who refuse to attend, it is the same as if they had attended and dissented from the act of those who were present." The same doctrine has been recognized and applied in *People v. Peters*, 4 Neb., 254, *Hopkins v. Scott*, 38 Neb., 661, and *State v. Bemis*, 45 Neb., 724. In the case last cited there was under consideration section 145, chapter 12*a*, Compiled Statutes, 1895, entitled "Cities of the Metropolitan Class." This section provides for the appointing of a board of fire and police commissioners for each city of the metropolitan class "by the governor, commissioner of public lands and buildings, and attorney general, sitting as an appointing board, of which the governor shall be *ex officio* chairman." In pursuance of said provision, the last two officers named, sitting as a board, previous notice of the meeting having been given to the governor, but

who refused to attend, appointed three fire and police commissioners for the city of Omaha. This court held the action of the two state officers as binding as if each member of the board had participated and joined in the making of the appointment. The present chief justice, in the course of his opinion in that case, observed: "It is argued that the concurrent action of the three state officers named in the act is essential to a valid appointment thereunder, hence the selection of the new board at such meeting in the absence of the governor is without authority and void; but to that proposition we cannot give our assent. On the contrary, it is clear that the presence and participation of the governor was not indispensable, he having been notified of the meeting and requested to attend. The action of the majority is, under the circumstances, the action of the board, and equally binding as if all had attended and expressly assented thereto." After citing the authorities upon the proposition, the opinion continues: "The reason upon which the doctrine rests is that public interest shall not be prejudiced by the neglect or caprice of a single member of a public body in failing or refusing to attend upon sufficient notice of its meetings; but where the law expressly requires the concurrent action of all the members of a board or body, all must participate therein, although that rule has no application to the act under consideration, which does not expressly, or by implication, require the action of all the members of the appointing board."

The learned attorney general, on behalf of Meserve, the respondent, insists that the opinion from which the foregoing excerpts were taken is not in point on the question now before us, since the statute construed in that case distinctly provided that three certain state officers should constitute a board for the appointment of fire and police commissioners, while section 3 of the depository law does not constitute the governor, secretary of state, and attorney general a board for the approval of bonds of state depository banks. It is obvious that the difference between

the two acts exists as suggested. While there is no provision in the depository law, nor in any language used therein, from which an inference may be properly drawn that a board is created out of the three executive state officers therein mentioned, or that said officers shall act as a body when considering depository bonds submitted for approval, it does not necessarily follow that the case is not controlled by the principle underlying the decision in *State v. Bemis, supra*, or that the legislature intended to require that a bond given by a bank seeking to become a depository of state funds should be approved by each of the three state officers as a condition precedent to the validity of such bond. On the contrary, our investigation of the subject satisfies us that it was not necessary that all three of the state officers should have concurred in the act of approving said bonds, but that the act of the majority was sufficient, all of them having met and conferred together. The rule is well settled that where authority is committed to three or more persons to perform a public duty or trust, if they all meet for the purpose of executing it, a majority may decide. The authorities all so hold, and the attorney general has cited no case, nor after diligent search have we been able to find a single one, which conflicts therewith. In support of the proposition that the act of a majority is sufficient, see Mechem, Public Officers, sec. 572, and cases cited. (*Crocker v. Crane*, 21 Wend. [N. Y.], 211; *Woolsey v. Tompkins*, 23 Wend. [N. Y.], 324; *Darge v. Horicon Iron Mfg. Co.*, 22 Wis., 691; *Jewett v. Alton*, 7 N. H., 253; *Patterson v. Leavitt*, 4 Conn., 50.)

An early case is *The King v. Beeston*, 3 Term Rep. [Eng.], 592, in which the church wardens and overseers, with the consent of a majority of the parishioners, were by statute authorized to contract for the support of the poor. The overseers and all but one of the church wardens joined in making a contract, and he declined to do so. The contract was upheld. Lord Kenyon, C. J., said: "A contract has been entered into in which the parish at large is concerned, and which the act of parliament has enabled the

parish officers with the concurrence of the parish to enter into, and the question is whether one obstinate man, in opposition to all the rest of the parish, in an act in which they are more interested than he is, shall be able to defeat their purpose. * * * In common understanding what is required to be done by the church wardens and overseers is satisfied by being done by a majority."

A case similar to the last one is *Withnell v. Gartham*, 6 Term Rep. [Eng.], 388, where a power was conferred upon the vicar and church wardens to appoint a school master, and it was held that the vicar and a majority of the church wardens might lawfully act. Lawrence, J., in his opinion, says: "In general it would be the understanding of a plain man that, where a body of persons is to do an act, a majority of that body would bind the rest."

Williams v. School District, 21 Pick. [Mass.], 75, was an action to recover back the sum of $21.91 paid by plaintiff for a school district tax, claimed to have been illegally levied, because the assessment was made by only two of the three assessors; the other, although duly notified, refused to attend and act in assessing the tax. Shaw, C. J., in passing upon the objection observed: "It appears by the case that the other assessor received notice and was requested to act with them, but refused to do so. Where a body or board of officers is constituted by law to perform a trust for the public, or to execute a power or perform a duty prescribed by law, it is not necessary that all should concur in the act done. The act of the majority is the act of the body. And where all have due notice of the time and place of meeting, in the manner prescribed by law, if so prescribed, or by the rules and regulations of the body itself, if there be any, otherwise if reasonable notice is given, and no practice or unfair means are used to prevent all from attending and participating in the proceeding, it is no objection that all the members do not attend, if there be a quorum. In the present case all three having had notice and an opportunity to act, the act of two is sufficient."

In *Horton v. Garrison*, 23 Barb. [N. Y.], 176, the last paragraph of the syllabus reads thus: "The rule that when an authority is to be exercised by several officers, they must all concur in its exercise, or all meet and consult and a majority agree to the act, is subject to the qualification that if one is notified to attend, and refuses, it is the same as if he had attended and dissented to the act of the majority."

There was involved in *Louk v. Woods*, 15 Ill., 256, the existence of a public highway. In pursuance of the provisions of the road law of Illinois, three persons were appointed to view the ground, locate the road, and report their action to the county court. The report upon the location of the highway in question was signed by two of the three viewers alone, and for this reason the trial court rejected as evidence said report. The ruling was reversed on a review of the case. Scates, J., in delivering the opinion of the court, says: "The general rule laid down on this subject is that where a number of persons are intrusted with powers in matters of public concern, and not of mere private confidence, and all of them are regularly assembled and consulting, the majority may act and determine, if their authority is not otherwise limited and restricted." The same doctrine in a case similar in its facts was stated in *Babcock v. Lamb*, 1 Cow. [N. Y.], 238.

By an act of the congress of the United States, the governor and judges of the supreme court of the territory of Michigan were empowered to lay out the town of Detroit, adjust claims to lots therein, and give deeds for the same. Under and in pursuance of such act, the three judges of the supreme court alone executed a deed conveying a lot in Detroit to the Detroit Young Men's Society. Subsequently, in *Scott v. Detroit Young Men's Society's Lessee*, 1 Doug. [Mich.], 119, the validity of said conveyance was assailed on the ground, among others, that the governor did not join with the judges in executing the deed. The court upheld the validity of the conveyance, and in passing upon the question used this language: "As a general

proposition, it is undoubtedly true, that where several persons are appointed to execute a power or trust, and no authority is given to a less number than the whole to act, all must join in its execution. A distinction is drawn, however, between a mere private trust or power and a power of a public nature, conferred by law, in the execution of which, it is contended, that a majority have a right to act. If all are present to deliberate, although a majority only assent to the act, it is unquestionably sufficient. * * * And, in this case, in the absence of proof to the contrary, it will be presumed that the governor was present and consulted with the judges touching the grant and conveyance to the Detroit Young Men's Society of the lot in question."

By section 5 of article 4 of the constitution of the state of Ohio it is provided: "District courts shall be * * * held in each county therein at least once in each year, * * * provided that the general assembly may, by law, authorize the judges of such district to fix the times of holding the courts therein." The legislature of that state, by section 7 of the act of March 29, 1856, in relation to the time of holding courts, authorized the judges of the district court to appoint special terms for good cause at such times as they shall determine, on giving thirty days' previous notice thereof. Three of the five judges of the district court of the fourth judicial district signed an order calling a term of court in and for Cuyahoga county, one of the counties comprising said judicial district, and due notice of said order was given, and the term of court was held at the time appointed. In *Merchants v. North*, 10 O. St., 251, it was urged that the term of court so held was illegal, because a mere majority of the judges of the district court joined in the order calling the same. This contention was overruled, the court holding, in accordance with well established principles of law recognized in analogous cases, that where all of the judges were notified of the time and place of the meeting at which the appointment of the special term was deter-

mined upon, the concurrent action of the majority of the judges was legal and binding.

A case in point upon the question under consideration is *People v. Nichols*, 52 N. Y., 478. That was an application for a peremptory *mandamus* against the respondent as comptroller of the state of New York, to compel him to draw a warrant upon the state treasurer in favor of relator for the sum of $20,000, in payment of certain relics of George Washington. The legislature appropriated that sum for the purchase of the relics, the act providing that the money was to be paid to Mrs. Washington upon the certificate of three persons named in the act, Martin Grover, the chancellor of the university, and J. Carson Brevort, that the relics were genuine, and that in their opinion it was desirable that they should be placed in the museum of the state library. The three persons designated met, one of them refused to certify, and the other two signed the required certificate, which was presented to the comptroller and a warrant for the money demanded. The warrant was refused, upon the sole ground that all did not join in the certificate. The court held that the procuring of the certificate required by the act was a condition precedent to any right to the money, and that the certificate signed by two of the three persons designated was sufficient.

Section 113, chapter 11, General Statutes, p. 195, authorized any railroad company to cross the line of any other railroad and provided, in case of a disagreement between the corporations as to the amount of compensation to be made therefor, or the place and manner of such crossing, that the same should be determined by commissioners to be chosen in the mode prescribed by law. Section 97 of the same chapter empowered the county judge to select six disinterested freeholders of the county, whose duty it was made to determine the matters aforesaid, and make report in writing to him, but it contained no provision that a less number than all the commissioners could act. Under said sections, six commissioners

were duly appointed for the purpose of assessing the damages accruing to the Union Pacific Railway Company by reason of the crossing of its tracks by two other railroad companies, as well as designating the place and manner of crossing. The commissioners proceeded in the discharge of their duties, and made report in writing to the county judge, which was signed by four of them alone. The validity of their report was assailed in the case of *Union P. R. Co. v. Burlington & M. R. R. Co. in Neb.*, 1 McCrary [U. S. C. C.], 452, upon the ground, among others, that all the commissioners did not sign. Judge McCrary, in the course of his opinion, said: "The law upon this subject is that where authority is vested in three or more persons to determine a public question or matter of public concern, a majority have power to decide, provided all act on the matter. If the matter be one of private concern all must concur, unless provision is made for a decision by a less number. * * * That the condemnation of a right of way in the exercise of the power of eminent domain is a public matter within the rule is not only clear, under the authorities, but also upon principle, since the proceedings can be justified only upon the ground that the land should be taken for public use for the public interest."

The principle deducible from the numerous authorities on the subject is that where three or more persons are entrusted by law with powers of a public character or nature, and in the execution thereof all of them are assembled, or have been duly notified of the time and place of meeting, the decision of the majority is binding, whether the statute authorizes a majority to act or is silent. Applying this rule to the facts before us, it is very evident that the approval of the governor was not essential to the validity of the bonds of the depository banks, since he was present with the other two state officers when the bonds were approved.

Is the bond of a state depository invalidated by the depositing of a sum of money therein by the state treas-

urer in excess of fifty per cent of the amount of the penalty of the bond given by the bank? Neither in the briefs nor upon oral arguments at the bar was this question discussed by counsel, and, therefore, according to precedents, the court might ignore it, notwithstanding it is raised by the record; but we shall not do so. The principle which should control our decision upon this feature of the case has already been recognized and applied by the court in *McAuley v. Cooley*, 45 Neb., 582, 47 Neb., 165. It is disclosed by that case that J. H. Cooley and George A. Bently formed a trading copartnership. By the terms of the articles, the total amount of capital was limited to $3,000, and said Bently was to have charge of and manage the business. W. S. McAuley and Charles S. Furer executed a bond with Bently conditioned for the due and faithful performance by the latter in and concerning the business in which the firm was engaged. After the giving of the bond, the capital was increased to $5,000. In an action on the bond, it was held that the sureties thereon were not released from their obligation by such increase in the amount of capital invested. It requires no argument to show the application of that decision to the facts under consideration. The depository law has fixed the maximum sum which the treasurer shall have on deposit in any bank at the same time at one-half of the amount of the bond executed by the bank. This is a limitation not only upon the power of the treasurer to deposit, but restricts the bank from demanding a larger sum than one-half of the penal sum named in the bond. Were it not for this limitation, unquestionably a depository bank and the sureties upon its bond would be liable, in case of a breach of its conditions, to the extent of the full penalty written in the bond. If the treasurer exceeds his duty by depositing a larger sum in a depository bank than he is authorized by law to do, it does not affect the liability of such bank and the sureties on its bond to repay to the state the sum deposited therein in strict conformity to the requirements of the depository law and the accretions

thereof. (See *Taylor v. Standard Life & Accident Ins. Co.*, 47 Neb., 673.)

We now pass to a consideration of the remaining question, whether it was the duty of Bartley to have drawn from the state depositories, and paid over to his successor, all moneys therein belonging to the state at the close of his term. By the eighth subdivision of section 2, article 4, chapter 83, Compiled Statutes, relating to the duties of the state treasurer, it is provided: "He shall account for and pay over all moneys received by him as such treasurer to his successor in office, and deliver all books, vouchers, and effects of office to him, and such successor shall receipt therefor." If this section stood alone upon the statute relating to the duties of that officer, and there was no other legislation on the subject, there would be more force to the argument advanced by the attorney general, that it was the intention of the legislature to require a retiring state treasurer to turn over, to hand over, to deliver the physical possession of, the moneys belonging to the state to his successor. It has been for many years a matter of public notoriety that in the settlements between the different state treasurers payments have been seldom, if ever, made in specie or lawful money, but have been almost invariably effected through the agency of certificates of deposit, checks, and bank drafts. We know, too, in the same way, that for many years it has been the custom of state treasurers to deposit state funds in banks for the private gain of the officer depositing the same. It was these matters, doubtless, which prompted the legislature to pass the law entitled "An act to provide for the depositing of state and county funds in banks," generally known as the depository law, and under which the funds in dispute were placed in banks. It is therefore to that piece of legislation, when construed with reference to its general scope and object, that we must look to ascertain the duties of the state treasurer in the premises. By section 1 of said law (Compiled Statutes, 1895, ch. 83, art. 13,

sec. 3*a*) it is made the duty of the state treasurer to deposit, and at all times to keep on deposit in state or national banks, or some of them transacting business within the state, and of approved standing and responsibility, the moneys in his hands belonging to the several current funds in the state treasury, subject to payment on his check, and the bank is required to pay for the use of such funds not less than three per cent per annum upon the amounts so deposited. The next section fixes the basis for computing such interest, when the same shall be paid and credited to the state, and for the keeping by every such depository separate accounts of the several funds of the state as may be deposited. The third section of the law has been sufficiently set forth in the first part of this opinion. Section 4 provides: "The making of profit, directly or indirectly, by the state treasurer out of any money in the state treasury belonging to the state, the custody of which the state treasurer is charged with, by loaning, depositing, or otherwise using it, or deposing [?] the same in any manner, or the removal by the state treasurer, or by his consent, of such moneys, or a part thereof, out of the vault of the treasurer's department, or any legal depository of the same, except for the payment of warrants legally drawn, or for the purpose of depositing the same in the banks selected as depositories under the provisions of this act, shall be deemed guilty of felony, and on conviction thereof shall be subject to punishment in the state penitentiary for the term of not more than two years, or a fine not exceeding five thousand ($5,000) dollars, and shall also be liable under and upon his official bonds for all profits realized from such unlawful using of such funds. And it is hereby made the duty of the state treasurer to use all reasonable and proper means to secure to the state the best terms for the depositing of the money belonging to the state consistent with the safe keeping and prompt payment of the funds of the state when demanded." (Session Laws, 1891, p. 350, ch. 50, sec. 4.) The provisions of said sections were be-

fore this court for consideration in *State v. Bartley*, 39 Neb., 353, where it was held that the depositing of public funds in bank under the depository law is, in substance and legal effect, a loan and investment of the moneys so deposited. We quote what we then said in the opinion on this subject: "Does the statute attempt to authorize the loaning or investing of these trust funds? Counsel for relator contends that it does not; that it merely requires their deposit temporarily for safe keeping, pending need for use or opportunity for permanent investment. This construction would be a reasonable and proper one if the deposit contemplated by the statute was a special one merely for safe keeping, and that the same identical money should be returned. But this is not the kind of deposit the legislature meant. If it was, the purpose is not indicated in the title of the act, since it makes no reference to the safe keeping of the funds deposited in banks. It is manifest, from an examination of the entire act, that a general deposit of the funds was what the framers intended. True, the first section declares that 'the state treasurer shall deposit, and all times keep in deposit for safe keeping,' in the banks that shall be designated as depositories, the moneys in his hands belonging to the several current funds, subject to payment on the treasurer's check; but further along, in the same section, the bank receiving and keeping such deposit is required to pay the state not less than three per cent per annum upon the amounts so deposited; and the next section provides, among other things, in substance, that the interest shall be computed on the average daily balances of the public moneys kept on deposit. While the statute mentions 'safe keeping,' when the several provisions are construed together it is quite clear that the transaction contemplated does not amount to a special deposit. Whoever heard of that kind of a deposit of money being paid out on checks, or of a banking institution paying for the privilege of holding a special deposit of funds? The identical moneys deposited are not re-

quired to be returned. Obviously, the bank receiving them had the right to use and control the money as its own. It could loan the funds for the purpose of earning the money with which to pay the stipulated interest due the state. A deposit of state funds, under the provisions of the law, amounts to a loan or investment of the funds so deposited." After citing, commenting upon, and quoting from numerous authorities from this and other courts, the opinion continues as follows: "The conclusion is irresistible that the framers of the law under review contemplated that the moneys deposited in pursuance of the provisions thereof should be retained by the bank receiving the same for an indefinite period of time and be used and loaned by it as its own, the bank being under obligation to repay the amount so deposited on the presentation of the check of the state treasurer. There is no room for doubt that where money is deposited under this act, the bank receiving the same is not a bailee, which would be the case if the title to the money remained in the state after the same was received by the bank."

Under the depository law, public funds are required to be deposited by the treasurer on open account, subject to payment on the presentation of the check of the treasurer. The depositing of the moneys of the state in a depository bank by the treasurer in pursuance of law is, in legal effect, a loan of such moneys to the bank, and the relation of debtor and creditor is thereby created, not between the bank and the treasurer, but between the former and the state, since the money thus deposited belonged to the state, and not to the treasurer, its agent and representative. A depository bank being the state's debtor for all funds deposited therein in compliance with law, all sums so remaining on deposit at the close of Mr. Bartley's term were not moneys in his hands in such a sense as he was bound at his peril to produce them in making settlement with his successor. He was under no more obligation to do that than he was required to pay over to his successor the amounts represented by any unpaid past due county

bonds or other securities belonging to the permanent school fund. No one will contend that in the case of the bonds the outgoing officer is compelled to turn over the money to his successor, where none has been paid or collected. The law, his bond, and official oath, everyone will agree, would be satisfied by the delivery of the bonds. The county is the debtor of the state to the extent of the amount due on such bonds, and the depository bank is indebted to the state for the amount of its public funds remaining on deposit, and the production and delivery of proper evidences of the true condition or state of the account ought to answer the requirements of the statute. This view is strengthened by section 11 of the depository law (Session Laws, 1891, ch. 50, sec. 11), which provides: "That no treasurer shall be liable on his bond for money on deposit in bank, under and by direction of the proper legal authority, if said bank has given bond," as well as by section 4 already quoted. By the provisions of which section it is made a penitentiary offense for a state treasurer to withdraw moneys deposited in a legal state depository "except for the payment of warrants legally drawn, or for the purpose of depositing the same in the banks selected as depositories under the provisions of this act." Construing said section literally, the treasurer has no right to demand the return of moneys in a depository bank, except for two objects, neither of which is to make settlement with his successor. We do not wish to be understood as intimating that he might not lawfully draw the funds for the purpose last stated prior to the expiration of his term, but what we do decide is that he is not liable for a failure so to do. Certainly Mr. Bartley, after he had retired from office, had no right to check out the funds, since they did not belong to him, and he is no longer the representative of the state. If it is the duty of an outgoing state treasurer to produce the cash for the amount of funds deposited in bank according to law, it likewise follows he must make good to the state the moneys lost, without his fault, in a depository bank. Such a holding

would be in the teeth of the statute. Whether a treasurer is liable for the loss of funds deposited by him in an insolvent depository, where he at the time had knowledge, or by the exercise of reasonable care could have ascertained, that such bank would not promptly pay the money on demand, it is unnecessary to decide, as no such question is presented by the stipulation of facts. It will not be amiss to here call attention to the fact that in two cases we have, in effect, held that the proper officers approve not only the bonds, but the depositories as well. (See *State v. Bartley*, 39 Neb., 353; *State v. Owen*, 41 Neb., 651.)

It is contended that in case the depositories, upon the surrender by Mr. Bartley of his office, were unable to pay the funds belonging to the state, and Mr. Meserve should accept the accounts in settlement instead of the cash, any loss of those funds would fall upon the latter, and *Bush v. Johnson County*, 48 Neb., 1, is cited to sustain the proposition advanced by the attorney general. No such question is presented by this record, nor was it passed upon in the case just mentioned. There an incoming county treasurer accepted from his predecessor in office a certificate of deposit issued by a bank for the amount thereof, instead of coin or currency, and it was held that the former and his sureties were chargeable therewith. The facts in that case arose before the depository law, and hence the decision has no bearing upon the point under consideration. In *City Savings Bank of Detroit v. Huebner*, 84 Mich., 391, it was held that the designation of a county depository for the public funds is valid until the expiration of the term of office of the county treasurer, and until a new designation is made by his successor and the board of auditors, which they should make as soon as convenient after the new officer enters upon the discharge of his official duties, and that until such new designation is made it is obligatory upon the treasurer to deposit the public funds in the existing depository or depositories. The opinion in that case neither contains the law therein con-

strued, nor is the substance of any of its provisions given. Assuming that the depository law of Michigan, like our own, contains no provision as to the length of time a bank which has been designated a depository of public funds remains such depository, and that court has given it the proper interpretation, yet the decision mentioned is not a precedent for holding that this outgoing treasurer is required to withdraw the funds from the depositories and deliver the physical possession of the same to his successor, since in that event it would be the duty of the latter, under that decision, to redeposit the moneys in the same depositories until such time as new ones were designated and their bonds were approved by the proper officers. The effect of the Michigan case is, not that all dealings with state depositories are to be wound up at the end of the treasurer's terms, but when new depositories have been properly designated after the new treasurer has qualified and entered upon the discharge of the duties of his office.

It is finally contended that if the construction we have placed upon the statute should obtain, then the depository law is inimical to section 11, article 3, of the constitution, in that it is amendatory of subdivision 8, section 2, article 4, chapter 83, Compiled Statutes, relating to the duties of the state treasurer, and does not contain the section so amended, nor repeal the same. This objection is not well taken. To give the subdivision mentioned a literal rendition would make it the duty of a state treasurer to pay over "all moneys received by him as such treasurer to his successor in office," though he may have paid the same out on warrants properly drawn upon the treasury, which would be absurd. He is, of course, only required to pay over the moneys unaccounted for "and effects of office to him." If the word "effects" is not broad enough to require the delivery of bonds and other securities belonging to the state permanent school fund, there is no statute making it the duty of a treasurer to deliver them to his successor. But they are embraced within the term

"effects," and so are moneys loaned to state depositories. It follows that the depository law is not repugnant to the constitution as being amendatory of the eighth subdivision of said section 2 of the statute. Judgment will be entered in accordance with this opinion.

JUDGMENT ACCORDINGLY.

MILDRED E. IVES ET AL., APPELLANTS, V. H. B. IREY, COUNTY TREASURER, ET AL., APPELLEES.

FILED APRIL 21, 1897. NO. 7154.

1. **Municipal Corporations:** JURISDICTION: ORDINANCES. It is competent for a city, in the absence of constitutional or statutory restrictions upon its powers, to prescribe by ordinance the means by which it may acquire jurisdiction over a particular subject.
2. ———: SIDEWALKS: ORDINANCES. An ordinance of a city authorizing the council thereof, by resolution, to require the construction of sidewalks in front of, and adjacent to, any premises situated upon any street, and which provides for notice to property owners by the publication of such resolution, is not directory merely, but mandatory; and a strict compliance therewith is essential in order to confer upon the city authority to charge private property with the cost of such improvements.
3. ———: VOID SPECIAL ASSESSMENTS: INJUNCTION. A court of equity will restrain the sale of land in satisfaction of a void special assessment. (*Touzalin v. City of Omaha*, 25 Neb., 817; *Bellevue Improvement Co. v. Village of Bellevue*, 39 Neb., 876.) *Wilson v. City of Auburn*, 27 Neb., 435, distinguished.

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

The opinion contains a statement of the case.

Lake, Hamilton & Maxwell, for appellants:

The resolution requiring the construction of the sidewalk in controversy not having been published, the action

of the city in laying the walk and in levying the assessment therefor was illegal and void. (*City of Dubuque v. Wooton*, 28 Ia., 573; *Starr v. City of Burlington*, 45 Ia., 87; *Roche v. Dubuque*, 42 Ia., 250; *Buckley v. City of Tacoma*, 37 Pac. Rep. [Wash.], 442; *McGavock v. City of Omaha*, 40 Neb., 82; *Scammon v. City of Chicago*, 40 Ill., 146; *Rork v. Smith*, 55 Wis., 67; *Johnson v. City of Oshkosh*, 21 Wis., 186; *Cowen v. Village of West Troy*, 43 Barb. [N. Y.], 52; *Leach v. Cargill*, 60 Mo., 316; *Brewster v. City of Newark*, 11 N. J. Eq., 114; *Newberry v. Fox*, 33 N. W. Rep. [Minn.], 333; *Leach v. Cargill*, 60 Mo., 317; *Kilcy v. Oppenheimer*, 55 Mo., 374; *Williams v. Mayor*, 2 Mich., 561; *Welker v. Potter*, 18 O. St., 85; *Hewes v. Reis*, 40 Cal., 255; *Sewall v. St. Paul*, 20 Minn., 511; *Ormsby v. City of Louisville*, 20 Am. Law Reg., 269; *Shaw v. Williams*, 87 Ind., 158; *Bryant v. State*, 16 Neb., 651.)

Where a special assessment for an improvement is for any reason void, injunction may be granted against its enforcement. (*Touzalin v. City of Omaha*, 25 Neb., 817; *Bellevue Improvement Co. v. City of Bellevue*, 39 Neb., 877; *Morris v. Merrell*, 44 Neb., 424; *City of Omaha v. Megeath*, 46 Neb., 503; *Smith v. City of Omaha*, 50 Neb., 883.)

W. J. Connell and *Lee S. Estelle, contra.*

Reference: *Wilson v. City of Auburn*, 27 Neb., 435.

POST, C. J.

This was an action in the district court for Douglas county by the plaintiffs, Mildred E. Ives and Virginia Druien, to restrain the sale by defendant Irey, as county treasurer, of the southeast quarter of the northwest quarter of section 29, township 15, range 13, in said county, in satisfaction of a special assessment in the sum of $436.56, for the constuction of a sidewalk on the north side of Park street adjacent to said premises, in the city of Omaha. The district court, upon a final hearing of the cause, found generally for the defendants, and entered a

decree dismissing the petition of the plaintiffs, from which the latter have prosecuted an appeal to this court.

The facts essential to an understanding of this controversy may be briefly stated as follows: In the month of September, 1890, a resolution was adopted by the council, and approved by the mayor of the city of Omaha, requiring the construction of a wooden sidewalk in front of the property described, within fifteen days from and after the publication thereof. Said resolution was not published in any manner, although the following notice was printed in the official newspaper of the city for three days, to-wit, November 23, 24, and 25, 1890:

"Notice is hereby given to the owner or owners of the following real estate in the city of Omaha to lay and repair sidewalks in front of and adjoining their property within fifteen days from the 23d of November, 1890. Such sidewalks to be constructed, laid, and repaired in accordance with plans and specifications on file in the office of the board of public works, and in accordance with resolutions adopted by the city council, to-wit: * * * North side of Park street, southeast one-quarter of the northwest one-quarter of section 29, township 15, range 13, 6 feet, present grade. P. W. BIRKHAUSER,

"Chairman of the Board of Public Works."

In the month of December, 1890, one Burns, claiming to act under and by virtue of a contract with the city, laid the sidewalk in question and for which the city council subsequently levied the special assessment complained of. Said assessment was by Henry Bolln, as treasurer of the city, reported to the defendant Irey, county treasurer, by whom the property was advertised for sale, with the result stated. Plaintiffs are non-residents, and had no actual notice of the proceedings which led to the construction of the sidewalk until some time in the month of March, 1891. Power is by section 69 of the charter of the city of Omaha (Compiled Statutes, ch. 12*a*, entitled "Cities of the Metropolitan Class") conferred upon the mayor and council to construct and repair sidewalks, and to

require the construction thereof by property owners within said city, although no method is by statute prescribed for the exercise of the power thus conferred. It must, however, be conceded that in the absence of a special provision upon the subject, proceeding by ordinance is at least an appropriate means of giving effect to the legislative intent. The city council, acting upon the authority conferred by the provision of statute, to which reference has been made, provided by ordinance as follows:

"Sec. 3. Whenever the city council may deem it expedient it may by resolution require the sidewalk in front of or adjacent to any premises along any street within the city to be constructed, widened, or repaired. * * * The board of public works is hereby directed to take the necessary steps to have the said work done by the owners in conformity to such plans and specifications, rules, and regulations as said board may require, and in the event of the failure of the owners to have such walks built, to cause the same to be laid by the contractor who shall have been awarded the contract for the construction of sidewalks. * * *

"Sec. 4. Said board shall cause a copy of said resolution to be published in the official paper of the city three times a week for one week, * * * and such publication shall be deemed good and sufficient notice to the owner or owners of the property in front of, abutting on, or adjacent to which such sidewalk is to be constructed, widened, or repaired. * * *

"Sec. 5. All sidewalks shall be constructed, widened, or repaired by the owner or owners of the property in front of, abutting on, or adjacent to which the same are ordered, in the manner required by this ordinance, within fifteen days after the completion of the publication of said resolution * * * as above required.

"Sec. 6. If at the expiration of fifteen days from the publication of said notice as above required the sidewalk ordered constructed, widened, or repaired shall not be

constructed, widened, or repaired, as by this ordinance required, and in strict accordance with the requirements prescribed by the board of public works, then said board shall direct the sidewalk contractor to immediately construct, widen, or repair such walk, and it shall be the duty of such contractor to do said work without unnecessary delay." (See Connell's Revised Ordinances of the City of Omaha, ch. 62, secs. 3-6.)

The first and only one of the several propositions discussed by appellants which need be noticed at this time is that the provision made by ordinance for publishing the resolution therein contemplated is mandatory, and a compliance therewith essential in order to charge property with the cost of the proposed improvement. It is without doubt competent for the city, except when prohibited by restrictions of its character, to prescribe by ordinance the steps essential in order to acquire jurisdiction over a particular subject. (*City of Dubuque v. Wooton*, 28 Ia., 571; *Roche v. City of Dubuque*, 42 Ia., 250; *Starr v. City of Burlington*, 45 Ia., 87; *Welker v. Potter*, 18 O. St., 85; *Williams v. City of Detroit*, 2 Mich, 560; *Kiley v. Oppenheimer*, 55 Mo., 374; *Leach v. Cargill*, 60 Mo., 317; *Buckley v. City of Tacoma*, 37 Pac. Rep. [Wash.], 442; *Hewes v. Reis*, 40 Cal., 255; 1 Dillon, Municipal Corporations [3d ed.], sec. 308; 2 Dillon, Municipal Corporations, sec. 811.) In *Dubuque v. Wooton, supra*, a case in point, the court, per Beck, J., make use of the following pertinent language: "We hold that the publication of the resolution prescribed in the ordinance is necessary in order to authorize the city to enforce, in any manner, the collection of the tax. The ordinances of the city are laws equally binding upon the city and the citizens. They cannot be dispensed with by the city when rights are secured under them or the exercise of power by the city is regulated by them, or power itself, conferred by the charter, flows through them. The city, if these laws require preliminary proceedings or acts necessary to the acquisition of power or rights in particular cases, cannot dispense with their requirements."

The reasoning employed in the opinion, from which we quote the foregoing, fairly illustrates the prevailing sentiment, if, indeed, there can be said to exist a diversity of opinion on the subject. The authorities cited also fully sustain the contention that the provision here involved is not directory merely, but mandatory, and that a strict compliance therewith is a condition precedent to the exercise of the taxing power by the city. We are referred by counsel for appellees to section 144 of the revenue law (Compiled Statutes, ch. 77), by which it is, among other things, provided: "No injunction shall be granted by any court or judge in this state to restrain the collection of a tax, or any part thereof, hereafter levied, nor to restrain the sale of any property for the non-payment of any such tax, except such tax, or the part thereof enjoined, be levied or assessed for an illegal or unauthorized purpose." That provision, it was said in *Wilson v. City of Auburn*, 27 Neb., 435, does not relate to taxes for general purposes alone, but is also applicable to special assessments of the character here involved. We are, however, of the opinion that the limitation thereby imposed upon the powers of courts of equity, so far at least as it relates to special assessments, embraces those charges only which are voidable on appeal or other direct proceedings by reason of irregularities in the assessment or levy, and not such as are void for want of jurisdiction to make the assessment. The statute, in so far as it relates to taxes for general purposes, may be said to be declaratory of the rule which forbids interference by the courts to prevent the apportionment of that which is in a general sense recognized as an equitable burden upon all property subject to taxation. One who appeals to equity for relief against such a charge will, as a condition to the granting of relief sought, be required to show that he has discharged his objection to the state by contributing his just share of the public revenue. But there is in this class of cases no antecedent obligation, and no sufficient reason has been suggested for extending the inhibition of the statute to assessments confessedly

void, and which could by no efflux of time ripen into valid obligations. The views here expressed are not without support in the decisions of the courts of this and other states. (See *Touzalin v. City of Omaha*, 25 Neb., 817; *Beaser v. City of Ashland*, 89 Wis., 28; *Dietz v. City of Neenah*, 91 Wis., 422; *Balfe v. Lammers*, 109 Ind., 347; *City of Terre Haute v. Mack*, 139 Ind., 99.) The precise grounds alleged for the relief sought in *Wilson v. City of Auburn*, *supra*, are not indicated by the reported decision, further than that they appear to have involved irregularities merely in the proceedings antecedent to the assessments, and not the omission of steps having the force and effect of jurisdictional process. That case is accordingly, on principle, distinguishable from one like this in which the attempted assessment is absolutely void by reason of the failure to observe some mandatory requirement of statute.

The decree is reversed and the cause remanded to the district court for further proceedings therein not inconsistent with this opinion.

REVERSED.

WENCEL KLIMENT ET AL. V. GEORGE F. CORCORAN, ADMINISTRATOR.

FILED APRIL 21, 1897. No. 7144.

1. **Intoxicating Liquors: DAMAGES: ACTION BY WIDOW: EVIDENCE.** An action by a widow for damage suffered in consequence of the furnishing to her deceased husband of intoxicating liquor cannot be defeated by proof that such liquors were furnished by the defendant, a licensed saloon-keeper, with the knowledge and consent of the plaintiff. (*Gran v. Houston*, 45 Neb., 813.)

2. **Instructions: ASSIGNMENTS OF ERROR.** Where several instructions are grouped in a single assignment of the motion for a new trial, they will be examined so far only as is necessary to determine whether any one of them was rightly given or refused.

3. **Intoxicating Liquors: DAMAGES: ACTION BY WIDOW: EVIDENCE.** In an action for the sale of liquor by the defendant, a licensed saloon-keeper, to the plaintiff's deceased husband, evidence tending to prove that deceased was, in consequence of the wrong alleged, reduced from a prosperous business man to a condition bordering upon imbecility and financial insolvency *held* properly admitted.

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

The opinion contains a statement of the case.

Simpson & Sornborger, for plaintiffs in error:

The wife having procured intoxicating liquors and furnished them to her husband, thus contributing to the injury of which she complained in her petition, should not be permitted to recover in this action. (*Kearney v. Fitzgerald*, 43 Ia., 580; *Elliott v. Barry*, 34 Hun [N. Y.], 129; *Rosecranz v. Shoemaker*, 60 Mich., 4; *McDonald v. Casey*, 47 N. W. Rep. [Mich.], 1104; *Regret v. Bell*, 77 Ill., 593; *Engleken v. Hilger*, 43 Ia., 563; *Brooks v. Cook*, 38 Am. Rep. [Mich.], 282.)

Billingsley & Greene, also for plaintiffs in error.

Reese & Gilkeson, contra.

POST, C. J.

This was an action in the district court for Saunders county, wherein the defendant in error's intestate, Amelia Kratky, as the widow of Florian V. Kratky, deceased, sued to recover from the defendants below, Kliment, Widman, and Simodynese, separately engaged as licensed saloon-keepers, the cause of action alleged being the furnishing to the plaintiff's said husband of intoxicating liquors in sufficient quantities to, and which did in fact, cause the latter to become an habitual drunkard. It is further in substance charged that the said Florian Kratky was, previous to the acts complained of, a healthy,

industrious, and capable man, upon whom the plaintiff was altogether dependent for means of support, and who was engaged in the practice of a profession from which he derived an income of $1,500 per year, but that he was in consequence of the drunkenness so produced unable to transact any business for more than three years last preceding his death, which occurred at the age of forty years, as the result of the defendants' aforesaid wrongful acts, whereby the plaintiff was deprived of her means of support to her damage, etc. There was a verdict and judgment for the plaintiff in the sum of $2,000, and from which the defendants prosecute error to this court.

Evidence was introduced tending to prove that the plaintiff below, during the period of such alleged disqualification, contributed to the intoxication of the deceased by procuring for him liquor at his request, and that she, on one or more occasions, drank liquor with him in public. Upon the evidence thus adduced the court was requested to charge that contribution by the plaintiff to her own injury, in the manner indicated, would constitute a complete defense to the cause of action alleged by her, and the refusal to so charge is now assigned as error. Counsel, in their discussion of the question thus presented, review at considerable length the cases from other states, which, it must be confessed, apparently lend support to the proposition contended for. But whatever view we might feel constrained to adopt of the subject as an original proposition, the question is certainly not now an open one in this jurisdiction. In *Buckmaster v. McElroy*, 20 Neb., 557, the voluntary purchaser of intoxicating liquor was held to be within the protection of the statute providing that "the person so licensed shall pay all damages that the community or individuals may sustain in consequence of such traffic," etc. The doctrine of that case was reasserted in *Curtin v. Atkinson*, 36 Neb., 110; and in *Gran v. Houston*, 45 Neb., 813, was applied to a state of facts in all essential respects identical with those here presented. It follows that the instruction was rightly refused.

The next exception to which our attention is directed relates to the giving of instruction No. 2 at the request of the plaintiff below. But the only reference to that instruction in the motion for a new trial is found in the following assignment: "The court erred in giving instructions numbered 1, 2, 3, 4, 5, and 6 on the motion of the plaintiff." Where several instructions are grouped in the same assignment of the motion for a new trial or petition in error, they will, in accordance with the oft-asserted rule of this court, be examined so far only as to determine whether any one of them was rightly given or rightly refused, as the case may be. It is not pretended that the court erred in giving each of the paragraphs above mentioned, while, on the other hand, those numbered 1, 3, 4, and 5, it must be conceded, accurately state the law of the case. The assignment does not, therefore, present for determination the soundness of the instruction relied upon for a reversal of the judgment.

Exception was also taken to the ruling of the district court in permitting plaintiff below to prove the value of the family homestead and amount of incumbrance thereon at the time of the death of her said husband. There is no error in the ruling assigned. The evidence to which the exception applies was supplementary, merely, of facts elicted by defendants to prove the amount and value of Kratky's estate as bearing upon the question distinctly presented by the pleading, whether the plaintiff had in fact been injured in her means of support in consequence of the wrongs alleged by her. Moreover, the theory upon which the cause was prosecuted by the plaintiff was that the deceased had been, within the period named, through the acts of defendants, reduced from a prosperous business man of good credit to a condition bordering on imbecility and financial insolvency. The evidence in question was in that view of the record certainly not irrelevant to the issues, and its admission affords no ground of complaint.

JUDGMENT AFFIRMED.

NORFOLK STATE BANK, APPELLEE, V. PETER SCHWENK, IMPLEADED WITH WESTERVELT, HAYES & YOST, APPELLEES, AND CHARLES FOSTER, APPELLANT.

FILED APRIL 21, 1897. No. 7238.

1. **Marshaling Assets:** LIEN UPON TWO FUNDS. Equity will require a creditor having a lien upon two funds, upon one of which alone another creditor has a subordinate lien, to first exhaust the fund to which he alone is entitled.

2. **Homestead:** LOT. The term "lot" is employed in the statute exempting homesteads to heads of families in its popular sense, and denotes a parcel of land within the limits of a city or village as surveyed and platted.

APPEAL from the district court of Madison county. Heard below before ROBINSON, J. *Reversed.*

Campbell & Wallis, for appellant.

Wigton & Whitham, *Barnes & Tyler*, and *Powers & Hays*, *contra.*

POST, C. J.

This was an action by the plaintiff, the Norfolk State Bank, in the district court for Madison county, for the foreclosure of a mortgage executed by the defendants Schwenk and wife upon the north half of lot 1, in block 4, of Haase's Suburban Lots, in the city of Norfolk, and to which the firm of Westervelt, Hayes & Yost, George N. Beels, the Chicago Lumber Company, the Norfolk National Bank, Valentine Blatz, and Charles Foster were also made defendants. A decree was in due time entered awarding to Westervelt, Hayes & Yost a first lien upon the premises described, by reason of a judgment in said court against Schwenk, the mortgagor, in the sum of $131.15; to the plaintiff a second lien, by reason of the mortgage above described, in the sum of $465.33, and to the defendant Foster a third lien, by reason of a judgment

against said Schwenk, then of record in said court, for $470.74. The judgment of Westervelt, Hayes & Yost was rendered April 12, 1888, and that of Foster on April 29, 1890, while the plaintiff's mortgage was executed October 10, 1890. The judgment first mentioned is, it is conceded, a lien upon the whole of lot 1 above described, and Foster, in his cross-petition, prayed for an order requiring Westervelt, Hayes & Yost to exhaust the south half of said lot in satisfaction of their said claim before resorting to the property chargeable with both judgments. But the court declined to grant the relief thus sought, which ruling is made the first ground of complaint on this appeal. Courts of equity have long assumed to so marshal assets coming within their jurisdiction as to require a creditor having the right to resort to two or more funds, upon one of which alone another creditor has a junior lien, to first exhaust the funds upon which the latter has no claim. (*Cheesebrough v. Millard*, 1 Johns. Ch. [N. Y.], 409; *Stevens v. Cooper*, 1 Johns. Ch. [N. Y.], 425; *Hayes v. Ward*, 4 Johns. Ch. [N. Y.], 123; *Evertson v. Booth*, 19 Johns. [N. Y.], 486; *Ingalls v. Morgan*, 10 N. Y., 178; Story, Equity Jurisprudence, sec. 633.) Appellees Westervelt, Hayes & Yost, while conceding the foregoing proposition, insist that the case at bar is, upon the evidence adduced, within a recognized exception to the rule stated, viz., that equity will not interfere to control the action of the paramount creditor where the effect thereof will be to materially hinder or delay him in the enforcement of his lien. We are, however, unable to determine that any substantial injury will result to the appellees named by requiring them to first exhaust Schwenk's interest in the south half of the lot in question. In the recent case of *Gotzian v. Shakman*, 89 Wis., 52, which involved a state of facts substantially similar to those here presented, the true test is said to be that applied in *Evertson v. Booth, supra*, viz., whether the marshaling of the securities in the interest of the junior lien "will endanger the prior creditor or in the least impair his right

to raise his debt out of both funds." There would be, it is true, some delay as the natural and necessary result of the order sought by appellants, although there will thereby, as said in *Gotzian v. Shakman, supra*, be no diminishing of security. The facts from which the appellees named argue that they would be prejudiced if required to first proceed against the south half of the lot are that Schwenk and wife, on the 1st day of March, 1890, executed in favor of the Farmers Loan & Trust Company two certain mortgages upon the premises last described, to-wit, a first mortgage for $1,500 and a second or commission mortgage for $225; that suit was subsequently brought for the foreclosure of the last mentioned mortgage, to which appellees Westervelt, Hayes & Yost were not made parties, which resulted in a decree of foreclosure, upon which the property therein described was, on the 30th day of May, 1893, sold to the mortgagee above named for the sum of $400, and which sale was in due form confirmed on the 15th day of November, 1893. But a sufficient answer to that argument is that appellees' judgment was recognized as a lien prior to the decree under which the property was sold, and the loan and trust company having purchased subject thereto, is presumed to have assumed the indebtedness thereby represented. It is noticeable, too, from the record that the amount deducted from the value of the premises on account of appellees' judgment was $248.05, whereas the amount due thereon was, as we have seen, $113.15 only. We conclude from an examination of the entire record that the case made is one for the application of the rule above stated, and that the district court should have allowed the order sought by appellant.

It is also contended by appellant that his judgment should have been awarded priority over the plaintiff's mortgage. But for that contention there is no foundation in the record. Lot No. 1 was at all times between the months of January, 1888, and January, 1891, occupied as the homestead of the defendant Schwenk and family.

It is, however, argued that because said lot exceeds in dimensions those in other portions of the city, it is not within the protection of section 1, chapter 36, Compiled Statutes, entitled "Homesteads." There is no question respecting the value of said property, nor is it denied that it corresponds in size to other suburban lots within the same addition, being 118 feet in width by 368 feet in length. The property which the statute exempts as a homestead in favor of the head of a family is 160 acres of land outside the limits of a city or village, or a quantity of contiguous land not exceeding two lots within any incorporated city or village. It is a matter of common observation that city and village lots vary in size, uniformity being the exception rather than the rule, even within the same corporate limits. The term "lot" is, it seems, employed in the statute cited in its popular sense, and denotes the subdivision of a city or village as surveyed and platted. (*Wilson v. Proctor*, 28 Minn., 14.)

For reasons above stated, the order denying appellant's motion is reversed and the cause remanded for further proceeding in the district court not inconsistent with this opinion.

REVERSED AND REMANDED.

WILLIAM HENRY V. STATE OF NEBRASKA.

FILED APRIL 21, 1897. No. 8991.

1. **Homicide.** Whoever kills another while engaged in the perpetration, or attempted perpetration, of any rape, robbery, arson, or burglary is, by section 3, Criminal Code, declared to be guilty of murder in the first degree.

2. ———. It is in such case, in order to sustain a conviction for murder in the first degree, not essential that the killing be such as, in the absence of the statute, would amount to murder as distinguished from manslaughter.*

*Further discussion of this subject and reference to many authorities will be found in *Morgan v. State*, 51 Neb., 692.

3. **Criminal Law**: EVIDENCE: JURY. The jurors are, under our practice, judges of the probative force of the evidence.

4. ———: INSTRUCTIONS: DISCREDITING DEFENSE. It is error in a criminal prosecution for the trial court to discredit a particular defense by advising the jury that it is one "easily fabricated, that it has occasionally been successfully fabricated, and that the temptation to resort to it as a spurious defense is very great, especially in cases of importance."

5. ———: PROOF OF ALIBI. It is not essential that the proof of an alibi should include the entire period during which the offense might possibly have been committed but will entitle the accused to an acquittal whenever the evidence is sufficient to create in the minds of the jurors a reasonable doubt of his presence at the commission of the offense with which he stands charged. (*Casey v. State*, 49 Neb., 403.)

6. ———: CONTRADICTORY INSTRUCTIONS. An erroneous instruction is not cured by the mere giving of another on the same subject contradicting it. (*First Nat. Bank of Denver v. Lowry*, 36 Neb., 290.)

ERROR to the district court for Gage county. Tried below before STULL, J. *Reversed.*

R. D. Sutherland, *C. E. Bush*, and *J. E. Bush*, for plaintiff in error.

C. J. Smyth, *Attorney General*, and *Ed P. Smith*, *Deputy Attorney General*, for the state.

POST, C. J.

The plaintiff in error, William Henry, was by the county attorney of Jefferson county, jointly with one Zimmerman, charged with the crime of murder in the first degree. A change of venue was, on his motion, allowed to Gage county, where a separate trial was had, resulting in a verdict of murder in the second degree and sentence to imprisonment in the penitentiary for a term of ten years, which judgment it is sought to reverse by means of this proceeding. The information, in apt language, charges the defendants therein with fatally shooting the deceased, Russel S. Graham, purposely and of their deliberate and premeditated malice, with intent him, the said Graham, thereby to kill and murder.

The first assignment of error to which our attention is directed by the argument of counsel for plaintiff in error relates to the giving of the following instruction on the court's own motion: "The court instructs you that the crime of murder in the first degree is committed when a person of sound memory and discretion unlawfully, purposely, and with deliberate and premeditated malice, kills another person in the peace of the state, or in the perpetration, or attempt to perpetrate any rape, arson, robbery, or burglary, shall unlawfully kill another person in the peace of the state. In this case, if you find from the evidence, beyond a reasonable doubt, that the defendant William Henry unlawfully, purposely, and of deliberate and premeditated malice, killed Russell S. Graham, on or about the 5th day of June, 1895, in the county of Jefferson and state of Nebraska, or if you find from the evidence, beyond a reasonable doubt, that in the perpetration, or attempt to perpetrate, a robbery or burglary, William Henry unlawfully killed Russell S. Graham, on the 5th day of June, 1895, in the county and state aforesaid, in the manner and form charged in the information, then you should find the defendant guilty by your verdict, and in that event you should find by your verdict what the penalty shall be, whether the defendant shall suffer death or shall be imprisoned in the penitentiary during his natural life." The contention of counsel, as we understand their position, is that in order to authorize a verdict of murder in the first degree, when the homicide is shown to have been committed in the perpetration, or attempted perpetration, of a rape, robbery, arson, or burglary, it is not sufficient that the killing be unlawful in the sense that it would, in the absence of the statute hereafter cited, warrant a conviction on the charge of manslaughter, but must be such as to amount to murder in the first or second degree. In other words, they contend that so much of section 3 of the Criminal Code as provides that if any person "in the perpetration, or attempt to perpetrate, any rape, robbery, arson, or burglary

* * * kill another, * * * every person so offending shall be deemed guilty of murder in the first degree," should be construed to mean if any person murder another, etc. But to that argument a sufficient answer is that the legislature has not so enacted, but has, on the contrary, declared that whoever kills another in the perpetration, or attempted perpetration, of either of the enumerated felonies shall be deemed guilty of murder. In so doing the legislature has, in the language of an eminent exponent of the criminal law, merely drawn its lines around the particular combination thus included under a penalty. (1 Bishop, Criminal Law, sec. 776.) "Where," as said by the same author, "the law forbids a defined combination of act and intent and provides a penalty for the violation of the inhibition, it establishes a distinct or specific crime." (1 Bishop, Criminal Law, sec. 599.) With such frequency has the rule as thus stated been applied in the administration of the criminal law, that its soundness may be said to be generally recognized in this country. (*Smith v. State*, 34 Neb., 689; *Graves v. State*, 45 N. J. Law, 204-358; *Moynihan v. State*, 70 Ind., 126; *Buel v. People*, 78 N. Y., 492.)

Although the evidence has not been preserved by means of a bill of exceptions, it is apparent that there was an attempt to establish an alibi, and with respect to which the court, in general terms, charged that it was sufficient for the purpose of the defense relied upon if the jury, from a consideration of all the evidence, entertained a reasonable doubt of the presence of the accused at the commission of the homicide. It also, at the request of the state, gave the following instructions, which are now assigned as error:

"9. The effect of an alibi, when established, is like that of any other conclusive fact presented in a case, showing, as it does, that the party asserting it could not have been present at the time of the homicide, and therefore did not participate in it, is, when credited, a defense of the most conclusive and satisfactory character. The fact, how-

ever, which experience has shown, that an alibi, as a defense, is capable of being and has been occasionally successfully fabricated, that even when wholly false its detection may be a matter of very great difficulty, and that the temptation to resort to this as a spurious defense may be very great, especially in cases of importance. These are considerations attendant upon this defense which call for some special suggestions upon the part of the court. These are that while you are not to hesitate at giving this as a defense full weight, that conclusive effect to which, when established, it is justly entitled, either as entirely satisfying you of the innocence of the defendant or as creating the reasonable doubt which entitles the defendant to an acquittal, still you are to scrutinize the testimony offered in the support of an alibi with care, that you may be satisfied that a fabricated defense is not being imposed upon you.

"10. The court instructs you that the defendant, William Henry, to establish an alibi, must not only show that he was present on the south side of the Republican river, between the towns of Franklin and Riverton, in Franklin county, state of Nebraska, at the time when the murder was committed at Bower post-office, Jefferson county, Nebraska, but also that said William Henry was at some point between the said towns of Franklin and Riverton, in Franklin county, Nebraska, such a length of time that it would be impossible for him to have been at Bower post-office, Jefferson county, Nebraska, where the murder was committed.

"11. The court instructs you that a defendant, to establish an alibi, must not only show he was present at some other place about the time of the alleged crime, but also that he was at such other place such a length of time that it was impossible for him to have been at the place where the crime was committed."

The inquiry, in the absence of a bill of exceptions, is whether the foregoing instructions are applicable to any evidence admissible to support the charge of the informa-

tion. It was said in *Casey v. State*, 49 Neb., 403, that an alibi is a legitimate defense and should not be disparaged by the trial court, the sufficiency of the evidence for the purpose of establishing such defense being a question of fact for the jury. We are aware that instructions in substantially the language employed in paragraph No. 9 have received the approval of courts of the highest standing. We are, however, unable to conceive of any sound reasons for cautionary instructions with respect to an alibi which do not apply with equal force to any other defense. Although it is true, as said by the district court, that an alibi "is a defense which has been frequently fabricated, that even when wholly false its detection may be difficult, and that the temptation to resort to it as a spurious defense may be great," it is a fact, abundantly attested by the observations of every judge experienced in the administration of the criminal law, that attempts to fabricate self-defense as a justification, or to simulate insanity as an excuse, are not less frequent or successful than like impositions with respect to an alibi. Instruction No. 9 would, it is conceded, be defensible in those jurisdictions where it is permissible, in charging the jury, to comment upon the evidence. But that it is within the province of the judge under our practice, by means of cautionary instructions, to discredit a particular defense or the evidence in support of a particular proposition we cannot admit, since witnesses are by no known rule of law or logic presumed to be less truthful simply because they testify concerning an alibi. In *Sater v. State*, 56 Ind., 378, it is said of an instruction of similar import that "Taken altogether it tends too strongly to cast suspicion upon an alibi as a defense, and to prejudice the minds of the jury against such defense. It seems to have been intended, too, by it to lay down a more rigorous rule for the consideration of evidence tending to prove an alibi than was required as to the other evidence in the cause." (See, also, to the same effect, *Line v. State*, 51 Ind., 172; *Spencer v. State*, 50 Ala., 124; *Simmons v. State*, 61 Miss., 243; *Nelms*

v. State, 58 Miss., 362; *Dawson v. State*, 62 Miss., 241; *Murphy v. State*, 31 Fla., 166; *People v. Kelly*, 35 Hun [N. Y.], 295.)

We are also of the opinion that the court erred in giving instructions numbered 10 and 11, by which the burden was imposed upon the accused of proving his presence in Franklin county for such length of time that it was impossible for him to have been present at the commission of the homicide. It follows logically, if not necessarily, from the decisions of this court that the proof of an alibi is not required to cover the entire period within which the offense might possibly have been committed, but that the accused is entitled to an acquittal whenever the evidence is sufficient to create in the minds of the jurors a reasonable doubt of his presence at the commission of the offense with which he stands charged. (*McLain v. State*, 18 Neb., 154; *Casey v. State, supra.* See, also, *Kaufman v. State*, 49 Ind., 248; *Stuart v. People*, 42 Mich., 255; *Pollard v. State*, 53 Miss., 410; *State v. Jaynes*, 78 N. Car., 504; *Albritton v. State*, 94 Ala., 76; *Caffery v. State*, 94 Ala., 76; *Bennett v. State*, 17 S. W. Rep. [Tex.], 545; *Beck v. State*, 51 Neb., 106.) The attorney general, while not defending the instructions to which the foregoing criticism is directed, argues that the giving thereof is at most error without prejudice, in view of the fact that the rule was correctly stated in the general charge of the court. It is true, as counsel contend, that instructions should be construed together, and if when so considered they fairly embody the law of the case, the fact will afford no ground for reversal that one or more of the expressions used, separately construed, might appear to be erroneous. (*St. Louis v. State*, 8 Neb., 405; *Murphy v. State*, 15 Neb., 383; *City of Lincoln v. Smith*, 28 Neb., 762; *Debney v. State*, 45 Neb., 856.) The rule thus stated is, however, but a modification of the doctrine recognized in all jurisdictions, that the giving of inconsistent and contradictory instructions with respect to a material proposition is reversible error, since it is, in general, im-

possible to determine whether the jury in their deliberations have followed the good or the bad one. Or, to use the language of NORVAL, J., in *First Nat. Bank of Denver v. Lowrey*, 36 Neb., 290, "An erroneous instruction is not cured by the mere giving of another on the same subject contradicting it." To the same effect, also, are *Wasson v. Palmer*, 13 Neb., 377; *Frederick v. Ballard*, 16 Neb., 559; *Carson v. Stevens*, 40 Neb., 112. And the rule applied in the cases cited is especially applicable to the case of an erroneous specific direction following a correct general instruction. (*Pittsburgh, C. & St. L. R. Co. v. Krouse*, 30 O. St., 222.) The giving of instructions 10 and 11 is error requiring a reversal of the judgment, whatever may have been the evidence tending to prove the alibi relied upon, since to no conceivable state of facts can the direction therein be held applicable.

REVERSED.

NATIONAL BANK OF BATTLE CREEK, MICHIGAN, V. J. L. MILLER ET AL.

FILED APRIL 21, 1897. No. 7207.

1. **Res Judicata:** NOTE: CONSIDERATION. Defendants *held* not estopped by a former judgment pleaded to allege the failure of consideration for the notes sued on.

2. **Negotiable Instruments:** FRAUD: ACTION BY INDORSEE: BURDEN OF PROOF. Where, to an action upon a promissory note by an indorsee thereof, the defense interposed is fraud or illegality in the inception of the contract, the burden is upon the plaintiff to prove that he is a *bona fide* holder for value, but where the only defense is the failure of consideration, or the like, the burden is upon the defendant to overcome the presumption that the note was transferred before due for value in the usual course of business. (*Violet v. Rose*, 39 Neb., 660; *Kelman v. Calhoun*, 43 Neb., 157.)

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

George B. France, for plaintiff in error.

F. C. Power, contra.

POST, C. J.

This was an action by the plaintiff in error, the National Bank of Battle Creek, Michigan, in the district court for York county upon two promissory notes executed by the defendants therein, J. L. Miller and M. G. Koons, for $175 each, under date of July 29, 1885, and payable to the order of Nichols, Shepard & Co. The defendants answered alleging failure of consideration and breach of the warranty of a certain separator and steam power for which the notes in suit, with four others of like amounts, were given. The plaintiff replied alleging (1) the purchase of the notes described in good faith before the maturity, for value, in the usual course of business; (2) that the defendants, on the 10th day of April, 1889, in an action then pending in said district court, wherein the said Nichols, Shepard & Co. were plaintiffs, recovered judgment for the identical breach of warranty herein alleged as a defense. A trial of the issues thus joined resulted in a verdict and judgment for the defendants, from which the plaintiff prosecutes error.

In the printed briefs submitted by counsel is found an exhaustive discussion of the doctrine of *res judicata* as applied to the facts of this case, each party relying upon the judgment rendered in the former suit as an estoppel. It is, however, in the view we take of the record, unnecessary to examine that question at length in this connection, since whatever may be the effect of that adjudication upon the right of the plaintiff to maintain this action, it is certainly not available as an estoppel against the defendants. It is sufficient, without setting out the pleadings introduced in evidence, that the ground upon which defendants successfully resisted the former action was that the machine above described was entirely worth-

less, and that the consideration for said notes had in consequence thereof wholly failed. True, there was in that case a counter-claim for freight paid and for time and money expended in attempting to operate the machine in question, upon which there was a verdict and judgment for the defendants therein in the sum of $200. There was no claim on account of the notes here involved, which were, by the charge of the court, also in evidence, expressly excluded from the consideration of the jury. Had defendants in that action sought by means of their counter-claim to recover the amount of these notes on the ground that they had been negotiated or otherwise converted by Nichols, Shepard & Co., there would have existed a more substantial foundation upon which to rest the claim of estoppel as against them. But it cannot, upon the record as made, be seriously contended that the former judgment is conclusive of the question of the consideration for the notes which are the subject of this action.

Among the instructions given by the court on its own motion, and to which exception was taken by the plaintiff, is the following: "Under the issues as joined by the pleadings the burden of proof is upon the plaintiff to prove by a preponderance of the evidence that before the said notes became due and payable, and for a valuable consideration, the said Nichols, Shepard & Co. sold, indorsed, assigned, and transferred said notes to the plaintiff; that said notes have not been paid, and that the plaintiff is an innocent holder thereof." The foregoing instruction is in direct conflict with the rule asserted in *Violet v. Rose*, 39 Neb., 660, and *Kelman v. Calhoun*, 43 Neb., 157, viz., where to an action on a promissory note by an indorsee thereof the defense interposed is fraud or illegality in the inception of the instrument, the burden is upon the plaintiff to prove that he is a *bona fide* holder for value, but where the defense is the failure of consideration, or the like, the burden is upon the defendant to overcome by proof the presumption that the note was trans-

ferred before due for value in the usual course of business. The rule thus stated was announced after a careful review of the decisions of this court, and is without doubt the essence of previous utterances on the subject. It follows that in giving the instruction quoted the district court erred, for which the judgment must be reversed and the cause remanded.

REVERSED.

NORVAL, J., not sitting.

CHICAGO LUMBER COMPANY, APPELLEE, V. CHARLES ANDERSON ET AL., IMPLEADED WITH MAX WINTHER, APPELLANT.

FILED APRIL 21, 1897. No. 7239.

1. **Subrogation.** The right of subrogation must in every case rest upon some recognized subject of equitable cognizance. (*Bohn Sash & Door Co. v. Case*, 42 Neb., 281.)
2. **Mechanics' Liens: MORTGAGES: PRIORITIES.** Evidence examined, and *held* to sustain the decree appealed from.

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

Kennedy, Gilbert & Anderson, for appellant.

Bartlett, Baldrige & De Bord, contra.

POST, C. J.

This was an action by the plaintiff, the Chicago Lumber Company, in the district court for Douglas county, to foreclose an alleged mechanic's lien upon the north 36 2-3 feet of lot 4 and the south 36 2-3 feet of lot 3, Winther's subdivision of lot 60, Oklahoma Addition to the city of Omaha. To said action Charles Anderson, who owns the legal title of the property described, his wife, Mary Anderson, Pat-

rick S. Casey and wife, Max Winther, the Mutual Investment Company, the Michigan Mutual Life Insurance Company, the Kennard Glass & Paint Company, P. C. Christainson, and Alexander McCargar were made defendants. The allegations of the petition are, in substance, that the plaintiff company, on the 7th day of January, 1891, and at divers times between said date and the 30th day of May following, furnished and delivered to the said Charles Anderson upon said premises, pursuant to a verbal contract previously made, lumber and other building material, particularly described, of the value of $1,045.68, and of which there remains due and unpaid a balance of $814.53. Also, that the plaintiff, on the 2d day of July, 1891, and within four months after the furnishing of such material, filed in the office of the register of deeds of Douglas county an itemized account thereof, duly verified, and claiming a lien upon said premises for the aforesaid balance. Answers were in due time filed by the several defendants, of which that of Winther alone calls for notice in this connection. Said defendant, after a statement which is in effect a general denial, alleges the execution to him of a purchase money mortgage upon the premises by one Musselman, under date of February 28, 1887, to secure the note of the mortgagor named, in the sum of $1,312. He further alleges that on the 28th day of January, 1891, the defendant Anderson, who had by *mesne* conveyances acquired title to the mortgaged premises, represented to him that he, Anderson, was desirous of securing a loan from the Mutual Investment Company for the purpose of enabling him to improve said property, but that he was unable to obtain such loan on account of the aforesaid prior mortgage, then of record; that said Anderson further represented said property to be free from liens, except the mortgage aforesaid; that, relying upon said statement, he accepted in lieu of the said prior note and mortgage, on which there was a balance of $600 then due, the three notes of Anderson for $200 each, payable in one, two, and three years after date,

secured by mortgage of even date therewith, and at the same time canceled and satisfied of record the mortgage herein first described. The sole purpose of the transactions above noted was, as he alleges, to enable Anderson to consummate the desired loan by means of a first mortgage, and, in the language of the pleader, "his said debt remains due as aforesaid, and said mortgage given to secure its payment is a valid and first subsisting lien upon said property and each parcel thereof * * * superior to any lien of the plaintiff and each and all of the defendants except the Mutual Investment Company." The district court, upon a final hearing, found generally for the plaintiff, and by its decree adjudged the mechanic's lien above described to be prior in equity to Winther's mortgage, and from which the latter alone appeals.

As we understand the contention of appellant, it is that the transaction of January 28 amounted to no more than a mere change of the evidence of indebtedness, whereby Anderson's own obligation was substituted for the Musselman note and mortgage, which the former had expressly assumed, and that by an application of the doctrine of equitable subrogation the last mentioned security should, for the purpose of this controversy, be regarded as a continuing lien. But the right of subrogation, it has been said, must in every case rest upon some recognized subject of equitable cognizance. (*Bohn Sash & Door Co. v. Case*, 42 Neb., 281; *Scieroe v. Homan*, 50 Neb., 601.) Tested by that rule, the claim of appellant appears to be without merit. His act in releasing the prior mortgage, whether prompted by a purpose to strengthen his security by means of the contemplated improvement or a desire to accommodate Anderson, was altogether voluntary on his part. True, it is alleged that Anderson represented the premises to be free from incumbrance aside from the Musselman mortgage. But it is not charged that the appellant relied upon such statement; or that he was ignorant of the fact that a lien had in fact

attached in favor of the plaintiff as against Anderson by the delivery upon the premises of material exceeding $600 in value; nor is he more fortunate in his proof. There is, indeed, no evidence in the record tending to prove that the transaction in question was other than that which, upon its face, it purports to be, viz., the payment and discharge of Musselman's indebtedness and the creation of a new lien for the amount due from Anderson to appellant. There is also another view of the transaction which is fatal to appellant's claim. It is conceded throughout that his lien is subordinate to the mortgage of the Mutual Investment Company, and is alleged by him that the advancement by the latter was made upon the express agreement that the mortgage given therefor should be a first lien upon the premises. It is, however, undisputed that the plaintiff had at the time in question a valid second lien thereon for the price of material previously delivered under its contract with Anderson. It results, therefore, that appellant, by agreeing that his mortgage should be second to the mortgage of the investment company, impliedly consented that it should be subject also to the plaintiff's lien. It follows that the decree should be

AFFIRMED.

JOSEPH W. MERRILL V. DAVID F. WILLIS.

FILED APRIL 21, 1897. No. 7231.

1. **Landlord and Tenant:** ABANDONMENT BY TENANT: REMEDY. A landlord is not, upon the abandonment of the demised premises by the tenant in violation of his contract, required to relet for the protection of the latter, but may at his election suffer the premises to remain vacant, and recover his rent for the remainder of the term by means of an action on the lease.

2. ———. *Allen v. Saunders*, 6 Neb., 436, distinguished.

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

A. D. McCandless, for plaintiff in error.

C. S. Otis and *E. O. Kretsinger, contra.*

POST, C. J.

The defendant in error, Willis, by written indenture, bearing date of January 25, 1892, leased to Merrill, the plaintiff in error, lot 7, in block 6, Casebeer's Addition to the city of Blue Springs, for the term of one year at the agreed rate at $7 per month, payable monthly in advance. Merrill went into possession under said lease and occupied the demised premises for the period of two months, at the expiration of which time he abandoned the same without Willis' consent. In an action on the lease for the balance of the rent reserved, upon the expiration of the term, Willis recovered judgment, from which Merrill prosecutes error. The undisputed evidence is that Willis refused to accept the proffered surrender, and that on being advised by Merrill of his intention to abandon the premises at once, notified the latter that he would look to him for the rent in accordance with the terms of the lease. There was on the trial below evidence introduced tending to prove the refusal of Willis to relet the premises for the unexpired term. The court, however, held that the doctrine of avoidable consequences was not applicable to the facts of the case, and that a lessor is not required to relet for the protection of a lessee who has, without his consent and without justification, abandoned the demised premises, and which ruling presents the only question for determination at this time.

We are, by counsel for plaintiff in error, referred to *Allen v. Saunders*, 6 Neb., 436, as opposed to the rule asserted by the trial court. The turning point of that case was, however, not the duty of the lessor to relet, but the qualification of an instruction, otherwise satisfactory to both parties, to the effect that the plaintiff therein was

not required to let to a tenant whose business would permanently injure the property. What is there said respecting the duty of the lessor to relet for the protection of the lessee must accordingly be regarded as *obiter* merely, and not decisive of the question here involved. It follows from the foregoing observations that the question is in this case an open one for consideration upon its merits. The rule sanctioned by the decided weight of authority, if indeed there can be said to be a diversity of opinion on the subject, is that the landlord may in such case, at his election, relet the premises upon the abandonment thereof by the tenant, in which case the measure of his damage will be the agreed rental less the amount realized on account of such reletting; or he may permit the premises to remain vacant until the end of the term, and recover his rent in accordance with the terms of the lease. (See *Hayward v. Ramge*, 33 Neb., 836; *Schuisler v. Ames*, 16 Ala., 73; *Tully v. Dunn*, 42 Ala., 262; *Rice v. Dudley*, 65 Ala., 68; *Ledoux v. Jones*, 20 La. Ann., 539; *Milling v. Becker*, 96 Pa. St., 182; *Randall v. Thompson*, 1 Tex. App. Civ. Cas., sec. 1102; *Rispini v. Porta*, 89 Cal., 464; *Clendinning v. Lindner*, 30 N. Y. Supp., 543; *Underhill v. Collins*, 132 N. Y., 269; *Bowen v. Clarke*, 30 Pac. Rep. [Ore.], 430.) The direction in favor of the plaintiff was accordingly right and the judgment will be

AFFIRMED.

T. A. SHAW & COMPANY V. ROBINSON & STOKES COMPANY ET AL.

FILED APRIL 21, 1897. No. 6997.

1. **Appeal and Error:** ELECTION OF REMEDIES. When a case, in its nature appealable, is brought into this court for review, the filing of a petition in error will be construed as an abandonment of an attempted appeal from the same judgment or decree.

2. **Review:** OBJECTIONS NOT RAISED BELOW. An objection on the ground that the finding and judgment complained of are unsupported by the evidence will not, on petition in error in this court, be considered unless presented to the district court by means of a motion for a new trial, and a ruling had thereon.

MOTION for rehearing of case reported in 50 Neb., 403. *Rehearing denied.*

Duffie & Van Dusen, for the motion.

POST, C. J.

Since the filing of the opinion in this cause, which will be found in 50 Neb., 403, we are reminded by counsel for Shaw & Co. that in addition to the question there decided, viz., the right of an insolvent corporation to prefer one creditor to the exclusion of others, they claim priority as against May Bros. on the ground that their lien upon the fund in controversy was acquired by means of the garnishee process, before the execution of the assignment of the Robinson & Stokes Company to the latter. An examination of the record in connection with their motion for a rehearing proves the suggestion of counsel to be well founded. The proposition now contended for was urged in the first brief filed herein, although overlooked in consequence of the overshadowing importance of the other question presented, and to which alone the able oral arguments were directed. Briefly stated, the contention is that the assignment to May Bros., although authorized by a vote of the directors of the Robinson & Stokes Company, November 15, 1892, and bearing date of the day aforesaid, was not in fact executed or accepted by said assignees until several days thereafter, and not until after the rights of Shaw & Co. had attached under and by virtue of the garnishee process.

We observe that Shaw & Co. are, by their motion for a rehearing and brief in support thereof, designated as appellants; but, assuming a proposition as to which we entertain a doubt, viz., that an appeal will lie from a judg-

ment or order of the character here involved, the record was not filed in this court within the six months allowed in order to secure a review by that means. It appears also from the record that said parties have filed a petition in error, in which they assign eleven distinct and separate grounds for the reversal of the judgment below. They will, therefore, be held to have abandoned any attempt to appeal, and to have elected to prosecute their petition in error. (*Burke v. Cunningham*, 42 Neb., 645; *Woodard v. Baird*, 43 Neb., 310.) In the petition of intervention by May Bros. is alleged the assignment to them, under date of November 15, and in the petition subsequently filed by Shaw & Co. it is alleged that "on or about November 16, 1892, the said Robinson & Stokes Company assigned and transferred to the Commercial National Bank, Anastacia Burnett, May Bros., and the National Bank of Commerce notes and accounts, the value of which these intervenors are unable to state." On July 26, 1893, the cause came on for hearing upon the petitions of intervention, without other pleadings, which resulted in a general finding for May Bros., and an order directing the receiver to pay over to them any balance of funds in his hands, the proceeds of the estate of the Robinson & Stokes Company, after deducting necessary costs and expenses of administration, to which order Shaw & Co. excepted, and at their request were allowed time within which to prepare and serve a bill of exceptions.

The hearing above mentioned was, as we have seen, brought on by the motion of May Bros., but evidently involved the merits of the petitions of intervention, by which alone the parties thereto had a standing in court. There was, it will be observed, no issue made by the pleadings respecting the date of the execution or the validity of the assignment to May Bros. It is, however, urged at this time that the cause was tried below upon the theory that the actual date of said instrument was in issue, and that it should be so regarded for the purpose of this proceeding. Parties will, as a rule, for the pur-

pose of review in this court, be restricted to the theory upon which the cause is prosecuted or defended in the trial court (*Smith v. Spaulding*, 40 Neb., 339; *Smith v. Phelan*, 40 Neb., 765; *Moline, Milburn & Stoddard Co. v. Wood*, 49 Neb., 869), although we are not aware that the rule thus stated has ever been so far extended as to supply allegations essential to the statement of a cause of action or defense. But it is unnecessary to further pursue the subject in this connection, since the motion for a rehearing must be decided on other grounds.

This is, as we have seen, a proceeding in error by which it is sought to reverse the final order complained of on the sole ground that the finding, upon the evidence adduced, should have been in favor of Shaw & Co. instead of May Bros. The question of the sufficiency of the evidence was not, however, so far as the record discloses, suggested to the district court by means of a motion for a new trial. The necessity for such a motion, in order to secure a review on error by this court of the evidence upon which is based the finding or judgment below, has been many times asserted (*Joiner v. Van Alstyne*, 20 Neb., 579; *Carlow v. Aultman*, 28 Neb., 672; *Miller v. Antelope County*, 35 Neb., 237; *Jones v. Hayes*, 36 Neb., 526; *Losure v. Miller*, 45 Neb., 465; *Hansen v. Kinney*, 46 Neb., 207); and that rule is, as will be observed from an examination of the cases cited, applicable alike to decrees in equity and judgments at law. Motion for

REHEARING DENIED.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY v. EMAN J. SPIRK ET AL.

FILED APRIL 21, 1897. No. 7069.

1. **Pleading.** MOTION TO STRIKE OUT OBJECTIONAL STATEMENTS. A motion to strike matter out of a pleading should refer specifically to the alleged objectionable statement. If the motion includes

matter which is pertinent with that which is objected to as impertinent, and they might have been separated, the motion must be overruled.

2. ———: OBJECTION TO PETITION. Where the objection to a petition, that it does not state a cause of action, is not interposed until after the commencement of the trial of the case, the pleading will be liberally construed and if possible sustained.

3. ———: ACTION FOR EJECTING PASSENGERS FROM TRAIN. The petitions, in the cases at bar *held* to state causes of action.

4. Review: EVIDENCE. Findings of a jury made on consideration of conflicting evidence will not be disturbed if there is sufficient evidence in their support.

5. Carriers: WRONGFUL EJECTION OF PASSENGERS: REMEDIES. Parties rightfully on a railroad train by virtue of a contract for their carriage to an agreed destination, and who are wrongfully ejected before the journey is completed, may sue for a breach of the contract, or in an action *ex delicto* for tort or negligence of the carrier.

6. Breach of Contract: MEASURE OF DAMAGES. If for a breach of the contract, the measure of the damages will be such as may fairly be considered as arising naturally, or in the usual course of things from the breach, or such as may reasonably be supposed to have been in contemplation of the parties to the contract when it was made, as the probable results of its breach. (*Hadley v. Baxendale*, 9 Exch. [Eng.], 341.)

7. Torts: NEGLIGENCE: MEASURE OF DAMAGES. If for the tort or negligence, the measure of damages will be compensation for all injuries which are directly caused or flow from the wrongful act or acts.

8. Carriers: WRONGFUL EJECTION OF PASSENGERS. *Held*, That the evidence in these cases sustains findings that the defendants in error were as passengers in a car and on a train which did not stop at the station, their purposed destination, to which the tickets they had purchased entitled them to be carried; that they were not so situated by reason of their own negligence but the negligence of the company or its employes.

9. ———: ———: MEASURE OF DAMAGES. Where passengers on a railroad train which does not stop at the station to which their tickets entitled them to be carried, and their being so situated is not the result of their own negligence but that of the company or its employes, were ejected from the train by the conductor and other employes of the company in obedience to a rule of the company for the guidance of the conductor in such cases, at a station other than the one to which they were to be carried, the company is liable in an action *ex delicto* for all damages which result or flow directly from the negligence.

10. ——: ——: ——: REVIEW. Whether the negligence is the proximate cause of injuries is ordinarily a question of fact for the jury, but if its finding in that regard is manifestly wrong it will be set aside.

11. ——: ——: ——. Some of the injuries alleged in this case,—incidents of a trip across the prairie,—*held*, not to directly result or flow from the negligence or wrongful acts of the plaintiff in error, and hence not to be within the measure of damages applicable here.

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

The opinion contains a statement of the case.

J. W. Deweese and *F. I. Foss*, for plaintiff in error:

The petition nowhere alleges that the plaintiffs took passage on a train that was scheduled to stop at the station of Haigler, to which point they held tickets. Nor does it allege that the train on which they took passage would or should stop at said station under any rule or regulation of the railroad company. The petitions were therefore defective. (*Ohio & M. R. Co. v. Hatton*, 60 Ind., 15; *Pittsburg, C. & St. L. R. Co. v. Nuzum*, 50 Ind, 141; *Ohio & M. R. Co. v. Applewhite*, 52 Ind., 540; *White v. Evansville R. Co.*, 33 N. E. Rep. [Ind.], 275; *Chicago & St. L. R. Co. v. Bills*, 104 Ind., 17.)

It was the duty of the plaintiffs to inform themselves by proper investigation and inquiry whether the train on which they took passage would stop at the station of their destination. The railroad company had a right to regulate the running of its trains, arranging for the through fast trains to make only certain stops, and for other trains to run as local trains and make all the stops. It was the duty of the plaintiffs under the law to get off at some station before reaching Haigler where the train did stop, after being notified by the conductor that it would not stop at Haigler; or they might properly pay their fare from Haigler west to the next station at which the train did stop, and stay on the train to such station,

(*Chicago & A. R. Co. v. Randolph*, 53 Ill., 515; *Texas R. Co. v. Ludlam*, 57 Fed. Rep., 484; *Beauchamp v. I. & G. N. R. Co.*, 56 Tex., 239; *Lake Shore & M. S. R. Co. v. Pierce*, 47 Mich., 277; *Platt v. Chicago & N. W. R. Co.*, 21 Am. & Eng. R. Cas. [Wis.], 319; *Duling v. Philadelphia, W. & B. R. Co.*, 6 Atl. Rep. [Md.], 592; *Pittsburgh R. Co. v. Lightcap*, 34 N. E. Rep. [Ind.], 243; *Texas P. R. Co. v. White*, 17 S. W. Rep. [Tex.], 419; *Deitrich v. Pennsylvania R. Co.*, 71 Pa. St., 433; *Chicago & E. R. Co. v. Field*, 34 N. E. Rep. [Ind.], 407; *Sira v. Wabash R. Co.*, 21 S. W. Rep. [Mo.], 906; *Pittsburgh R. Co. v. Klitch*, 37 N. E. Rep. [Ind.], 560; *Galveston, H. & S. A. R. Co. v. Kimelrew*, 27 S. W. Rep. [Tex.], 631; *Church v. Chicago, M. & St. P. R. Co.*, 60 N. W. Rep. [S. Dak.], 854.)

When the plaintiffs were notified that they were on the wrong train, and refused to get off when directed so to do by the conductor, they became trespassers and their forcible ejectment at Benkleman was rightful. (*Atchison, T. & S. F. R. Co. v. Gants*, 17 Pac. Rep. [Kan.], 60; *Galbraith v. Flemming*, 27 N. W. Rep. [Mich.], 581; *Peabody v. Oregon R. & N. Co.*, 26 Pac. Rep. [Ore.], 1053; *Mahoney v. Detroit City R. Co.*, 52 Am. & Eng. R. Cas. [Mich.], 581; *Chicago, St. L. & P. R. Co. v. Bills*, 104 Ind., 15; *Townsend v. New York C. & H. R. R. Co.*, 56 N. Y., 301.)

Plaintiffs sought to recover damages and expenses sustained and incurred in going into the country after they were ejected. Such damages are too remote and contingent and do not in any manner relate to the contract made with the railroad company nor were they the proximate results of the alleged violation of the company's contract. (*Sira v. Wabash R. Co.*, 21 S. W. Rep. [Mo.], 905; *Selleck v. Lake S. & M. S. R. Co.*, 23 Am. & Eng. R. Cas. [Mich.], 340; *Lewis v. Flint & P. M. R. Co.*, 54 Mich., 55; *McLary v. Sioux City & P. R. Co.*, 3 Neb., 53; *City of Crete v. Childs*, 11 Neb., 253.)

Webster, Rose & Fisherdick and *J. H. Grimm, contra:*

There was no prejudicial error in overruling the motion to strike from the petition the language attacked. (*Balti-*

more & O. R. Co. v. Bambrey, 16 Atl. Rep. [Pa.], 67; *Head v. Georgia P. R. Co.*, 79 Ga., 359.)

The plaintiff had a right to assume that all of defendant's agents understood their duties and would perform them; and if he performed his he could stand upon his contract, and upon his relation as passenger, which the contract generated. (*Alabama G. S. R. Co. v. Heddleston*, 3 So. Rep. [Ala.], 53; *South & N. A. R. Co. v. Huffman*, 76 Ala., 496.)

A passenger wrongfully evicted from a train does not forfeit his right of action against the road for his injuries merely by reason of having insisted, however strenuously, on his right to passage, and by having resisted the assailant who wrongfully expelled him. (*Louisville, N. A. & C. R. Co. v. Wolfe*, 27 N. E. Rep. [Ind.], 606; *St. Louis, A. T. R. Co. v. Mackie*, 9 S. W. Rep. [Tex.], 451; *Shepard v. Chicago, R. I. & P. R. Co.*, 41 N. W. Rep. [Ia.], 564; *Baltimore & O. R. Co. v. Bambrey*, 16 Atl. Rep. [Pa.], 67; *Chicago, St. L. & P. R. Co. v. Bills*, 20 N. E. Rep. [Ind.], 775; *Sternberg v. State*, 36 Neb., 307.)

HARRISON, J.

John and Eman Spirk commenced separate actions against the Chicago, Burlington & Quincy Railroad Company to recover damages alleged to have accrued in their favor on account of their unlawful and wrongful expulsion, prior to arrival at their destination, from one of the trains of the company, upon which they were passengers. The alleged causes of action had their origin in the same state of facts; hence after issues joined the causes were, on motion presented therefor, consolidated, the evidence introduced but once and the one jury returned a verdict thereon in each case favorable to plaintiffs. The company has prosecuted error proceedings to this court.

Before answer there was a motion interposed in behalf of the company, in each case, to strike out of the petitions certain portions thereof quoted in the motion. The refusal of the trial court to act in accordance with these

motions is the subject of one assignment of error. If the matter sought to be stricken out of the pleadings contained anything immaterial, which we need not now decide, if it also contained any material averment or averments, which it clearly did, it was proper to overrule the motions, and there was no error in so doing. There was no prejudicial or available error in the overruling of the motions to strike out disclosed by the record presented to this court.

After the issues had been joined and the cases called for trial, at the inception of the introduction of evidence on behalf of defendants in error, counsel for the plaintiff in error objected to the reception of any evidence, on the ground that the facts stated in the petitions were insufficient to constitute a cause of action. This was overruled; and the action of the court in this regard is assigned and urged as error. Where, as in this case, the objection to the sufficiency of a petition, that it does not state a cause of action, is not interposed until on the trial, the pleading will be liberally construed, and if possible sustained. (*Roberts v. Taylor*, 19 Neb., 184.) Read and interpreted in accordance with the foregoing rule, the petitions herein were sufficient and not open to the criticism urged against them, viz., that it did not appear that defendants in error were at the time rightfully on the train from which they alleged they were ejected. The petitions disclosed that the defendants in error purchased tickets, which entitled them to a safe passage on or over plaintiff in error's road from a named starting point to a designated destination, and that they became passengers on said railroad accordingly, and took seats in the cars of plaintiff in error, to be carried to their journey's end, and were carried directly toward their destination until a station called Benkleman, on the line of road, was reached, where they were unlawfully and forcibly ejected from the train or car in which they were riding. The foregoing is, in substance and in short, a statement of the portions of the pleadings attacked, and the averments were, we think,

sufficient to show a cause of action in favor of the parties seeking redress for alleged wrongs.

The evidence discloses that the defendants in error were citizens and residents of Wilber, in Saline county, this state, that at the time of the trip, of which some of the incidents and circumstances form the basis of these suits, certain matters of business rendered it necessary that they go to Haigler, a station on the line of road of the company, plaintiff in error, to be there met by someone, and be taken from there twenty-five or thirty miles across the prairie to meet a party or parties, with whom defendants in error had certain affairs to transact, or with whom they were to consult. The brothers called, according to the evidence of the company's agent at Wilber, on him, separately, a short time prior to the projected travel, and made certain inquiries in regard to the arrangement of the running of the trains by which they could reach their desired destination, and were furnished with the information. On Saturday, June 10, 1893, they boarded a train of plaintiff in error at Wilber, paying their fare to Wymore to the conductor on the train; at the last mentioned station they purchased tickets which entitled them respectively to a continuous passage to Haigler, and entered the train which was then standing at Wymore, and which was the proper one for the portion of their journey between Wymore and Oxford Junction, and it contained a chair car and a "Pullman," which were destined to run through to Denver, Colorado, the other cars of this train going no farther than the junction at Oxford. The Pullman and chair car, to which we have just referred, were to be and were attached to a "local" train which passed through Oxford Junction on its run from Chicago to Denver, and hauled by the local westward as far as McCook, where they were to be and were detached from the local and attached to another train, a through passenger train running between Chicago and Denver, to be taken to the latter place. This was known as the fast train, or flyer, and made but a few stops at any of the stations along the

route. The defendants in error were, at or prior to the arrival of the train on which they were passengers, at Oxford Junction, notified to change from the coach in which they were seated to the one in its rear, relatively to the position of the cars considered from the engine or forward end of the train, and they did so. Though there is some conflict as to this particular fact, we must conclude that the parties were so notified, and made the requested change, as this must have been of the findings of the jury and had ample support in the evidence; and further, it is borne out by the conditions then existing in regard to the cars in the train, and the proper one for them to be in, if they expected to go farther west from Oxford Junction, as this rear chair car which they were told to, and did go into and take seats, was the only one of that train, other than the Pullman, for passengers, which was to proceed farther west toward Denver from Oxford Junction. The chair car and Pullman were attached to the local train for Denver, and hauled by it to McCook, where they were detached, and taken up by the through or fast train, and became a part of it during the balance of the run to Denver. A porter who was on duty on the local train on this day, and in the chair car which had been taken into the train at Oxford Junction, while it was part of such train, to-wit, between Oxford Junction and McCook, was examined as a witness, and stated that it was of his duties to notify all passengers who were in the chair car, which had been attached at Oxford Junction, and who were going to stations beyond McCook and intermediate points between there and Denver, to change from that coach to the one in front of it, which would continue to be part of the local train after it should have passed McCook; that he saw the defendants in error in the through chair car, and after ascertaining their destination to be Haigler, told them two or three times to go forward into the local coach, in order that they might be served as their tickets required. That they were thus notified, or in any other manner, or that they had or gained in any manner, any information of the

fact that it was necessary they should leave for another car than that into which they had gone as ordered at or prior to arrival at Oxford the defendants in error strenuously denied. As to this point there was evidence corroborative of that of the porter, but it is manifest that the jury must have determined it in favor of defendants in error, and while we are not satisfied that we should have agreed to such a conclusion in the first instance, as there was sufficient evidence in support of the finding, it will not be disturbed.

On the particular date of the events which are of the subject-matters of this case the through or fast Denver train was, to use a general expression, behind time, and did not reach McCook until later than it was scheduled to be there, and the local train left McCook prior to and ahead of the through train, and continued in advance of it, so far as we are informed by the evidence herein of the relative movements of the two trains. The conductor who took charge of the "flyer" train at McCook went through the cars and made, as is usual, an examination and disposition of the tickets of the passengers, and discovered the defendants in error and that they had tickets for Haigler as their stopping place, and immediately informed them that the train was not scheduled to stop there and would not; that they must leave the train at Benkleman, the last and nearest station east of Haigler at which the train would halt, or that they could remain on until it reached a station in Colorado, beyond or west of Haigler, where the train would stop, the last conditional upon the payment of the fare from Haigler to the station beyond. They refused either alternative and demanded that the train be stopped at Haigler and they be allowed to leave it; but this last they were informed could not be. When the train reached Benkleman a stop was made, and the conductor informed the defendants in error that he could not halt the train at Haigler, that they must get off where they then were or pay the fare from Haigler to the station beyond, at which the train

was scheduled to and would stop. The defendants in error refused to do either, and finally, after some parleying without any effectual results, the conductor, helped by other employes of the company, put the defendants in error out of the car and off the train. One of them (they were brothers), who was at the time sick and nervous, made little or no resistance. He says that the conductor "grabbed hold of me before I had a chance to take a second breath, and simply shoved me out. I was in poor health at the time and walked out. He had no trouble with me; he simply shoved me out on the platform and then went back and started on my brother." The conductor testified on this subject: "He said he would not get off, that I would have to force him off; this John Spirk told me that I would have to force him off, so I took hold of him and he walked out and did not make any resistance. He went out quietly until he got to the platform of the car, in the vestibule, and then he said he would not get off without his brother. I left him then and went back and got hold of his brother, and he resisted with all his might." The other brother, as the conductor says, resisted to the extent, seemingly, of his ability, but was finally ejected. The train went on its way and the brothers were left in Benkleman. This happened at between 1 and 2 o'clock on Sunday morning. The brothers went to a hotel in Benkleman, where they remained until about 1 o'clock P. M. of Sunday, when, having in the meantime secured a driver and livery team, they started and drove across the prairie forty or fifty miles to the land, their intended ultimate destination, which they had purposed reaching by way of Haigler. They arrived about 9 o'clock of Monday morning, having been forced, after driving until 11 o'clock at night, to camp and sleep, or attempt to, during the remainder of the night on the prairie.

Counsel for the company, in arguments in relation to the measure of damages which should have been adopted, and in the enforcement of their complaint that the proper

rule in this particular was violated in the trial court, treat the action as predicated on a breach of the contractual rights of the defendants in error, created by the sales of the tickets to them by the company's agent. There are allegations contained in the petitions which tend to support this position, but the petitions when read and construed as a whole, we think, state a cause of action sounding in the negligence or tort of the company, committed by or through its agents or employes. In the petitions the purchases of the tickets are alleged, and the consequent ensuing rights of the purchasers to be carried to Haigler; but these things and others are pleaded to show the inception and establishment of the positions of the parties to the action at the time of the occurrences which gave the rights of action, and not to show the contracts for carriage to Haigler and their breaches. The defendants in error had the right, no doubt, to elect to sue the company for breaches of its contracts to carry them to Haigler, or for the torts, the ejections from the train, and we are led to conclude, from the pleadings and evidence, that they chose the latter. It is necessary that this distinction be made, emphasized, and borne in mind, as the rules to be enforced on the subject of the damages allowable differ very materially. If the cases are to recover for breaches of contracts, then the rule would be: "Where two parties have made a contract, which one of them has broken, the damages which the other ought to receive in respect to such breach of contract should be either such as may fairly and substantially be considered as arising naturally—that is, according to the usual course of things—from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it." (*Hadley v. Baxendale*, 9 Exch. [Eng.], 341; *Candee v. Western Union Telegraph Co.*, 34 Wis., 479.) In actions for torts, as a general rule, there is a liability for all injuries which directly flow or result from the wrongful act or acts of

the wrong-doer, regardless of whether they might or might not have been foreseen or contemplated by him as probable to follow or flow from the doing of the act or acts. (*Vosburg v. Putney*, 80 Wis., 523; *Brown v. Chicago, M. & St. P. R. Co.*, 11 N. W. Rep. [Wis.], 356.)

It is urged on behalf of the plaintiff in error that it devolves on a prospective passenger to inform himself whether the train on which he proposes to take passage will stop at the station to which he is bound, and that it was the duty of defendants in error to ascertain and know whether they were aboard of the right train. Be this rule as it may, it could have no application here. These parties took the right train and proceeded on their journey until they were directed, and properly so, by the employe of the company whose duty it was to give such order, to go into a designated car of the train, which they accordingly did, and there they remained, having, as the jury determined, received no other or further orders in regard to changing to another car, though it was of the duties of an employe, who testified and so stated, to, at a subsequent stage of their trip, inform them of a necessary change to a car which would be of the local train, which would stop at their destination. In view of these and facts of similar import, it must be said that the defendants in error were in the through or wrong car by direction or negligence of the company, and not of their own volition or want of care; hence, whatever subsequently happened to them by reason of their being in the wrong car was not of their blame; but the direct consequences, if injurious to them, must be borne or compensated by the blamable one, the company. It is said that a railroad company may make and enforce all reasonable rules and regulations for the operation of the road, including the running of trains, and that certain of them shall not stop except at such and so many of the stations on the line of road as may be designated by the company. It is also said that it was of the rules of the plaintiff in error, in force at the date herein involved, that the through

train to Denver should not stop at Haigler, and that the conductor was in duty bound to observe this. Conceding the rule by way of argument, and it was proven that the train was scheduled to run without stopping at Haigler, then the conductor had no choice but to insist that the defendants in error leave the car at Benkleman, or be carried to the first scheduled stopping station beyond Haigler, and pay their fare from Haigler to the place beyond; and when they refused, to order them out at Benkleman, and if they did not go, to put them off the train, using only such force as was absolutely or reasonably necessary to effect the purpose; but, notwithstanding the conductor might so do, it did not relieve the company of its liability to answer to any resulting damages. As we have seen, it was to blame for their being in the wrong car, and subject to its rule in regard to the running of the through train; hence, any damages directly resulting from the enforcement of the rule became its liabilities.

By objections to certain of the paragraphs of the charge to the jury, and the offer of an instruction with a request that it be given, which was refused, to all of which exceptions were noted, and the actions of the trial court in regard to which were duly assigned for error, the question was raised that the alleged journey of forty or fifty miles across the prairie, and the consequent exposure to inclement weather and other inconveniences and hardships, should not have been submitted to the consideration of the jury as proper elements of damages. Undoubtedly, under the rule for the measurement of damages in actions of the nature of which we have determined these to be (*ex delicto*),—(for rule see 1 Sedgwick, Measure of Damages, 130, note),—it was competent to prove the trip out into the country, with its concomitant circumstances, if it and they were further shown to be necessarily and directly traceable to the ejection from the train, and directly consequent therefrom (*Vosburgh v. Putney, supra; Brown v. Chicago, M. & St. P. R. Co., supra*); and whether the ejection of the defendants in

error from the train was the proximate or direct cause, or directly produced the trip, and any damages arising therefrom, was, as it is ordinarily, a question of fact for the jury (*Milwaukee & St. P. R. Co. v. Kellog*, 94 U. S., 469; *Patten v. Chicago & N. W. R. Co.*, 32 Wis., 524); but where the finding of the jury as to the proximate cause of an injury is manifestly wrong it will be set aside. The facts in the case at bar in relation to the trip made across the prairie and its attendant circumstances were undisputed. The defendants in error were left in Benkleman at about half past one o'clock on Sunday morning, and ascertained before going to the hotel, or early in the day (just which is not clear from the evidence), that there would not be a train that would pass through Benkleman by which they could reach Haigler until at some time that night; they waited in Benkleman until 1 o'clock in the afternoon of Sunday and then started with horses and vehicle, not to Haigler, where they were due and were to have and should have been carried by the company, and had arranged to be met by some person, who was to take them out some twenty-four or twenty-six miles from there to a piece of land which they desired, and it was the purpose of their trip, to inspect,—but across the prairie some forty-five or fifty miles, in a direction where there were but a few settlers and for a considerable portion of the distance no road, or but a poorly defined one. As a consequence of their late start for a journey of such length in the manner they made it, night came on before they had completed the trip, and they lost their way and were compelled to spend the night on the prairie, with nothing to sleep on or under except the buggy cushions and lap-robes, which they utilized for such purposes. We have no doubt that if it had been necessary for them to reach Haigler the night they were put off the train at Benkleman, and pursuant to such necessity, and to attain their purpose, they had immediately continued their journey and accomplished it, that all injuries or damages springing or resulting directly from the trip from Benkleman

to Haigler would have been recoverable; or had it been shown that it became necessary, in order to meet a business engagement or purpose at the land (to reach which was the ultimate design of the whole journey), to go direct from Benkleman to the land, and that this necessity had been immediately or reasonably attempted, the attendant directly resulting damages might have been assessable herein; but for the parties to wait until more than half of the succeeding day's light had expired and then start to travel the distance, and with existent conditions, such as in the natural course of events would almost necessarily cause a part of the trip to extend into the late evening or night, the consequent exposure and hardships do not come within injuries proximately or directly flowing as consequences from the wrong of the company. Had there been evidence that the trip from Benkleman to the land was unavoidably necessary and must be made on that day, and that the start was delayed until late in the day for some sufficient reason, then it might still have been proper to submit the question to the jury; but there was no such evidence, and we are forced to the conclusion that on the undisputed facts in respect to this trip from Benkleman to the land, the incidental exposure and hardships, and resulting injuries to the defendants in error, were not within the proper measure of the damages in the cases at bar. (*Indianapolis, B. & W. R. Co. v. Birney*, 71 Ill., 391.)

There are some complaints made of the information given to the jury in the charge of the trial court with reference to the use of force by the conductor, or employes of the company, in ejecting the defendants in error from the train, but we think the objections to the charge in this particular are without merit, nor do we deem it necessary to comment on or discuss them at length at this time.

For the errors committed, herein indicated, the judgments must be reversed and the causes remanded.

REVERSED AND REMANDED.

PHŒNIX INSURANCE COMPANY OF HARTFORD V. WILLIAM H. WALTER ET AL.

FILED APRIL 21, 1897. No. 7218.

1. **Principal and Agent: OSTENSIBLE AUTHORITY.** "Ostensible authority to act as agent may be conferred if the party to be charged as principal, affirmatively or intentionally, or by lack of ordinary care, causes or allows third persons to trust and act upon such apparent agency." *Thomson v. Shelton*, 49 Neb., 644, approved and followed.
2. ———: ———. "That the party to whom money due another is paid is not in possession of the instruments by which the indebtedness is evidenced is not conclusive of the question of the authority, or lack of it, in the party receiving the money to collect it, but is a circumstance or fact to be considered in the determination of such question." *Thomson v. Shelton*, 49 Neb., 644, approved and followed.
3. **Review: ADMISSION OF EVIDENCE: HARMLESS ERROR.** That immaterial, illegal, or irrelevant evidence was admitted at the trial of a cause by a court without the intervention of a jury furnishes no sufficient reason for the reversal of the judgment.
4. **Mortgages: AUTHORITY OF AGENT TO WHOM PAYMENT WAS MADE: FINDING FOR MORTGAGOR SUSTAINED.** The evidence examined, and *held* to sustain the findings of the trial court.

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

Wright & Stout, for plaintiff in error.

J. S. Gilham, contra.

HARRISON, J.

The plaintiff in error, on December 29, 1893, commenced this action in the district court of Webster county to foreclose a mortgage on certain real estate described in the petition, and to enforce the payment of a principal note in the sum of $800 and accrued interest thereon, also an amount of taxes which had been assessed against the real estate and paid by plaintiff to protect its security. In the answer there were pleaded, payment of the amounts

claimed by plaintiff, facts which it was claimed estopped plaintiff to prosecute its action, also that the premises mortgaged constituted the homestead of the mortgagors and that the mortgage in suit had been acknowledged before a notary public, who was the manager of the loan company of or through which the loan evidenced by the note and mortgage in controversy had been obtained; hence the instrument was invalid and unenforceable. The main and real issue in the case is whether or not payment of the indebtedness evidenced by the note and mortgage had been made. This is raised here under the assignment that there was not sufficient evidence to sustain the findings and judgment. This we will now examine.

At the times of the transactions from which evolved the present suit there was in existence in Red Cloud, this state, what was known as the Nebraska & Kansas Farm Loan Company, the business of which is sufficiently indicated by its title or designation. There was in Hartford, Connecticut, a firm of loan brokers doing business under the name and style of George W. Moore & Co., their office and principal place of business being the city last named. Of this firm one James H. Tallman was an active working member, and the business of the firm was the purchase and negotiation of western and southern farm loans. The plaintiff was an insurance company organized and existing under the laws of the state of Connecticut, with its principal office and place of business in Hartford. This insurance company had quite a large amount of money, a goodly sum of which it invested in farm loans. The manner in which the business between the Nebraska & Kansas Farm Loan Company and the firm of George W. Moore & Co. was conducted we will now state generally. At its inception, and until after the first two or three transactions (so it is stated by one witness who, during the greater portion of the time, was secretary of the loan company at Red Cloud), applications for loans were received from prospective borrowers by the company at Red Cloud, the se-

curity offered or land to be mortgaged was examined, and, if approved, abstracts of title were prepared, notes and mortgages drawn and executed, insurance policies, covering buildings on mortgaged premises and made payable to the mortgagees, were obtained, the mortgages recorded, and all forwarded to George W. Moore & Co., at Hartford, for inspection and approval or rejection. For such as were approved a sum of money, in the aggregate of the sum evidenced by the mortgages, was placed in the Hanover National Bank at Hartford to the credit of the Nebraska & Kansas Farm Loan Company and by it received in the usual course of such affairs. In all transactions subsequent to the first two or three the instructions from the eastern firm were to the effect that as soon as any papers were completed and started for the east, the western company should draw upon the firm at Hartford for the amount of money represented or called for by the loans included and sent, and this course was adopted and followed in regard to all succeeding loans. The loans were all drawn payable to James H. Tallman, who, as we have said, was a member of the Hartford firm, and whenever a loan was paid or its release became necessary, it was released by James H. Tallman, regardless of the then ownership of the mortgage to be released, or whether any sale or assignment of it had been made. The notes, interest coupons, and mortgages all stated that the payments were to be made at the Mechanics Savings Bank of Hartford, Connecticut. The Nebraska & Kansas Farm Loan Company collected all interest as it became due on loans which had been effected through it, also the principal sums, when due and paid, and in doing these things sent out notices to the different parties debtors prior to the dates and informing them respectively of the maturity of the interest installments or principal sums as the case might be, attended to the payment of taxes when allowed by mortgagors to become delinquent, also procured renewals of insurance if policies on mortgaged premises were allowed to expire, and if notes and mortgages were

not paid when due they were transmitted to the company at Red Cloud for foreclosure if it became necessary. It was expected, as was usual in such cases, that the western company would forward all moneys collected to the firm in Hartford, each one having a book or books in which an account was kept of or with each mortgage or loan, by names of parties and by number. When money was received by the Hartford firm it was applied in payment of the coupons if interest, or mortgage if principal, for which it was intended, as indicated by letter accompanying it, and in some instances the parties owning mortgages, to whom they had been sold by the eastern firm, received the money at its office. To others it was sent by draft, etc. In the case of the plaintiff, it appears it was taken to its office, it being close to that of the firm of brokers, and there delivered. In each instance the coupon or mortgage, as it might be, was obtained from the holder and transmitted by the eastern firm to the loan company at Red Cloud and by it sent or given to the borrower to whom it belonged.

The note and mortgage in suit were executed of date October 21, 1885, and were due October 1, 1890, payable to James H. Tallman, and pursuant to the business arrangement hereinbefore noticed between the loan company at Red Cloud and George W. Moore & Co., passed into the hands of the latter and were sold to the plaintiff. These, with a number of similar papers evidencing loans on Nebraska farms effected by the company at Red Cloud, and all of which had been transmitted to George W. Moore & Co., and by this firm sold and assigned to the plaintiff and held by it, and all collections of interest or principal, also incidental matters in regard to taxes and their payment, renewals of insurance, etc., were supervised and performed by the firm of brokers and the Nebraska & Kansas Farm Loan Company, pursuant to the plan inaugurated by them, some of the details of which we have hereinbefore set forth. The assignment of the mortgage in question to plaintiff was not recorded in

Webster county,—the *situs* of the mortgaged land,—and the mortgagor had no knowledge of its existence or that the owner of the papers was other than Tallman, to whom they were in terms payable. The plaintiff never presented either interest coupons or notes when due at the Mechanics Savings Bank at Hartford, where they were made payable, but in each instance depended on receiving the amounts due thereon in the manner we have previously herein stated. The note and mortgage in suit matured, as to the principal sum, October 1, 1890, shortly prior to which date the mortgagor was notified of such fact by the loan company at Red Cloud, and to obtain the funds to pay the amount due, executed a mortgage payable to the loan company, which, it appears, was afterwards sold, and the books of the company disclosed a credit to the mortgage in suit of the amount due thereon. About the 1st of October, 1891, a representative of the plaintiff called at the office of the loan company at Red Cloud, and as to what occurred at that time we will give an extract from the evidence of the then secretary of the loan company.

Q. Do you know one E. B. Cook, manager of the loan department of the Phœnix Insurance Company, plaintiff?

A. I had a slight acquaintance with him.

Q. When did you meet him?

A. About the first of October.

Q. What took place between you and him at that time?

A. Well, he came into the office with another gentleman, made himself known, and presented his credentials showing who he was, and asked if we had any money for him. I paid him some money [it appears in another portion of the evidence, about $400], and he wanted to know if we couldn't pay him some more, and I told him no we couldn't at that time; he commenced talking about these loans that the Phœnix Insurance Company had. He stated that they had an agent in this state, and wanted to know if it would be satisfactory to us to turn the business over to that agent. I told him as far as I was con-

cerned I would be glad to get rid of it. I think that was the first I knew the Phœnix Insurance Company had any of these loans.

The foregoing is a statement, in substance, of some of the salient facts shown in the evidence at the trial of this cause, and from their consideration in connection with other material, competent facts in evidence, some of which were similar in intent and effect, we are convinced that there was sufficient to sustain a finding that even if it may be said that the Nebraska & Kansas Farm Loan Company did not have specific authority from or was not agent in fact for the plaintiff in the collection of the amount due on the mortgage herein sought to be enforced, it had ostensible authority to receive the money. (*Reid v. Kellogg*, 67 N. W. Rep. [S. Dak.], 687; *Thomson v. Shelton*, 49 Neb., 644.) Ostensible authority is such as a principal intentionally, or by want of ordinary care, causes or allows a third person to believe the agent to possess. (*Quinn v. Dresbach*, 75 Cal., 159; 1 Parsons, Contracts, p. 44*; *Kasson v. Noltner*, 43 Wis., 650; *Reid v. Kellogg, supra; Thomson v. Shelton, supra.*) It is true that the note and mortgage were not in the hands of the loan company when it collected the money, and had not been at any time after their execution and transmission to George W. Moore & Co. at Hartford, but this was not conclusive of the fact of the existence of the authority to collect, but a fact or circumstance to be considered in connection with other matters of evidence bearing upon the subject. (*Thomson v. Shelton, supra.*) The evidence was sufficient to sustain the finding of the trial court; hence it will not be disturbed.

There are some further assignments of error argued in the briefs of counsel in reference to alleged errors committed in the admission of evidence. This was a trial to the court, and if errors were committed in the admission of evidence, they are unavailable. That immaterial, illegal, or irrelevant evidence was admitted at the trial of a cause by the court without a jury furnishes no sufficient

reason for the reversal of the judgment. (*Stabler v. Gund*, 35 Neb., 648; *Ward v. Parlin*, 30 Neb., 376; *Enycart v. Davis*, 17 Neb., 228.) The judgment of the district court is

AFFIRMED.

PHŒNIX INSURANCE COMPANY OF HARTFORD V. CHARLES F. ROBINSON.

FILED APRIL 21, 1897. NO. 7219.

Mortgages: AUTHORITY OF AGENT TO WHOM PAYMENT WAS MADE: FINDING FOR MORTGAGOR SUSTAINED. (See *Phœnix Ins. Co. v. Walter*, 51 Neb., 182.)

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

Wright & Stout, for plaintiff in error.

J. S. Gilham, contra.

HARRISON, J.

This action was instituted in the district court of Webster county to foreclose a mortgage on certain real estate situated in said county, and specifically described in the mortgage and in the petition filed in the action. The mortgage had been given to secure the payment of a negotiable bond or note and the coupons originally attached thereto. One of the defenses interposed was that of payment. The facts developed in the evidence introduced at the trial were very similar and to the like effect of those displayed in the case of *Phœnix Ins. Co. v. Walter*, 51 Neb., 182, in which a decision is filed at this time, and the assignments of error argued present similar questions for adjudication. The conclusions reached and announced in that case are pertinent in and decisive of this. It follows that the judgment of the district court must be

AFFIRMED.

PHŒNIX INSURANCE COMPANY OF HARTFORD V. CLINTON A. HALE ET AL.

FILED APRIL 21, 1897. No. 7217.

Mortgages: AUTHORITY OF AGENT TO WHOM PAYMENT WAS MADE: FINDING FOR MORTGAGOR SUSTAINED. (See *Phœnix Ins. Co. v. Walter*, 51 Neb., 182.)

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

Wright & Stout, for plaintiff in error.

J. S. Gilham and *R. McNitt, contra.*

HARRISON, J.

December 29, 1892, the plaintiff instituted this action in the district court of Webster county to foreclose a real estate mortgage executed and delivered by Clinton A. Hale and wife to one James H. Tallman, of Hartford, Connecticut, to secure the payment of a coupon note or bond in the principal sum of $1,500 and its accompanying interest coupons. The mortgage and note were of date August 1, 1885, and were payable August 1, 1890. The papers evidenced one of a number of farm loans effected by the Nebraska & Kansas Farm Loan Company, of Red Cloud, Nebraska, and forwarded to George W. Moore & Co., a firm of brokers having its business office in Hartford, Connecticut, of which firm the payee of the note and mortgage, James H. Tallman, was a member and the attorney. The instruments in suit had been assigned to the plaintiff, but the assignment had not been recorded in the proper office in Webster county, where the mortgaged property was situate. In the answer filed for defendants there were alleged four defenses, which, stated in short, are: First, material alteration of the note; second, estoppel; third, payment; fourth, matters entering into the

execution of the mortgage which rendered it invalid. As a result of a trial of the issues joined the defendants were awarded a favorable decree. Plaintiff filed a motion for a new trial, which was overruled, and the case has been removed to this court by error proceedings.

One of the assignments of error is that the evidence is insufficient to sustain the judgment of the trial court. There was a general finding in favor of defendants, and it is further stated in the decree "that the bond and mortgage have been fully paid," from which we conclude that the trial court based its decree mainly on a finding that payment had been made; and for this and other sufficient reasons we shall base our decision here on an examination of the same subject.

This is one of three cases of a like character in which decisions are filed at this time, in all of which there is the same party plaintiff; the principal defendant in one of the other cases being William H. Walter, and in a second, Charles F. Robinson. The facts as disclosed in the evidence adduced in the present case bring it within the rules announced in the case of *Phœnix Ins. Co. v. Walter*, to which we have just referred, and in which the facts were stated somewhat *in extenso;* hence the decision herein will be governed by the doctrines and conclusions therein stated. There were some circumstances developed in this case differing from those shown in that, and some additional ones, but none of them such as to materially affect the conclusions or call for or warrant contrary ones. It follows that the judgment of the district court must be

AFFIRMED.

FRANK J. KIRCHMAN V. AMELIA KRATKY.

FILED APRIL 21, 1897. No. 7220.

1. **Instructions: ASSIGNMENTS OF ERROR.** An assignment of error in a motion for a new trial that "The court erred in giving paragraphs 3, 5, 7, 8, 9, 10, 11, 12, and 13 of the instructions, and in giving each of them, given by the court on its own motion," is sufficiently specific. It refers to each paragraph separately and not in group. (*Aultman v. Martin*, 49 Neb., 103.)

2. ———: ———. A similarly worded assignment, in the motion for a new trial, in regard to a refusal to give several enumerated instructions proffered by the complaining party is within the same rule and is sufficiently specific.

3. **Fraudulent Conveyances: HUSBAND AND WIFE: BURDEN OF PROOF.** It is the general rule that fraud will not ordinarily be presumed but must be established by the party who has alleged it. The rule does not apply in a contest between a wife and creditors of her husband, in respect to transactions involving the transfer of property from the husband to the wife. In such a contest there is a presumption against her which she must overcome by affirmative proof. She must show, by the preponderance of the evidence, the *bona fide* character of the transaction. (*Carson v. Stevens*, 40 Neb., 112.)

4. ———: ———: INSTRUCTIONS. Actions of the trial court, in giving certain instructions and refusing others, examined, and *held* erroneous.

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

Good & Good and *Simpson & Sornborger*, for plaintiff in error.

Reese & Gilkeson, contra.

HARRISON, J.

In this action the defendant in error claimed to recover of the plaintiff in error the sum of $3,287.13 and interest thereon, alleging in her petition for cause of action that on and prior to April 16, 1892, she was the owner of certain lands in Saunders county, this state, by virtue of a

contract of sale from the state of Nebraska, executed and delivered to her on or about October 20, 1889; that on or about April 16, 1892, she transferred and assigned all her interest in the real estate to Rudolph Safranek and August Widman, in consideration of the payment to her of the sum of $3,287.13; that the money, the purchase price of the land, was, within her knowledge and consent, as the result of an arrangement between Florian V. Kratky, the husband of defendant in error, and the purchasers of the lands, paid to or placed in the hands of Frank J. Kirchman, the plaintiff in error; that on or about the 3d day of May, 1892, her husband departed this life and Frank J. Kirchman was duly appointed administrator of the estate of the deceased, gave the required bond, and entered upon the performance of his duties as administrator, and in such capacity took and holds possession of the said sum of money and refuses to pay the same, or any part thereof, to defendant in error, although often requested so to do, wherefore she demanded judgment. In the answer the defendant in error's ownership of the lands was specifically denied, and all allegations of the petition as to which there was not an admission were made the subject of a general denial. It was alleged that the money expended in the purchase of the lands from the state was money of the husband, who, it was stated, at the time of such purchase was insolvent, and was so at the time of his death; that the title to the real estate was taken in the name of the wife, with the intent and for the purpose of cheating and defrauding the creditors of the husband, and with the intent and for the purpose of concealing and preserving the interest of the husband in the land and preventing its application to the payment of his debts. It was also pleaded that on the 16th day of April, 1892, the defendant in error joined with her husband in a conveyance of the lands to Rudolph Safranek and August Widman, the consideration being the sum of $3,287.13, which was paid to the plaintiff in error; that the sale was with the full knowledge and

concurrence of the defendant in error, and the money derived from such sale was paid to plaintiff in error in express trust for the benefit of, and to be paid to the various creditors of, the husband, who was indebted in the aggregate about $10,000; that the money derived from the sale of the lands was so placed in the hands of plaintiff in error with the full knowledge and consent and by the direction of Florian V. Kratky and his wife, the defendant in error. The allegations of the death of Florian V. Kratky, the appointment of plaintiff in error as administrator of his estate and the assumption of the duties of the administration, and the possession of the money in controversy as a part of the estate of the deceased were admitted. It was further pleaded that plaintiff in error was appointed administrator of the estate at the instance and request of defendant in error, and pursuant to the prayer of a petition filed by her in the proper court; that in such petition she stated that the property of her deceased husband consisted of real estate in the city of Wahoo of the probable value of $1,000 and personal estate of about $3,000, knowing at the time that practically all the personal property of the estate was the money, the trust fund in the possession of the plaintiff in error. It was also pleaded that on about March 1, 1893, the defendant in error filed a petition in the county court of Saunders county asking that a mortgage indebtedness existing against the property in which she was residing, and which had been the residence and homestead of herself and her husband at the time of his death, might be paid from the proceeds of the personal estate of the deceased, with full knowledge that the only personal estate of any appreciable value was the money, the trust fund in the hands of plaintiff in error. It was also stated that at all times during his life, after the purchase of the lands from the state, Florian V. Kratky treated the lands as his own, and received the rents and profits thereof and made all deferred payments of the purchase price to the state as they matured. It was further pleaded that the

plaintiff in error, as administrator, had reported this money to the county court in the schedule of assets or personal property of the estate of Florian V. Kratky, and had proceeded to administer the estate with a view to the payment of the debts of the deceased, and had in the course of the administration incurred necessary expenses and paid out sums aggregating $500, for the payment of which there was no personal or other available estate to exceed in value $50, save and except the aforesaid trust fund or money. The reply filed was as follows:

"Now comes said plaintiff and for her reply to the answer of said defendant says:

"She admits that defendant was appointed administrator of the estate of Florian V. Kratky with the consent of plaintiff, and upon her petition; but says that she did not know anything therein stated in said petition would or could affect her legal rights, nor was she informed of any such fact or condition, nor did she know her legal rights in the premises, nor the effect of any statements therein made.

"Plaintiff further answering says that she signed the petition asking that the administrator be first required to pay the mortgages on the homestead of this plaintiff, but denies that said application had any reference to the money which this plaintiff claims. And this plaintiff denies each and every allegation contained in said answer not herein specifically admitted."

The result of a trial of the issues was a verdict and judgment in favor of defendant in error.

We will first give our attention to the claim of defendant in error that there was no sufficiently specific assignment of error in the motion for new trial, in regard to instructions given and also those tendered by defendant in error and refused, to present the alleged errors for review. The assignments were as follows:

"The court erred in giving paragraphs 3, 5, 7, 8, 9, 10, 11, 12, and 13 of the instructions, and in giving each of them, given by the court on its own motion.

"The court erred in refusing to give instructions 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10 asked by the defendant, and in refusing to give each of them."

A similar objection to an assignment in reference to instructions given was considered by this court in the case of *Aultman v. Martin*, 49 Neb., 103, and it was held: "An assignment of error in a motion for a new trial that the court erred in giving instructions 2, 3, 5, 6, 7, and 8, and each of them, asked for by plaintiff is sufficiently specific to call for a review by the supreme court of each of the instructions specified. It is not an assignment to the giving of the instructions *en masse*, but to each one separately." The rule then announced is applicable to the assignments in this case which we have quoted, and establishes their sufficiency in the particular questioned here.

It is urged on behalf of plaintiff in error that the court erred in giving instruction numbered 10 of those given on its own motion, and in refusing to give that numbered 1 prepared and requested for plaintiff in error, and further stated that the errors are of such a nature that it is proper to consider them together. Paragraph 10 of the portion of the charge of the court to the jury on its own motion was as follows: "You are instructed that the defendant, having admitted in his answer that the contracts for the purchase of said land were in the name of the plaintiff, the burden of proof is upon the defendant to establish that the plaintiff is not the owner thereof, but only holding said lands as the trustee of the said F. V. Kratky." And instruction numbered 1 of those requested for plaintiff in error and refused to be given was in the following language: "You are instructed that transactions between husband and wife where the rights of creditors are involved are looked upon with suspicion, and where a wife claims property which is sought to be subjected to the payment of the husband's debts, it is incumbent upon her to satisfy the jury by a preponderance of the evidence that such transaction was fair and free from any fraud-

ulent intent or purpose to put such property beyond the reach of her husband's creditors." One of the most important of the issues presented was one as to the ownership of the lands purchased from the state, and whether the title thereto was placed in the wife's name with a fraudulent intent and purpose as to creditors of the husband, and while the contest was one nominally between the plaintiff in error as administrator or trustee for the creditors of Florian V. Kratky and defendant in error, it involved the rights of the creditors to the money to obtain which the suit was brought, as opposed to the alleged rights thereto of defendant in error, the outcome being, to a large extent, dependent upon the determination of the character of the transaction of the purchase of the lands from the state, for or by whom made, and to whom did they really belong, and if to the husband were they of apparent title in the wife's name with a fraudulent intent and purpose of the parties relative to the rights of creditors of the husband. While it is the general rule that fraud will not ordinarily be presumed, but must be proved by the party alleging it, this rule has no application in a contest between a wife and creditors of her husband in regard to transactions involving the transfer of property from the husband to the wife. In such a contest there is a presumption against her which she must overcome by affirmative proof. She must establish by a preponderance of the evidence the *bona fide* character of the transaction. (*Carson v. Stevens*, 40 Neb., 112.) Viewed in the light of this rule there was a misstatement of the law applicable to the issues before the jury in the instruction numbered 10, which we have quoted, and a failure to give a correct statement of it as requested by counsel for the plaintiff in error. The court clearly erred both in the statement made and the refusal to give the one requested.

It is also urged that the court erred in giving a portion of its charge to the jury, contained in paragraph numbered 11 thereof, which was as follows: "You are instructed that fraud is never to be presumed, but must be

proven by competent testimony, and in this case, unless you find from the evidence that there was fraud committed by the deceased, F. V. Kratky, in having the title put in the name of his wife, then the plaintiff would be the owner of the land, and entitled to claim the proceeds of the sale thereof at any time before paid over to the creditors of said Kratky." What we have said in regard to instruction numbered 10, given by the court on its own motion, is equally pertinent here and it follows that this instruction was erroneous and should not have been read.

There was prepared and tendered on behalf of plaintiff in error an instruction, numbered 9, in the following language: "You are instructed that the burden of proof is upon the plaintiff, and she must satisfy you by a preponderance of the evidence of all the material allegations of her petition, and if you find that the evidence is evenly balanced, or that it preponderates in favor of the defendant, then your verdict should be for defendant." This instruction was refused. There was no equivalent in the instructions given, and its refusal was an error. It certainly devolved upon the defendant in error to establish the material allegations of her petition by a preponderance of the evidence.

In view of the issues presented for trial and which an examination of the instructions establishes were submitted to the jury for consideration and determination, the errors which we have outlined were of a prejudicial character relatively to the rights of plaintiff in error, and call for a reversal of the judgment.

An objection was interposed for defendant in error to the consideration of the document attached to the record as the bill of exceptions on the ground that it purports to be settled and was signed by the clerk of the district court instead of the trial judge, and the record fails to disclose that the statutory reasons existed and had been made to appear in the manner prescribed by law, or that the required stipulations had been entered into by the parties, which our statute requires, to confer authority

on the clerk of the district court to settle and sign a bill of exceptions. (See Code of Civil Procedure, sec. 311.)

Having reached the conclusion as to errors in the charge of the court to the jury, which will effectually dispose of the case for the present, it is unnecessary to examine or discuss the question of whether the bill of exceptions was or was not settled as required by law, as its consideration need not and does not enter into the decision of the cause.

There were many other assignments of error, but their examination would require an inspection of the evidence, and as we have concluded not to go into the bill of exceptions, they will not be considered. The judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

JOHN R. JOHNSTON ET AL. V. ELMER E. SPENCER.

FILED APRIL 21, 1897. No. 7037.

1. **Fraud**: PLEADING. In a charge of fraud and misrepresentation, the facts showing such fraud and misrepresentation must be pleaded; but this does not require that the probative or evidential facts shall be stated. It is sufficient if ultimate facts are alleged which show the falsity of the representations.

2. **Pleading**: OBJECTIONS: CONSTRUCTION. Where an objection that a petition does not state a cause of action is interposed for the first time during the trial of a cause or after verdict, the pleading must be liberally construed, and, if possible, sustained.

3. **Cross-Examination of Witnesses.** "When a witness is cross-examined on a matter collateral to the issue he cannot, as to his answer, be subsequently contradicted by the party putting the question."

4. ———: COLLATERAL FACTS. "The test of whether a fact inquired of in cross-examination is collateral is, would the cross-examining party be entitled to prove it as a part of his case tending to establish his plea?" *George v. State*, 16 Neb., 318, approved and followed.

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

Charles O. Whedon and *Charles Offutt*, for plaintiffs in error.

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

HARRISON, J.

The defendant in error sued the plaintiffs in error in the district court of Lancaster county to recover an amount alleged to be his due from them as damages which accrued through a sale to him of shares of stock of the Globe Publishing Company at Crete, induced by the false and fraudulent representations of the plaintiff in error. Issues were joined, of which a trial resulted in a verdict and judgment favorable to defendant in error. To secure a review of the proceedings during the trial in the district court the case has been presented to this court. After verdict in the proceedings a motion was interposed for plaintiffs in error asking for judgment in their favor notwithstanding the verdict for the other parties, on the grounds that under the pleadings they were entitled thereto. This was denied, which, it was assigned, was error.

In section 440 of the Civil Code it is provided: "Where, upon the statements in the pleadings, one party is entitled by law to judgment in his favor, judgment shall be so rendered by the court, though a verdict has been found against such party." This provides a remedy, substantially the judgment *non obstante veredicto* of the common law. (*Manning v. City of Orleans*, 42 Neb., 712.) That the shares of stock were purchased by the plaintiff was established beyond question by the pleadings, and the main issuable fact was that of the practice of fraud and deceit by plaintiff in error in the negotiations which culminated in such sale, the other questions being incidental thereto and connected therewith. The petition

contained a statement of the allegations alleged to have been made by plaintiffs in error to influence the defendant in error to purchase the shares. This was followed by other and further statements in reference to the representations made, purposed, by the pleader, to negative the truth of the alleged representations and show them to have been false. It is argued that there was not a sufficient statement of facts in the petition in negation of the truth of the alleged representations and showing their falsity. It is a rule of pleading that in pleading a charge of fraud and misrepresentation the facts must be stated, and not mere conclusions. (*Arnold v. Baker*, 6 Neb., 134; *Clark v. Dayton*, 6 Neb., 192; *Aultman v. Steinan*, 8 Neb., 109; *Tefoel v. Saunders County Nat. Bank*, 24 Neb., 815; *Staley v. Housel*, 35 Neb., 160.) But it is also a rule that where an objection that a petition does not state a cause of action is made, for the first time, during the trial of the action, the statements of the pleading must be liberally construed and the petition sustained if possible. (*Roberts v. Taylor*, 19 Neb., 184; *Marvin v. Weider*, 31 Neb., 774.) The rule which requires a petition in an action of the nature of the one at bar to contain a statement of facts negativing the truth of the stated representations, does not necessitate the pleading of the probative or evidential facts. It is sufficient if ultimate facts are alleged which show the falsity of the representations. If the allegations of the petition in the case at bar be construed liberally, as the rule requires, the attack having been made during trial, they were sufficient in their statements of facts, and not mere conclusions, to establish the falsity of the material representations pleaded to have been made to defendant in error by plaintiffs in error, hence the trial court did not err in overruling the motion for judgment notwithstanding the verdict.

J. W. Craig was called on behalf of the plaintiffs in error as a witness and examined. He gave testimony in regard to the financial condition and business affairs of

the Globe Publishing Company during the time prior to the date its control and management was assumed by defendant in error, the witness having formerly been the manager, he being succeeded by defendant in error. During the cross-examination he was asked the following question: "Q. Did you, in that conversation (referring to a conversation between witness and J. G. Spencer, at Crete, in the summer of 1888), state to him this: That Elmer E. Spencer, the plaintiff in this case, should sue Johnston and Stevens for misrepresentations in the sale of that stock, for it was a shame and an outrage?" And, over the objection of counsel for plaintiff in error, was allowed to answer it, which he did as follows: "No, sir; I made no such statement to Mr. Spencer, not that in substance. I knew nothing about what representations Johnston and Stevens had made to Spencer." Subsequently during the trial J. G. Spencer was called to the witness stand and thus interrogated: "Q. Did you meet Mr. Craig in the town of Crete on the street in the summer of 1888, that being the only time you met him there, and have a conversation with Mr. Craig upon the streets there of that town, in which he told you this, or this substantially: That Elmer E. Stevens, the plaintiff in this case, should sue Johnston and Stevens for misrepresentation in the sale of that stock, as it was a shame and an outrage?" And the objection interposed for plaintiffs in error being overruled, answered as follows: "I did, sir." It is assigned and urged that it was error for the court to allow the foregoing evidence to be introduced. The subject-matter of the question put to Craig on cross-examination did not tend to contradict, as facts, any of his evidence in chief. It could not be placed under the head of a contradictory statement. It was, if made, but a statement of his opinion, and not one of fact. The party asking the question on cross-examination would not have been allowed to ask a witness on the part of defendant in error the question which was propounded to Craig, and elicit the evidence of such a conversation, or of such an

opinion. It was, therefore, of a subject entirely collateral to the issues being tried. "In order to avoid an interminal multiplication of issues, it is a settled rule of practice that when a witness is cross-examined on a matter collateral to the issue, he cannot, as to his answer, be subsequently contradicted by the party putting the question. The test of whether a fact inquired of in cross-examination is collateral is this: Would the cross-examining party be entitled to prove it as a part of his case, tending to establish his plea?" (Wharton, Evidence, sec. 559. See, also, *George v. State*, 16 Neb., 318; *Frederick v. Ballard*, 16 Neb., 559; *Farmers Loan & Trust Co. v. Montgomery*, 30 Neb., 39; *Hooper v. Browning*, 19 Neb., 428; *Republican V. R. Co. v. Linn*, 15 Neb., 234; 1 Greenleaf, Evidence, secs. 455-462.) It follows that the trial court erred in allowing the evidence in contradiction of the witness Craig's denial of having made the statements attributed to him. The evidence admitted was of a character calculated to work prejudicially to the rights of the complaining parties.

There were other assignments of error, but we do not deem it necessary to discuss them here. The judgment of the district court is reversed and the cause remanded.

REVERSED.

RYAN, C., took no part in the decision.

JULIUS S. MORTON ET AL., APPELLANTS, V. JAMES CARLIN ET AL., APPELLEES.

FILED APRIL 21, 1897. No. 8494.

1. Counties: POWERS. Counties and county boards can exercise only such powers as are expressly conferred upon them by statute, and such grant of powers must be strictly construed. (*State v. Lincoln County*, 18 Neb., 283.)

2. ———: ———: PRECINCTS. In the year 1886 the statute governing cities of the second class having a specified number of inhabitants provided that "each city governed by this act shall be divided into not less than four nor more than six wards" (Compiled Statutes, 1885, ch. 14, art. 2, sec. 8), and further provided: "Precinct lines in that part of any county not under township organization, embraced within the corporate limits of a city of the second class, shall correspond with the ward lines in such city, and such precincts shall correspond in number with the wards of the city, and be co-extensive with the same." (Compiled Statutes, 1885, ch. 14, art. 2, sec. 9.) Nebraska City was a city of the class referred to by these sections and had been divided into four wards. On October 4, 1886, the county commissioners of Otoe county, wherein said city was situate, the county not being under township organization, attempted to establish a precinct designated as Nebraska City precinct, and included therein the whole territory of Nebraska City and a number of sections of land. *Held*, That the commissioners had no power or jurisdiction to make such a precinct and their order in that regard was void and of none effect.

3. ———: ———: ———: BONDS: INJUNCTION. On October 6, 1886, the county commissioners issued a call for an election in the so-called Nebraska City precinct, at which was to be submitted to vote of the electors thereof a proposition to issue bonds of the precinct in the sum of $40,000 to aid in the construction of a railroad. This call was issued under the provisions of section 14, chapter 45, Compiled Statutes, by which precincts were authorized to issue bonds for such purpose if the proposition so to do be approved by a specified majority of the votes of the electors at an election called and held pursuant to and in accordance with the provisions of the section. The proposition received the requisite majority and the commissioners issued, or caused the bonds to be issued. *Held*, That there was no precinct in existence which could, by its vote, authorize the issuance of bonds in its name. The bonds were void, and an injunction, in an action by one or more of the taxpayers to be affected, for themselves and others, is a proper remedy and will issue to restrain the levy of taxes with which to pay principal or interest of the bonds.

4. ———. No questions were presented, considered, or adjudicated herein in regard to the rights or interests of purchasers of the bonds.

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

M. L. Hayward and *C. J. Greene*, for appellants.

Paul Jessen, contra.

HARRISON, J.

The appellants, as citizens, property holders, and taxpayers of what had been known as Nebraska City precinct, in their own behalf and in behalf of other persons or taxpayers similarly situated, instituted this action against the appellees, the county commissioners and the county clerk of Otoe county, with the purpose of obtaining an injunction by which the appellees would be restrained from levying any tax on any property situate within the limits of what had been designated or known as Nebraska City precinct, to be appropriated to the payment of the principal or interest of bonds issued as the obligations of the said precinct in the aggregate principal sum of $40,000, and ostensibly "to aid in the construction of the Missouri Pacific Railway Company's railroad through said Nebraska City precinct, by purchase of right of way and grounds for depot therein." This is a quotation from the wording in the body of what is attached to the record as an exhibit, and as being an exact counterpart of the printed portions of each of the bonds in question. The petition, after a statement of the interest of the appellants on which was based their right to commence and prosecute this action, and an allegation of the official capacity of the appellees respectively, contained further allegations, as follows:

"That the city of Nebraska City was in 1885 duly organized as a city of the second class having over 5,000 inhabitants, and was from 1885 until the spring of 1891 such a city of the second class, governed by the laws of Nebraska holding and regulating such cities, and was and is a city in Otoe county, Nebraska.

"4. That Otoe county never at any time was organized under township organization; that by the laws governing such cities it is declared that 'Precinct lines in that part of any county not under township organization, embraced within the corporate limits of a city of the second class, shall correspond with the ward lines of such

city, and such precincts shall correspond in number with the wards of the city and be co-extensive with the same.'

"That said city was in 1885 divided into four (4) wards and has ever since been and now is divided into four (4) wards; that the authorities, prior to December, 1890, never made any change in said city, but disregarding the law in such cases, and conniving to defraud these plaintiffs and other property holders and taxpayers within the pretended bounds of said Nebraska City precinct, said authorities of Otoe county did, on October 4, 1886, by an order made on said day by the commissioners of said county, declare that Nebraska City precinct should constitute all of said Nebraska City and about ten (10) sections of land out of said city. Such order included in said pretended precinct all of said city and all of sections 4, 5, 6, 7, part of 8, all of 14, 15, 16, 17, and 18, in town number 8 north, of range number 14 east; and sections 30, 31, and 32 and 33 in town number 9, range 14, all in said county, four (4) of said sections being fractional. That plaintiffs own both real and personal property situated within the limits of said pretended precinct; that such precinct was so made for the express purpose of allowing and adding to the voters of said city to vote any indebtedness and any taxes upon the property holders of said pretended precinct.

"That in pursuance of said plan of the authorities of said county to defraud and tax the property of such precinct with a heavy bonded indebtedness they did, on the 6th day of October, 1886, issue a call for the people of such pretended precinct to vote upon the proposition to issue forty thousand ($40,000) of bonds of said precinct, to be called Nebraska City precinct bonds, to be issued and placed in the hands of three trustees, to be by them sold and the proceeds from the sale of such bonds to be by said trustees paid over and delivered to certain persons and parties who had, prior to said time, purchased and donated to the Missouri Pacific Railroad Company a right of way through said city and depot grounds in

said city; that said parties had, prior to said date, given a contract to said railroad company for such depot grounds and right of way in and through said city; that such election was held on the 16th day of November, 1886; that afterward, in the year 1886, the county commissioners of said county declared that said vote was carried, and that the proposition for issuing bonds so submitted had been carried and adopted by the people of such precinct, and on the —— day of ——, 1886, such commissioners executed, issued, and delivered to three trustees such $40,000 of so-called Nebraska City precinct bonds; that such bonds were by said trustees, as plaintiffs are informed, sold for the sum of about $30,000, and the proceeds of such sale turned over to the persons who claimed to have so purchased depot grounds and right of way, and expended such sum of money in so paying for such depot grounds and right of way, to carry out said contract made by such persons with said railway company; that such bonds are now claimed to be outstanding; such bonds purport to draw interest at five per cent per annum; that such bonds were not issued, and such call was not made for such bonds to be issued, for any works of internal improvement, but to help certain persons and parties out with such contract as made as aforesaid; that such bonds and the proceeds were issued as a donation to certain private persons and parties, contrary to law, and were issued for no purpose for which bonds can be lawfully issued.

"That such precinct was unlawfully organized; that there was not, and could not at that time be, under the law, any such precinct as said Nebraska City precinct, so to include a city of the second class and ten sections of land outside; that early in 1891 the authorities of Otoe county, Nebraska, reorganized such territory embraced in so-called Nebraska City precinct and made of Nebraska City, within the corporate limits, four (4) separate precincts, and the property lying outside of said city, being said sections of land before mentioned, was added and

annexed to Four-Mile precinct and Wyoming precinct, in said county; that the defendants threaten to and are about to, and will at once, unless restrained by order of this court, proceed to levy upon all of the property, real and personal, within the territory in said so-called Nebraska City precinct a tax of fifty-five (55) mills upon the dollar assessed valuation, for the purpose of paying interest and principal on such $40,000 bonds, so wrongfully and unlawfully issued; that when such bonds were issued property of Otoe county was bonded ten per cent of its assessed valuation; the property of Nebraska City was bonded twenty per cent of its assessed valuation, and that owing to such heavy bonded debt, the heavy expenses, and excessive taxation, property holders and taxpayers were then, and have ever since been, and are now, absolutely unable to pay the assessed taxes upon their property, and a large portion of the property in such city is heavily incumbered with unpaid taxes, which the owners are unable to pay, and in many cases the property is not worth the delinquent taxes thereon. The plaintiffs own real and personal property subject to taxation in said sections of land outside of the city, and also within the corporate limits of said city; that if such levy shall be made plaintiffs will be put to great and irreparable injury, for which they will have no remedy at law."

The appellees, in their answer, admitted all the allegations of the first, second, third, and fourth paragraphs of the petition. Denied that any fraud was practiced in the formation or establishment of Nebraska City precinct by the county commissioners on October 4, 1886, and averred that the action then taken was pursuant to the provisions of section 60 of article 1 of chapter 18 of the Compiled Statutes of Nebraska. It was also stated that all the necessary steps prior and preparatory to the submission to the voters of the precinct of the question of the issuance of the bonds were taken in a regular and legal manner, and that the proposition received in its favor more than two-thirds of the votes cast at the election at which

it was submitted, and that subsequent to such election the bonds were issued. The further portions of the answer were as follows:

"These defendants further deny that the said bonds were issued for the benefit of the persons who had guarantied the right of way and depot grounds in said precinct to the said railroad, but state that these defendants are informed and believe that said bonds were issued for the sole and only purpose of assisting said railroad to build into and through said precinct, as provided in sections fourteen (14) and fifteen (15) in chapter forty-five (45) of the Compiled Statutes of Nebraska; that the said railroad has since been built into and through said precinct, and has been since the —— day of ——, 1887, and still is, in active operation therein.

"5. Defendants further answering state that a tax has been levied each year since 1886 by the county commissioners of said county for the purpose of paying the interest on said bonds, which tax has been levied upon and collected from the property situated in said precinct; that these plaintiffs, together with the other property owners of said precinct, have paid said tax each year for the past nine years; that said bonds were issued and the interest thereon paid with the knowledge and consent of these plaintiffs, who have thereby recognized the validity of the said bonds and are now estopped by their actions from bringing this action.

"6. These defendants further answering state that they were, as county commissioners of said county, about to levy a tax on the property formerly included in said Nebraska City precinct for the purpose of paying the said bonds, together with the last year's interest thereon, when they were enjoined by the plaintiffs in this action.

"7. These defendants further deny each and every allegation in the plaintiffs' petition contained not herein admitted to be true."

There was a reply, a denial of all new matters pleaded in the answer. As a result of a trial of the issues there

was a judgment by which the relief asked was refused and the action dismissed, from which this appeal has been perfected.

Counsel for appellants claim that the bonds were invalid, and in this connection present and discuss two main propositions or reasons in support of such claim, which were stated in their brief as follows:

"1. They were not issued in aid of works of internal improvement, but to reimburse private citizens for moneys expended and obligations assumed for the benefit of a private corporation.

"2. They were voted and issued by a precinct not organized according to law."

Of these we will consider the second. We deem it best to state here that, though it is alleged that the bonds were issued and a sale of them made, and that they "are now claimed to be outstanding," it is not pleaded or otherwise made to appear that the bonds were or are held by innocent purchasers or parties without notice; hence we are not now directly considering the rights of such persons, if they exist. We will now direct our attention to the question of the legal existence of Nebraska City precinct at the time of the issuance of the bonds. At the time the county commissioners changed the boundaries of the precinct, and for several months prior thereto, Nebraska City was and had been a city of the second class, under and by virtue of an act of the legislature making provision for and defining municipalities of such class, and had been divided into wards numbered 1, 2, 3, and 4, in accordance with the requirements of a section of the act in relation to cities of the second class, which was as follows: "Each city governed by this act shall be divided into not less than four nor more than six wards, the boundaries of which shall be defined by ordinance." On October 4, 1886, the county commissioners of Otoe county so altered the boundary lines of Nebraska City precinct as to include within it the whole of Nebraska City and a number of sections of land, and on the 6th day of the same

month ordered a special election to be held on the 16th day of November, at which was submitted the bond proposition. The statutory authority of the county commissioners to establish and fix the boundary lines of precincts, at the time at which this action was taken by the commissioners of Otoe county, was contained in section 60, article 1, of chapter 18, Compiled Statutes, 1895, and section 9, article 2, chapter 14 thereof. These sections read as follows:

Sec. 60, art. 1, ch. 18, Comp. Stats., 1895: "[Precincts.] Each board of county commissioners shall divide the county into convenient precincts, and, as occasion may require, erect new ones, subdivide precincts already established, and alter precinct lines. And whenever any portion of territory containing in the aggregate not less than one township of land, and not more than four townships lying contiguous, shall contain not less than fifteen voters, it shall be the duty of the county commissioners, on receipt of a petition signed by a majority of the legal voters therein, to constitute such portion of the territory a voting precinct."

Sec. 9, art. 2, ch. 14, Comp. Stats., 1895: "[Precinct lines.] Precinct lines in that part of any county not under township organization, embraced within the corporate limits of a city of the second class, shall correspond with the ward lines in such city, and such precinct shall correspond in number with the wards of the city, and be coextensive with the same; *Provided*, That when a ward is divided into two election districts, the precinct corresponding with such ward shall be divided so as to correspond with the election districts."

Otoe county was not, at the time, under township organization; hence the provisions of the latter of the sections we have just quoted were pertinent to the matter in hand.

It was held in the decision in the case of *State v. Lincoln County*, reported in 18 Neb., 283: "Counties and county boards can only exercise such powers as are expressly

granted by statute, and such grant of powers must be strictly construed." If this rule be applied in the case at bar it must be said that the commissioners of Otoe county had no power granted them which, in the establishment of the precinct on the 4th of October, 1886, warranted them in including in what they sought to make Nebraska City precinct the whole of Nebraska City, a city of the second class, with its four wards, together with a number of sections of adjoining land, and the attempt so to do was without authority or jurisdiction on their part, consequently had no force, and the so-called precinct derived from the order no legal establishment or status. This being true, it could not, by its vote, authorize the issuance of the bonds in question in its name, as its obligations or promises to pay, and they were void. There was not a mere irregularity in their authorization and issuance, but a total lack of a body corporate, either *de facto* or *de jure*, having power or authority to issue such bonds. The law under which these bonds were issued (Compiled Statutes, 1885, ch. 45, sec. 14) provides, among other things, that when a petition signed by not less than fifty freeholders of the municipal body contemplating the issuance of bonds shall be presented to the county commissioners, they shall call an election at which to submit the bonding proposition. In 1885 an election was held in Dannebrog precinct, Howard county, at which the question submitted was the advisability of issuing bonds of the precinct to aid in the construction of a railroad. The petition to the county commissioners had a less number of signers than fifty freeholders of the precinct. It was held, in an action of *mandamus* against the auditor of public accounts to compel him to certify the bonds, that no lawful petition had been presented to the board of commissioners. They had no authority to call the election and the proceedings were void. (*State v. Babcock*, 21 Neb., 187.)

In *Wullenwaber v. Dunigan*, 30 Neb., 877, an action to enjoin the issuance of bonds by K township in Seward

county to a railway company, it was held: "At least fifty freeholders, resident of the township, etc., must sign a petition to the county commissioners requesting them to call an election in said township for the purpose of voting aid for a railway. Without a petition so signed by the full number required, the commissioners have no jurisdiction."

In the case of *Force v. Town of Batavia*, 61 Ill., 99, it appeared that under an act that authorized townships to become subscribers for the stock of a railway company and issue bonds for the stock if such action was authorized by the electors of the township at an election, the call for which should be made by the clerk of the township, the call for an election was issued by the town supervisors, and it was held: "That an election under the provisions of this act, by a township, to determine whether it would make such a subscription, called by the town supervisors was void, and the vote therefor, although in favor of subscription, conferred no power on the county authorities to issue the bonds therefor. The town clerk, and he only, could legally call such election." (See, also, *Clarke v. Board of Supervisors of Hancock County*, 27 Ill., 305; *Williams v. Town of Roberts*, 88 Ill., 11.)

By the law of the state of Kansas newly organized counties were prohibited from issuing bonds within one year after the organization. Bonds issued within the forbidden time were held invalid even in the hands of *bona fide* holders. And it was also held: "A purchaser of municipal bonds is bound to ascertain whether the municipality has power to issue them, and an utter want of such power is not cured by any recitals in the bonds." (*Coffin v. Board of Commissioners*, 57 Fed. Rep., 137, citing, in support of the last point, *Dixon v. Field*, 4 Sup. Ct. Rep., 315, 111 U. S., 83, a Nebraska case.)

In *Coler v. Cleburne*, 9 Sup. Ct. Rep., 720, bonds issued by the city of Cleburne, Texas, purported on the face to have been executed January 1, 1884, and to be signed by the mayor of said city, but were in fact made July 3, 1884,

and antedated and signed by W. N. Hodge, a private citizen, formerly mayor of the city, his term of office having expired in April, 1884. The act under which the bonds were issued required that they be signed by the mayor. The bonds were held illegally executed and invalid in the hands of innocent purchasers because not signed by the proper person, and it was said in the opinion: "But we have always held that even *bona fide* purchasers of municipal bonds must take the risk of the official character of those who execute them." (See, also, *Anthony v. County of Jasper*, 101 U. S., 693; *Bayley v. Taber*, 5 Mass., 286; *Sutliff v. Board of County Commissioners*, 13 Sup. Ct. Rep., 318; *Goedgen v. Supervisors of Manitowoc County*, 2 Biss. [U. S.], 328; *Atchison, T. & S. F. R. Co. v. Commissioners of Jefferson County*, 12 Kan., 127.)

"Where there is a want of authority to issue bonds and the officers of the municipality are taking steps to levy a tax for their payment, one or more taxpayers, for themselves and others, have a right to file a bill restraining these officers." (Burroughs, Public Securities, 295.)

It has been said that the bondholders should be made parties to the suit (see *Board v. Texas & P. R. Co.*, 46 Tex., 316), but the question has not been raised or presented in this case; hence it need not be discussed or decided.

Since the conclusions reached on the branch of the case which we have considered will effectually dispose of the controversy, we deem it unnecessary to discuss the other question raised. The judgment of the district court must be reversed and a judgment entered in this court enjoining the appellees from levying any tax to pay the principal and interest of the bonds described in the petition.

REVERSED.

E. M. HARRINGTON V. F. N. CONNOR, RECEIVER.

FILED APRIL 21, 1897. No. 7248.

1. **Substitution of Plaintiff.** Where a transfer of the subject of an action is made by the plaintiff during its pendency, the action may be prosecuted to judgment in the name of the original party plaintiff, or the party to whom the transfer is made may be substituted as plaintiff.
2. **Pleading:** AMENDMENTS. Whether an amendment to a pleading shall be allowed after issues have been joined and trial thereof commenced is within the discretion of the trial judge. The discretion is, however, a judicial one and subject to review to ascertain whether there has been an abuse thereof.
3. ———: ———. The action of the trial judge in refusing to allow an amendment to the answer in this case during the trial examined and approved.
4. **Corporations:** STOCK. That one person becomes the owner of a majority of all of the shares of stock of the corporation does not work a dissolution of the corporation nor necessarily destroy its identity or individuality as a business concern. Property conveyed to the corporation does not become the property of such person individually.
5. **Banks and Banking:** INSOLVENCY: RECEIVERS: FRAUD: SALE OF ASSETS. The receiver of a bank, appointed under the provisions of section 34, chapter 8, Compiled Statutes, takes charge of the assets of such bank in favor of and to assert and guard the claims of depositors and creditors of the bank as the paramount and superior claims against the assets thereof; and in an action by the receiver on any note or evidence of indebtedness of the assets a defense thereto cannot prevail which involves the recognition and enforcement of an agreement which, when made, was a fraud on creditors and depositors of the bank, present and future; and this is true notwithstanding the defense might have been entertainable and good against the bank. *Held, further*, That a purchaser of the assets in a sale by the receiver took the title thereto of the receiver, including its exemption from the defense to an action on an asset to which we have alluded.

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

F. I. Foss, for plaintiff in error.

Charles Offutt, contra.

HARRISON, J.

On September 13, 1892, Theodore H. Miller, then receiver of the State Bank of Nebraska, at Crete, instituted this action against E. M. Harrington and George D. Stevens. The suit was based upon a promissory note in the principal sum of $5,000, with interest at the rate of ten per cent per annum from date, stated to have been executed by E. M. Harrington, of date May 21, 1892, payable one month after date, and to the order of George D. Stevens. It was pleaded in the petition that the bank was a corporation organized under the laws of this state, and that the note in suit had been, on a day of the month of its execution and delivery, indorsed by George D. Stevens, the payee thereof, and sold and delivered to the State Bank of Nebraska; that on September 9, 1892, Miller was appointed receiver of the bank. After this action was commenced Miller resigned and Frank H. Connor was appointed receiver of the bank. An attachment was procured against Stevens and service was made, as to him, by publication. Personal service of summons was had on Harrington, who filed an answer in the case, in which he stated as follows: "That the facts in relation to the making of said note are as follows: Prior to the making of said note the said George D. Stevens was the cashier of said bank, and so remained for some months thereafter, and until the said bank passed into the hands of said Miller, receiver; that at or about the time of the making of said note it was proposed and intended to reduce the capital stock of said bank from $75,000 to the sum of $50,000; that the said Stevens was in debt to said bank to the amount of $13,000, which was a greater amount than he was allowed by law to carry under the capital of $50,000; that for the purpose of apparently reducing his said indebtedness to an amount within the statutory limit he, the said George D. Stevens, being cashier as aforesaid, took up his note to the bank of $13,000, and in lieu thereof gave his own note for $8,000

and induced this defendant to make, execute, and deliver the note in suit to the said Stevens, for the sole and only purpose of enabling him to indorse the same to the bank in lieu of the remainder of the said $13,000 note; and the defendant alleges that he did so indorse said note to the said bank, and that there was and is no other and further consideration for the said note moved either from said Stevens or said bank to this defendant, or from said bank to said Stevens, and that this defendant received no consideration, nor did the bank give any consideration, for the same, or lose or part with anything of value therefor." The answer in which the foregoing appeared was filed of date October 17, 1892. On May 15, 1893, a second answer was filed for Harrington, in which it was alleged that on January 9, 1893 (some months after this suit was brought), the entire assets, including the note in suit, were, by the order and authority of this court, sold, assigned, and transferred to John R. Johnston, who since that time has been the owner of the note; that George D. Stevens, for several years prior to the time the note in suit was executed, had been and was cashier of the State Bank of Nebraska; that the defendant Harrington was and had been a clerk in the bank during a number of years; that the relations between him and Stevens were of a confidential and friendly nature, and that he executed the note at the request of, and for the accommodation of, Stevens, and without any consideration; that Stevens was the sole owner of the bank, all except five shares of the stock being in his name, and those five being nominally owned by his wife, but controlled and in reality owned by him; that of all these matters Johnston had full knowledge. To this a reply was filed, in which the transfer to Johnston, during the pendency of this suit, of the assets of the bank, including this note, was admitted as stated in the answer. It was also admitted that Stevens had been cashier of the bank as alleged in the answer, also that the defendant Harrington had been a clerk therein as pleaded, and each and every other allega-

tion of the answer was denied. During the October, 1893, term of the district court in Saline county the cause was tried and the receiver was awarded a verdict and judgment for the amount claimed in the petition. The plaintiff in error seeks a reversal of the judgment.

One point argued is that after the sale and transfer of the note to John R. Johnston he became the real party in interest, and should have been made a plaintiff or substituted as party plaintiff. The transfer was during the pendency of the action, and in such cases the action may be continued or further prosecuted in the name of the original party. (Civil Code, sec. 45; *Howell v. Alma Milling Co.*, 36 Neb., 80, and cases cited.) The disposition of this question determines a number of assignments of error which related to the action of the trial court in excluding evidence the intent and drift of which would have been to show the acquisition of the note by Johnston and the consequent change of the real party in interest in the suit from the receiver to him.

During the progress of the trial, and after several ineffectual attempts on behalf of defendants to introduce evidence, the defendant having the burden of proof and having been accorded the opening and closing of the case, it having become quite apparent from the rulings of the court that under the existing conditions of the pleadings, or more particularly the answer as it then stood, no evidence would be received on the part of the defendant, the following request was made: "The defendant Harrington now asks permission to withdraw a juror and amend his answer to state therein the fact that there was no consideration for the transfer of the note from George D. Stevens to the State Bank, and that said note was made without any consideration and transferred without any consideration, and that the receiver of said bank took the same directly among the assets of said bank, and that the same was sold by him, long after due, to John R. Johnston, who had formerly been for a number of years the president of the State Bank, and who knew that this

note of his own knowledge had been given without any consideration and transferred to the bank in the same way, and that he purchased it long after due." To this counsel for the receiver objected and the request was refused. This refusal is the subject of one of the assignments of error. The rule in reference to the amendment of pleadings after the issues are fully joined is well settled. Whether the amendment shall be allowed is a matter which rests within the discretion of the trial judge,—the discretion, however, is a judicial one, the abuse of which is subject to review. (*Commercial Nat. Bank v. Gibson*, 37 Neb., 750.) The statement of what it was desired to plead in the answer, for the filing of which leave was asked, shows that it would have been in direct conflict with the answer then on file as to at least one fact, viz., the transfer of the note in suit by Stevens to the bank, and the consideration therefor. This, associated with other circumstances, may have been sufficient to warrant the trial judge in the refusal to permit the amendment, but if the amendment be read into the answer on file, it would still clearly appear that the note was made by defendant and delivered to Stevens, and by him indorsed and delivered to the bank and placed among its assets, presumably to swell their volume and the apparent capital and responsibility of the bank in the eyes and minds of the public who might, as depositors or in business transactions, become the creditors of the bank. In this connection it is urged by counsel for defendant that, inasmuch as it appeared by the answer, and would have been proved had the evidence been admitted, that Stevens, at the time of the execution of the note in suit, owned all the shares of capital stock of the bank, except five owned by his wife, which were controlled by him, that the bank no longer existed as a corporation, or that at least its corporate existence, powers, and functions were suspended, that it became Stevens, the individual, and ceased to exist as a corporation; that the note, though indorsed by Stevens and ostensibly delivered to

the bank, was yet with Stevens, as he owned and was in reality the bank; that any equities existing against the note in favor of defendant were attached to it at all times, as it was during its life, up to the time it reached the receiver, always owned by Stevens, who knew its inception and the infirmity attendant thereon. Though Stevens may have owned a majority of the stock, all but five shares, or all of it, the corporation did not necessarily lose its identity or individuality as a business concern, nor its business powers and capacities, nor did he acquire the right to act for it, or in its transactions, apart or independently from its proper officers and agents, nor did property conveyed to it become his individually. That one person becomes the owner of all the stock does not work a dissolution of the corporation. (Cook, Stock & Stockholders [3d ed.], vol. 1, sec. 631, vol. 2, sec. 709; *Button v. Hoffman*, 61 Wis., 20; 2 Morawetz, Private Corporations, 635.) The note was transferred to and became the property of the corporation.

The receiver of the bank was appointed under the provisions of section 34, chapter 8, Compiled Statutes. The receiver thus appointed took possession and charge of the assets of the bank to guard and assert the rights of depositors and creditors of the bank, as the paramount or superior claims against or upon such assets, to the exclusion, if necessary, of all others, and in an action to recover any of the assets a defense which would not be available or good as against the rights of the creditors of the bank could not prevail against the receiver. The defense which it was sought to interpose on behalf of defendants involved the statement of a fraud which had been practiced upon the rights of depositors and creditors of the bank, present and future; and even if it could be entertained against the bank or corporation, it could not be tolerated in a suit by the receiver, the representative of depositors and creditors. His title to the assets was shorn of any such apparent right or equity in defendant. (*Pittsburg C. Co. v. McMillin*, 119 N. Y., 46; *Alexander v.*

Relfe, 74 Mo., 495; *Tuckerman v. Brown*, 33 N. Y., 297; *In re Pennsylvania Bank*, 25 Atl. Rep. [Pa.], 310.) Johnston received the title to the assets, which was vested in the receiver and subject to like and no other equitable defenses. He took the title of his vendor to the note and was entitled to the like protection. (*Koehler v. Dodge*, 31 Neb., 337.) These conclusions being true, if error in not permitting the amendment, it was not prejudicial, as the proposed defense would have been of no avail. This also disposes of the further assignment that the court erred in directing a verdict for plaintiff, which it did; also alleged errors in relation to excluding evidence. No prejudicial error having been assigned, the judgment of the district court must be

AFFIRMED.

UNION PACIFIC RAILWAY COMPANY V. HATTIE V. CLARK, ADMINISTRATRIX.

FILED APRIL 21, 1897. No. 7145.

Death by Wrongful Act: EVIDENCE. Evidence examined, and *held* not sufficient to sustain a verdict that the death of plaintiff's intestate was caused by the negligence of defendant's servants.

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

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

Green & Hostetler, *contra.*

NORVAL, J.

This action was instituted in the court below by Hattie V. Clark, administratrix of the estate of John Clark, to recover damages by reason of the death of plaintiff's in-

testate, said to have been caused by the negligence of the defendant's servants while switching cars. From a judgment in favor of the plaintiff for $2,000 the defendant brings the case to this court for review by appropriate proceedings.

On and for a long time prior to the 27th day of April, 1892, John Clark was in the employ of the defendant as a section hand. In the afternoon of said day, while so engaged, he, together with George Keefover, Charles Coleman, and Frank Slamma, was directed by the foreman of the gang, Lawrence Brooks, to repair the roadbed upon the main line a short distance west of what is known as the "Cotton Mill Switch," at West Kearney, in Buffalo county, and the said Clark went to work in pursuance of said instructions less than 100 feet west of the switch stand. While thus engaged a freight train of the defendant, consisting of a locomotive and tender, two freight cars in front of the engine, and two in the rear, stood on the main track something like 400 feet east of said switch. Mr. Brooks, the foreman, observing the train, left the men, including Mr. Clark, who was standing in the center of the main track, and went to open the cotton mill switch, so as to place the cars thereon. Presently the servants of the company in charge of the train made what is called a "flying switch," which was done in the following manner, according to the testimony of Charles A. Coleman:

The engine was started with sufficient force with these cars in front of the engine, so as to throw them on the cotton mill switch by reason of their own momentum, after the engine was cut loose.

Q. What was done? Were they cut loose?

A. Those two cars were cut loose from the engine by reason of the steam being shut off, and the pin was drawn out and it was separated from the cars, and the engine then passed out of the way.

Q. What did the engine do with the cars that were behind it?

A. They went with the engine faster than the two cars that had been cut loose, and ran back upon the main line out of the way of the cars that were running by their own momentum, which ran onto the cotton mill switch, leaving space enough between the two cars for the switchman to throw the two cars onto the cotton mill switch.

Q. You say that the train started up at this depot and got under headway or speed enough, so that the cars in front of it ran onto this cotton mill switch?

A. Yes, sir.

Q. And then it was cut loose and it ran out of the way on the main track so that the switchman could turn the switch to throw the two cars onto the switch?

A. Yes, sir; that is correct.

It is disclosed that the front of the engine was to the east, and that in making the "flying switch," as above described, the engine and the two cars in the rear, after passing the switchstand, ran west upon the main line at a speed from twenty to thirty miles an hour, striking Mr. Clark, knocking him down, and injuring him so badly that he died in a few hours thereafter. The breach of duty claimed is that the defendant's employes were negligent in running the engine and cars at a high rate of speed, and in not ringing the bell and sounding the whistle, or giving any notice or signal of warning. The evidence is conflicting as to the speed of the engine and cars at the time of the accident, as well as whether any signals were given. The proofs for the company tended to show that the whistle was sounded before the engine started, and that the bell was rung continuously thereafter. Furthermore, that Mr. Brooks, by signalling with his hands, gave notice that a flying switch was about to be made. The testimony on behalf of the plaintiff below was sufficient to warrant the jury in finding that no signals of any kind were given. But there was, however, an entire failure of proof to establish that a flying switch could have been made at a less rate of speed, or that the failure to sound the bell or whistle, or the omission to sig-

nal the approach of the engine and cars, either or all combined, occasioned Clark's death. The cars were in plain sight of the section hands at all times, and they knew that the cars were about to be put upon the switch or side track. Had the deceased been looking eastward he would have seen the cars in ample time to have escaped danger. No disinterested person can peruse this record without reaching the conclusion that Mr. Clark's life was lost through his own negligence in not looking out for the cars and stepping off the track, as did the other men in the gang who were nearer the switch than he. The case in most respects is like that of *Chicago, B. & Q. R. Co. v. Soderberg*, 50 Neb., 674. The evidence being insufficient to sustain the finding, the judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

JOHN HOGUE V. WILLIAM H. OGLE ET AL.

FILED APRIL 21, 1897. No. 7127.

1. **Judgments:** CORRECTION OF JOURNAL ENTRY. Evidence examined, and *held* insufficient to sustain a motion filed under subdivision 3 of section 602 of the Code of Civil Procedure to correct the record entry of a judgment "for mistake, neglect, or omission of the clerk, or irregularity in obtaining a judgment or order."

2. **Review:** LACHES. A judgment cannot be reviewed which was rendered more than one year prior to the commencement of proceedings in error in this court.

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

Edmund C. Lane, for plaintiff in error.

Nightingale Bros. and *J. R. Scott, contra.*

NORVAL, J.

On the 6th day of December, 1892, William H. Ogle recovered a money judgment in the district court of Sherman county against the Sherman County Banking Company, John Hogue and others, stockholders in said corporation. The journal entry of the judgment states that, after the impaneling of the jury the parties, by their attorneys, stipulated in open court that the jury should be discharged and that "the cause was submitted to the court, upon the stipulation there and then made by the parties in open court, on consideration whereof the court found the issues joined in favor of the plaintiff," etc. On February 8, 1894, one of the defendants, John Hogue, filed a motion to correct the said journal entry of December 6th so as to disclose that the stipulation upon which the judgment was rendered was made between the attorneys for the plaintiff and attorney J. R. Scott, and not by the parties themselves, and also to show that the stipulation was for a judgment against the Sherman County Banking Company alone. From an order overruling this motion said Hogue prosecutes proceedings in error.

There was read upon the hearing of the motion the affidavit of the defendant Hogue, stating "that he did not consent in person or by attorney to having any judgment rendered against him in the cause, by stipulation or otherwise, during the December term of court, 1892, or at any other time, and had no knowledge of such a stipulation during said term of court." This was wholly insufficient to impeach the truthfulness of the record entry of the judgment. It may be true that Mr. Hogue did not by himself, or a duly authorized attorney, stipulate or consent to the rendition of the judgment against him, yet, for aught that appears, he or his attorney may have stipulated in open court as to the facts, which justified the court in rendering the judgment complained of. The journal entry contains no finding or recitation to the effect that anyone consented or stipulated to the entry of

the judgment; hence the defendant is not entitled to have the judgment corrected under subdivision 3 of section 602 of the Code of Civil Procedure, "for mistake, neglect, or omission of the clerk, or irregularity in obtaining a judgment or order."

It is contended that the stipulation must be construed as a confession of judgment, and that no warrant of attorney was presented to the court and placed on file prior to the time the judgment was rendered as required by statute. There is more than one answer to the argument. First, the stipulation is not before us; therefore we are unable to say whether it amounted to a confession of judgment or not. In the next place, we cannot review the original judgment, since it was rendered more than one year prior to filing of the petition in error in this court. (*Campbell v. Farmers & Merchants Bank*, 49 Neb., 143; *Omaha Loan & Trust Co. v. Knight*, 50 Neb., 343; *Renard v. Thomas*, 50 Neb., 398.) The order assailed is

AFFIRMED.

CITY MISSIONARY SOCIETY, APPELLANT, V. ANDREW J. REAMS ET AL., APPELLEES.

FILED APRIL 21, 1897. No. 7159.

Mortgages: AUTHORITY OF AGENT RECEIVING PAYMENT. Evidence *held* not to show that one to whom a mortgage debt was paid was the agent of the owner and holder.

APPEAL from the district court of Franklin county. Heard below before BEALL, J. *Reversed.*

James McNeny, for appellant.

E. A. Fletcher and *A. H. Kidd, contra.*

NORVAL, J.

On the 5th day of December, 1885, Andrew J. Reams and wife borrowed $300 from James H. Tallman of Hartford, Connecticut, through the Nebraska & Kansas Farm Loan Company of Red Cloud, this state, and gave their negotiable promissory note to said Tallman for said sum, due in five years, with interest coupons attached, both principal and interest being made payable at the Mechanics Savings Bank of Hartford. To secure the payment of said note and coupons the Reams at the same time executed and delivered a mortgage on the northwest quarter of section 22, township 1 north, in range 14 west, in Franklin county, which was duly recorded. The note and mortgage, soon after their date, were in the regular course of business sold and transferred for value to the City Missionary Society of Hartford, the plaintiff herein. The Reams paid the first two coupons falling due to the Nebraska & Kansas Farm Loan Company, who forwarded the money to George W. Moore & Co., a firm of loan brokers at Hartford, and of which said Tallman was a member, and the last named firm paid the money to plaintiff, took up the coupons and forwarded the same to the Nebraska & Kansas Farm Loan Company, who delivered them to the makers. On the 4th day of October, 1890, for the purpose of paying off said note and mortgage, the Reams gave their negotiable promissory note for $350 to the said Nebraska & Kansas Farm Loan Company, due October 1, 1895, and at the same time to secure the payment thereof executed and delivered to said company a mortgage upon the real estate above described. The note and mortgage were sold and assigned to the defendant Samuel Slocum. This was an action to foreclose the mortgage first above described, the defense being payment. The defendant Slocum also filed a cross-petition setting up his mortgage and praying a foreclosure of the same. Upon the trial in the court below a decree was entered favorable to Slocum, and foreclosure was refused plaintiff, from which it appeals.

The sole question relates to the sufficiency of the evidence to sustain the finding of the trial court that the mortgage debt had been paid. The facts developed by the record in every essential particular are substantially identical with those in the case of *Richards v. Waller*, 49 Neb., 639, wherein it was held the proofs failed to show that the one to whom the mortgagor paid the debt was the agent of the owner and holder. With that conclusion we are content. Payment in the case at bar was not made to the plaintiff, the owner of the note and mortgage, nor to a person who had possession of them; hence it was for the defendants to establish by the proofs that the party to whom they made payment was empowered, or possessed ostensible authority, to collect the money. As to this there was a total lack of evidence, and the case is accordingly distinguishable from *Thomas v. Shelton*, 49 Neb., 644, cited by defendants, where payment of a mortgage debt to one possessing ostensible authority to act as agent of the owner, was sustained. The decree against plaintiff is reversed and the cause remanded with directions to the district court to enter a decree in plaintiff's favor for the amount due on the mortgage.

REVERSED AND REMANDED.

FRANCIS G. HAMER V. JAMES MCFEGGAN ET AL.

FILED APRIL 21, 1897. No. 7288.

1. **Assignments of Error: WAIVER.** Assignments of error not presented by the briefs or oral arguments are waived.
2. **Judicial Sales: APPRAISEMENT.** Objections to the appraisement of property made under an order of sale should be filed in the trial court prior to the sale.

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

F. G. Hamer, for plaintiff in error.

Hall, St. Clair & Roberts, W. P. Hall, and *Halleck F. Rose, contra.*

NORVAL, J.

This cause was brought to this court to obtain a review of an order confirming the sale of real estate. While the petition in error contains twenty-eight assignments, the only one argued in the brief relates to the appraisement, and all others will be disregarded. (*Wood Mowing & Reaping Machine Co. v. Gerhold*, 47 Neb., 397; *City of Kearney v. Smith*, 47 Neb., 408.)

It is urged that the value placed upon the property was so low as to raise a presumption of fraud in making the appraisement. There are two answers to this contention: First, no objection was made to the appraisement until after sale, which was too late. (*Vought v. Foxworthy*, 38 Neb., 793; *Smith v. Foxworthy*, 39 Neb., 214; *Ecklund v. Willis*, 44 Neb., 129.) But it is said there was no notice of the appraisement given. The only notice the statute requires is the legal notice of sale and the filing of the copy of the appraisement with the clerk of the district court. These steps were taken. Second, there was sufficient evidence adduced on the hearing to show that the property was appraised at its actual value. The order is

AFFIRMED.

STUDEBAKER BROS. MANUFACTURING COMPANY, APPELLANT, V. MERRITT D. WELCH ET UX., APPELLEES, AND WILLIAM A. SAYERS ET AL., APPELLANTS.

FILED APRIL 21, 1897. No. 7164.

1. **Husband and Wife: PROCEEDS OF ENDOWMENT POLICY: CLAIMS OF CREDITORS.** An endowment policy was taken out by a husband, which was made payable to his wife. The premiums thereon were

paid by him and likewise the money due on the policy was received by the wife from the insurance company during the solvency of the husband, and the money so received was invested in real estate in her name. Subsequently the husband became insolvent. *Held*, That such property was not subject to the claims of his creditors.

2. ———: GIFTS. A gift from a husband to his wife will be upheld, if made when the former was solvent, and the existing rights of creditors were not thereby impaired.

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

Ricketts & Wilson, J. C. Johnston, and *S. B. Iiams,* for appellants.

Lamb & Adams, contra.

NORVAL, J.

This action was instituted by plaintiff to subject certain real estate to the payment of its two judgments recovered against the defendant Merritt D. Welch. Subsequently, William A. Sayers and A. R. Scoville filed an answer and cross-petition praying that a judgment recovered by them against said Welch be adjudged a lien on the said property, and that the same be sold upon execution to satisfy the judgment. From a decree dismissing the petition and cross-petition plaintiff and the defendants Sayers and Scoville appeal.

The facts may be summarized as follows: The defendants Merritt D. Welch and Lizzie C. Welch are, and have been since 1872, husband and wife. In July, 1893, plaintiff recovered two judgments in the county court of Lancaster county against said Merritt D. Welch, one for $506.43 and costs, and the other in the sum of $499.15, besides costs of suit. Transcripts of these judgments were duly filed and docketed in the district court of said county, and executions were issued thereon, which were returned *nulla bona.* Subsequently, alias executions were issued and levied upon lots 7, 8, and 9, in block 4, of Pleasant Hill subdivision of lots 3, 4, 5, and 6, in the

northeast quarter of section 36, town 10, range 6 east, in Lancaster county, as the property of said Merritt D. Welch, the title of record to which property being in the name of his wife. On April 21, 1892, the defendants Sayers and Scoville obtained a judgment against said Welch in the district court of Lancaster county for $889.60 and $48.05 costs, upon which execution was issued and returned unsatisfied. A second execution was thereafter issued on said judgment, and levied upon the premises above described. It is sought by these proceedings to have said property subjected to the payment of said several judgments, the creditors claiming that the money with which the same was purchased belonged to the husband, and not the wife, which position is assailed by the Welches. There is no conflict in the evidence relating to the ownership of the premises in controversy. It is disclosed that in 1873 Mr. Welch procured a tontine policy on his life for $4,000, in the New York Life Insurance Company, maturing in ten years from date, and payable to his wife. He paid the premiums on the policy until 1883, when it matured, and the company then paid to Mrs. Welch on the policy $1,200, or $1,300, her husband being free from debt at the time. This money Mr. Welch loaned for his wife until April 23, 1885, when the principal and interest went to purchase four lots owned by Samuel S. Chase, who on that date, his wife joining with him, executed and delivered a deed conveying said lots to said Lizzie C. Welch. At that time Mr. Welch was neither indebted to the plaintiff, nor to Sayer and Scoville. On September 28, 1891, the Chase property was traded for the premises in dispute; the title to the latter, through mistake, was taken in the name of Mr. Welch, who, on the same day, by deed of general warranty, conveyed the property to his wife, both deeds being filed for record on said date. Subsequently, the indebtedness was contracted upon which plaintiff's judgments were obtained. It is argued by appellants that the money received from the insurance company was the money of Mr. Welch, and

when invested in the Chase property Mrs. Welch held the legal title for her husband, and *Talcott v. Field*, 34 Neb., 611, is cited in support of the contention. In that case it was decided that an endowment policy taken out by a husband and payable to his wife is in effect a loan or investment, and where the premiums have been paid for an insolvent debtor, the money received by the wife on such policy during the lifetime of her husband is liable to the claims of his creditors. That case lacks analogy, since Mr. Welch was not insolvent, nor, so far as this record shows, was he indebted to the extent of a farthing, when he paid the premiums on the policy, while the rule announced in *Talcott v. Field* is limited in its application in express terms to suits where the premiums have been paid by an insolvent debtor. The case in hand more nearly resembles *Dayton Spice-Mills Co. v. Sloan*, 49 Neb., 622, where a similar transaction between husband and wife was upheld. Mr. Welch being solvent when he paid the premiums, and at the time the insurance company paid the money, he had a perfect right to make an absolute gift of the same to his wife as he did, and it is not rendered invalid by the subsequent insolvency of the debtor husband. The gift of the money to Mrs. Welch was fully consummated, and it is sustainable in equity. (*Dayton Spice-Mills Co. v. Sloan, supra.*) Mr. Welch paid no portion of the consideration for the property herein involved so far as this record discloses. The title to the premises, when the indebtedness was contracted upon which the judgments were rendered, was in the name of the wife; and she had been the owner of the Chase property, which was exchanged for these premises, nearly five years prior to the giving of the note which was the foundation of the Sayer and Scoville judgment. The fact that Mr. Welch was indebted to them at the time he executed the deed to his wife is not important. She having paid the consideration for the property, was the equitable owner thereof; hence it was not liable for his debts. The decree is

AFFIRMED.

S. S. VAN HORN ET AL. V. STATE OF NEBRASKA, EX REL. RICHARD M. ALLEN.

FILED APRIL 21, 1897. No. 7943.

1. **Mandamus: RELATOR.** When *mandamus* proceedings are instituted to redress a private wrong or enforce a private right, the party beneficially interested should be named as relator.
2. **———: DRAINAGE-DITCH: INTEREST OF RELATOR.** A *mandamus* will not issue to a county board to compel the construction of a drainage-ditch under article 1, chapter 89, Compiled Statutes, where the relator is not shown to be interested in the improvement, independent of that which he has in common with the public at large.

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

George L. Loomis, C. Hollenbeck, and *John W. C. Abbott,* for plaintiffs in error.

Samuel Maxwell, W. H. Munger, and *J. E. Frick, contra.*

NORVAL, J.

On the 18th day of April, 1894, a petition was presented to the county board of Dodge county, accompanied by the requisite bond, praying for the location and construction of a drain or ditch, known as the "Central Cut-Off Ditch," over and across certain lands. Thereupon the board viewed the line of the proposed improvement, made its report in writing in favor of the ditch, finding all the matters and things required by section 5, article 1, chapter 89, of the Compiled Statutes, which report was entered on the journal, and the county surveyor was ordered to go upon the line described in the petition and survey, level, and stake the proposed ditch, and make a report, profile, and plat of the same, together with estimates of the cost of construction, according to law. On June 30, 1894, the county surveyor filed his report, from which it appears that the estimated cost of constructing

the improvement was nearly $24,000. The county clerk fixed August 7, 1894, for the hearing on the report, and notice thereof was duly given. On the last named date the county board, after making a finding that the requisite notice of the hearing had been given, postponed action upon the surveyor's report, the estimates, and all matters connected with said ditch until the second Tuesday of January following, at which time the board, by resolution, indefinitely postponed "all business connected with the Central Cut-Off Ditch." Thereupon the relator, Richard M. Allen, applied to the district court for a peremptory writ of *mandamus* against the members of the board of supervisors of Dodge county to compel them to convene as a county board and proceed with the construction of said ditch. To the petition the respondents demurred, on the grounds that it does not state facts to constitute a cause of action, and that plaintiff has no legal capacity to sue or legal interest sufficient to maintain the action. The demurrer was overruled by the court, the respondents answered, and certain parties affected by the ditch intervened. Upon the trial a peremptory writ was awarded, and the respondents and intervenors separately prosecute petitions in error.

In the briefs, and at the bar, the proposition was argued by counsel for the respective parties whether the county board acted judicially when it found in favor of the ditch, and if it did, whether it possessed the power to review or disregard its action in the premises, as it attempted to do by adopting the resolution at the January meeting to indefinitely postpone further proceedings connected with the ditch. This point it is unnecessary to consider at this time, owing to the views we entertain upon another question, which must control the decision in the case, namely, the right of the relator to maintain the suit.

"The rule is well established in this court that, where the question is one of public right and the object of the *mandamus* is to procure the enforcement of a public duty,

the relator need not show that he has any legal or special interest in the result, it being sufficient to show that he is a citizen and, as such, interested in the execution of the laws. (*State v. Shropshire*, 4 Neb., 411; *State v. Stearns*, 11 Neb., 104.) This rule applies more particularly to the enforcement of such public duties which the failure to perform will affect the entire community alike. * * * The distinction between cases where a private person may act as relator to enforce a public duty, and where to maintain the action he must show an interest, is not very clearly drawn in the cases. The dividing line, however, appears to be that where private or corporate rights are affected, then the relator must show an interest, while if the state is the real party, and the relator the mere informer, to procure the enforcement of a mere public duty, then a private individual may become the relator." (*State v. City of Kearney*, 25 Neb., 266.) *Mandamus* will lie against a public officer to compel the performance of a duty of a public nature on the petition of a private person where the proper prosecuting officer refuses to institute the suit. If the writ is sought to enforce a private right merely, the relator must show a direct interest in the result. (Code, sec. 646; *Hagerty v. Arnold*, 13 Kan., 385.) In one sense it may be said that a public object and purpose is to be accomplished by the construction of this ditch, namely, to promote the public health and welfare; but in every other respect private interests alone are to be subserved. A highway is a public improvement, yet every citizen or elector of the county has not such an interest in its establishment as to enable him to invoke the writ of *mandamus* to enforce the opening of a highway which has been duly established, but he must have an interest in the improvement independent of that which he possesses in common with the public at large (*Throckmorton v. State*, 20 Neb., 647); and, upon principle, such an interest is necessary to authorize one to institute *mandamus* against a county board to compel the taking of necessary steps to secure the construction of a ditch

under article 1, chapter 89, Compiled Statutes. Section 4 of said article requires the petition for such improvement to be signed by one or more owners of the lots or lands which will be benefited thereby. Freeholders alone are competent to sign such a petition, and without a petition properly signed the proceeding would be a nullity. (*Doody v. Vaughn*, 7 Neb., 28; *State v. Babcock*, 21 Neb., 187; *Wullenwaber v. Dunigan*, 30 Neb., 877.) It follows that this suit cannot be maintained by this relator unless he is beneficially interested in the matter. The record fails to disclose that he possesses such an interest. He was not a signer of the petition presented to the respondents for the location of the ditch, nor does it appear that he is the owner of any real estate which will be affected by the proposed improvement. Not being a competent petitioner for the ditch, it would seem that he is not a competent party plaintiff, at least unless he would be injuriously affected by the failure of respondents to act, which is not disclosed. It is true relator resides near the line of the contemplated ditch, but it is not shown that he is in any manner aggrieved by the failure of the respondents to act. It appears that the Standard Cattle Company, a Wyoming corporation, which owns several hundred acres of land near the line of said ditch, and within the course of the general flow of surface water that would be carried off through said ditch if constructed, signed the petition therefor, that relator is a stockholder in said corporation, is the manager thereof in Dodge county, and resides upon the company's lands in said county. The fact that Mr. Allen is the manager of the Standard Cattle Company, or is a stockholder therein, confers no right upon him to maintain this action in his individual name. As such stockholder he is the owner of no interest in the real estate of the corporation. (*Carpenter Paper Co. v. Wilcox*, 50 Neb., 659.) As a general rule, a stockholder may not sue on behalf of the corporation. He may sue for its benefit, however, where the corporation refuses to sue, or is controlled by direct-

ors who are chargeable with liability. (*Fitzgerald v. Fitzgerald & Mallory Construction Co.*, 41 Neb., 374.) No facts are alleged or proven to bring the case within any recognized exception to the general rule stated above. For the want of a competent relator, the judgment of the district court is reversed and the cause dismissed.

REVERSED AND DISMISSED.

STATE OF NEBRASKA, EX REL. FRED W. GRAY, V. SCHOOL DISTRICT OF NORFOLK.*

FILED APRIL 21, 1897. No. 7871.

Unauthenticated Bill of Exceptions. A bill of exceptions must be authenticated by the clerk of the trial court or it will not be considered.

ERROR from the district court of Madison county. Tried below before ROBINSON, J. *Affirmed.*

Wharton & Baird and *Robertson & Wigton*, for plaintiff in error.

Barnes & Tyler and *Powers & Hays, contra.*

NORVAL, J.

This is the second appearance of the case in this court. By the former opinion, reported in 35 Neb., 438, the decision of the district court sustaining a general demurrer to the petition and dismissing the action was reversed and the cause remanded for further proceedings. Subsequently, the respondent filed an answer in the district court admitting certain allegations of the petition, denying other averments therein contained, and pleading new matters as a defense. A reply was filed, the cause was

*See following case for opinion on motion for rehearing. (*State v. School District*, 51 Neb., 237.

submitted to the court upon the pleadings and evidence, on consideration whereof it found the issues in favor of the respondent, and dismissed the action.

The petition in error contains but four assignments, viz.:

1. The court erred in finding the issues in favor of the defendant.
2. The finding is not sustained by sufficient evidence.
3. The finding is contrary to law.
4. The court erred in overruling the motion for a new trial.

None of those assignments can be reviewed, for the reason the bill of exceptions embodying the evidence adduced on the trial is not certified as being the original bill in the case, or a copy thereof. (*Wax v. State*, 43 Neb., 18; *Merrill v. Equitable Farm & Stock Improvement Co.*, 49 Neb., 198; *Spurck v. Dean*, 49 Neb., 66; *Derse v. Straus*, 49 Neb., 665.) The judgment is

AFFIRMED.

STATE OF NEBRASKA, EX REL. FRED W. GRAY, V. SCHOOL DISTRICT OF NORFOLK.

FILED JUNE 3, 1897.* No. 7871.

1. **Building Contract: ASSIGNMENT: EFFECT.** An assignment of a building contract by the contractor was *held* not merely an assignment of the moneys thereafter to be earned, but an assignment of the whole contract with its obligations and burdens.
2. **Mandamus Against School District for Issuance of Warrant for Balance Due on Building Contract.** *Held*, That a writ of *mandamus* was rightly refused.

ERROR from the district court of Madison county. Tried below before ROBINSON, J. *Affirmed.*

Wharton & Baird and *Robertson & Wigton*, for plaintiff in error.

*Filed on motion for rehearing of preceding case, 51 Neb., 236.

Barnes & Tyler and *Powers & Hays, contra.*

NORVAL, J.

This was an application by the state, on the relation of Fred W. Gray, for a writ of *mandamus* to compel the school district of Norfolk to draw its warrant in favor of the relator for an amount alleged to be due him on a contract for the erection of a school building. A judgment for the defendant rendered in the district court was affirmed at the present term on the ground that the bill of exceptions lacked authentication. (*State v. School District*, 51 Neb., 236.) Plaintiff has applied for a rehearing of that decision. By inadvertence we overlooked the fact that attached to the record proper is a certificate of the clerk of the trial court to the effect that the original bill of exceptions in the cause is attached to the transcript; therefore the motion is well taken. We will now consider the case on its merits, which would have been the course pursued in the first instance had it not been for the oversight indicated.

It is disclosed that in November, 1889, one Martin T. Murphy entered into a written contract with the respondent, the school district of Norfolk, for the erection of a schoolhouse for the stipulated sum of $22,500, and gave a bond executed by himself as principal, and Fred W. Gray, the relator, as surety, conditioned substantially that Murphy should erect and complete the building according to said contract and pay for all the labor performed and materials used in the erection of said building. The contract, among other things, provided that "on the first of each month during the progress of the work hereby agreed to be performed, the architect shall make an estimate of the materials furnished and on the ground, and of the work done since the last previous estimate, and not included in any previous estimate, and when said estimate is furnished said first party in writing, said first party shall thereupon pay said second party

eighty-five per cent of said estimate, and the amount remaining on completion of said contract shall be due and payable when said school building shall be fully finished and accepted by said architect and by the school board, or a committee designated by the said board for the purpose, and when the said first party shall be fully satisfied that no liens or claims of any kind exist against said property, or any part thereof, for which said first party would or could be liable. Provided said first party shall have the right, at their election, instead of paying on the architect's estimates to said second party the amount from time to time found due and payable, to pay the amount for materials or labor on said building to the party or parties furnishing the material or performing labor, and the receipt of any or all such parties to the amount actually due them shall be accepted by the second party as though so much cash in hand paid. The aggregate amount to be paid by said first party in no event, however, to exceed the said sum of $22,500." After the building had been partially erected by Murphy he abandoned the contract and failed to complete the same. Gray was notified of such failure by respondent, and the former took an assignment of the contract from Murphy and proceeded to, and did, complete the building according to the terms of the said agreement. He expended therefor $7,742.63, and received from the respondent on various estimates $3,426.82, and no more. It is the difference between said amounts, the sum of $4,315.81, for which the respondent is asked to issue its warrant. It is disclosed that at the time of the assignment of the contract to Gray, and when he commenced the completion of the building, there were several unpaid sums due material-men and subcontractor of Murphy for materials furnished and labor performed in the erection of the building, aggregating the amount in controversy herein, which several sums the school board subsequently paid to the respective owners and holders of the claims.

The question presented for consideration is whether

the payments made by the respondent to Murphy's subcontractors after the assignment of the contract are binding upon Gray. It is urged by counsel for relator that the decision rendered when the case was before this court the first time is *res judicata*. It is a general rule that the decision of the supreme court is conclusive upon the parties, as to questions determined therein, on the subsequent trial of the case in the same or the lower court. When this cause was before us first the question was as to the sufficiency of the petition, and it was determined that, upon the facts stated in the petition, *mandamus* would lie. (*Gray v. School District*, 35 Neb., 438.) Since the judgment of reversal was entered an answer and a reply have been filed, and the issues tendered were tried upon the evidence adduced. It is insisted that the averments of the petition were supported by the proofs. Some of them were, others not. The agreement set up in the sixth paragraph of the petition alleged to have been made between Gray and the school board was not established on the trial. On the contrary, there were proofs tending to show no contract of that character was made. There was also evidence tending to prove other matters not in accord with the statements contained in the petition.

In the first opinion it was held that the petition disclosed that the stipulation in the contract for the erection of the building had been disregarded. It was said: "The defendant no doubt had a right under the contract to pay the workmen and material-men instead of paying the contractor, but to hold the surety liable the payments must be made upon each estimate so far as it sought to charge the eighty-five per cent. No doubt claims of that kind may be deducted from the fifteen per cent held back till the completion of the contract." It was not established upon the trial that the contract had been violated by the respondent making payments either to the contractor Murphy or to his subcontractors in excess of the amounts due on the estimates. It is obvious that Murphy

could not have refused to accept as payments the receipts taken by the respondents from the laborers and materialmen, and Gray, by virtue of the assignment, takes the place of his assignor. There was not merely an assignment of the moneys thereafter to be earned, but Gray acquired the whole contract with its burdens and obligations. (*Union P. R. Co. v. Douglas County Bank*, 42 Neb., 469.) For an analogous case see *Knapp v. Swaney*, 56 Mich., 345.)

There was no error in refusing a writ of *mandamus* in this case, and the judgment below stands

AFFIRMED.

HANNAH J. DUELL, APPELLANT, V. HENRY POTTER ET AL., APPELLEES.

FILED APRIL 21, 1897. No. 7142.

1. **Lien of Judgment.** The lien of a judgment of the district court attaches to all the lands of the debtor within the county where the judgment was rendered, whether then owned by him or subsequently acquired.
2. **Homesteads: EXEMPTIONS.** Although lands acquired as a government homestead are forever exempt from liability for the debts of the patentee created before the patent was issued, such lands in the hands of a subsequent owner are not exempt by the federal homestead law from the payment of the debts of the latter incurred prior to the issuance of the patent.

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

Greene & Hostetler, for appellant.

Dryden & Main, contra.

NORVAL, J.

This is an appeal from the decision of the court below sustaining a general demurrer to the petition, and

dismissing plaintiff's action brought to enjoin the sale upon execution of the following described real estate, to-wit: The northeast quarter, section 4, township 12, range 14, in Buffalo county, this state. The facts averred in the petition, and by the demurrer admitted to be true, may be summarized thus: On the 3d day of October, 1883, Sardius Smith entered, under the provision of the United States homestead law, the above described land; that prior to making final proof, to-wit, on July 27, 1886, he died, leaving him surviving his widow, Louisa Smith, and two children, the plaintiff herein and one Jay T. Smith; that the widow made final proof of said land on July 5, 1890, and a patent for the premises was issued to her on November 13, 1891; that on February 8, 1892, said Louisa died seized of said real estate, leaving her only heirs at law, this plaintiff and said Jay T. Smith; that on the 23d day of April, 1890, and prior to the making of final proof, Henry Potter, one of the defendants herein, recovered a judgment in the district court of Buffalo county against the said Jay T. Smith for the sum of $1,461.19, on a note held by Potter as collateral security for the debt of said Sardius, the original entryman; that on February 25, 1892, plaintiff purchased her brother's undivided one-half interest in said land, and ever since has been the owner of the fee of the property; and that subsequently said Potter caused an execution to be issued upon said judgment and the said real estate to be seized thereunder. Jay T. Smith having acquired title to the undivided one-half interest in the land subsequent to the rendition of the judgment, and sold such interest to his sister before the levy of said execution, the point is made that the plaintiff took the land unaffected by this judgment. In *Filley v. Duncan*, 1 Neb., 134, in an opinion by CROUNSE, J., it was decided that as to *bona fide* purchasers the lien of a judgment does not attach to subsequently acquired real estate until the levy of an execution. The same question was again before the court in *Colt v. Du Bois*, 7 Neb., 391, where *Filley v. Duncan, supra*, was overruled, the court

holding that judgments are liens on all the lands of the debtor within the county where the judgments are rendered, either then owned by him or subsequently acquired. The latter rule has been followed in *Berkley v. Lamb*, 8 Neb., 399, and is now the settled law of this state.

There remains to be considered the proposition whether these lands are exempt from liability for this judgment under the provisions of the act of congress of the United States, approved May 20, 1862, entitled "An act to secure homesteads to actual settlers on the public domain." Section 4 of said act (Revised Statutes, U. S., sec. 2296) declares: "No lands acquired under the provisions of this chapter shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor." This provision has been often under consideration by this court, and in an unbroken line of decisions it has been ruled that lands acquired under said act of congress are exempt from liability for debts contracted by the patentee before the patent was issued. (*Smith v. Schmitz*, 10 Neb., 600; *Smith v. Steele*, 13 Neb., 1; *Kruger v. Adams & French Harvester Co.*, 13 Neb., 97; *Baldwin v. Boyd*, 18 Neb., 444; *Brandhoefer v. Bain*, 45 Neb., 781.) In the last case it was decided the rule applied where the patentee had conveyed the land, and subsequently acquired the title. In no case in this court, or in any other, so far as we are advised, has been determined the question here involved, namely, that the said act of congress protects lands acquired under its provisions from debts contracted prior to the date of the patent by one other than the patentee. The section under consideration has never been given a literal or strict construction by the courts, but has been invariably so interpreted as to carry out the purposes and object of its adoption. Thus a literal rendition of the language of the provision quoted would prevent a voluntary incumbrance of a federal homestead by mortgage to secure a debt contracted by the patentee prior to the issuing of the patent, and yet this and other courts have held that the law does not

prohibit such a voluntary incumbrance of the land. (*Jones v. Yoakam*, 5 Neb., 265; *Blanchard v. Jamison*, 14 Neb., 246; *Skinner v. Reynick*, 10 Neb., 323; *Orr v. Ulyatt*, 43 Pac. Rep. [Nev.], 916.) The federal homestead act never has been regarded, or construed, merely as one of exemptions, nor is such its purpose and scope. On the contrary, the title to the act, as well as the body of the law, plainly indicates that the object of its framers was to secure homes to actual settlers on the public lands, and for the better accomplishment of that purpose congress wisely prescribed the condition upon which title to such lands should be conveyed, viz., that the lands acquired under its provisions should not be liable for any antecedent debt of the patentee. Further it did not undertake to legislate. Judge Dillon, in construing said section, in the course of his opinion in *Seymour v. Sanders*, 3 Dill. [U. S.], 437, said: "It is not difficult to discover the reason for this provision. A leading object of the enactment was to benefit the poor man who was unable to buy lands at government price and receive his title at once and without condition; and it undoubtedly occurred to congress that many persons who had been unfortunate, and were insolvent, would avail themselves of the act; and conceiving that the creditor, in such cases, had no equity to subject to the payment of his debt lands which had been given to the debtor by the bounty of the government, and to protect the debtor and encourage persons to settle upon the public domain under the act, the fourth section was adopted." Manifestly the provision under consideration was intended as a protection to the homestead settler, the patentee, and not to exempt the land acquired under the law from the payment of the debts of a subsequent owner, although incurred prior to the date of the patent. The decree is accordingly

AFFIRMED.

MONROE E. SMITH ET AL. V. GEORGE S. BOWEN.

FILED APRIL 21, 1897. No. 7042.

1. **Insolvency:** PREFERRING CREDITORS. An insolvent debtor may lawfully secure a portion of his creditors to the exclusion of the others, if in so doing he acts in good faith and without a fraudulent intent.
2. **Attachment:** DISSOLUTION: REVIEW. An order dissolving an attachment made on conflicting evidence will not be disturbed.
3. **Chattel Mortgages:** EXCESSIVE SECURITY. The disproportion between the value of chattels mortgaged and the amount of the debt secured is not a basis for presumption of fraud.

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

Charles B. Keller, T. J. Doyle, and *J. R. Hanna,* for plaintiffs in error.

M. B. Gearon, J. R. Swain, and *Heald & Leavens, contra.*

NORVAL, J.

Plaintiffs brought an action against the defendant upon an account for merchandise, an attachment was obtained, and certain property was seized thereunder as belonging to the defendant. A motion to vacate and discharge the attachment was filed, which motion was supported by affidavits and other testimony denying the grounds set up in the affidavit upon which the same was issued, and resisted by testimony submitted by plaintiffs in the form of affidavits, depositions, and oral proofs. Upon the hearing the motion was sustained, and the order dissolving the attachment has been brought to this court for review by appropriate proceedings.

While the affidavit for attachment alleged several grounds for granting the writ, but one of them is relied upon in this court, namely: "That the defendant sold, conveyed, or otherwise disposed of his property with the

fraudulent intent to cheat or defraud his creditors, or to hinder or delay them in the collection of their debts." The following facts are undisputed: On the 7th and 8th days of August, 1893, the defendant was and for some time prior thereto had been engaged in the mercantile business and also in the practice of medicine in Greeley Center. D. R. Pomroy managed the store for him, the defendant devoting his time and attention to the practice of his profession. On said dates he executed chattel mortgages upon his stock of goods and store fixtures aggregating $5,443.50, as follows: C. J. McGuire, $1,000; E. F. Cashman, $500; M. H. Nugent, $1,500; D. R. Pomroy, $1,500; J. H. Bowen, $500; Voorheis & Miller, $540; C. B. Rouse, $472; M. Anderson & Co., $131.50. The last mortgage was likewise secured by defendant's book accounts. The approximate cash value of the property mortgaged equaled, if it did not exceed, the aggregate amount of the mortgages. It is conceded that some of the mortgages are *bona fide*. The defendant, under oath, denied each averment of fraud contained in the affidavit on which the attachment issued, and unequivocally stated that each mortgage was given to secure an actual preexisting indebtedness, except the McGuire mortgage, which was given to secure a present loan of $600 and a debt then past due. The defendant, as to some of the mortgages, especially those executed to Cashman and Pomroy, is corroborated by the testimony of the mortgagees. If Bowen's testimony is true, he acted in good faith and without any intent to defraud his creditors in executing the mortgages. He had a right to secure a part of his creditors to the exclusion of the others, if he acted in good faith and without any fraudulent purpose. (*First Nat. Bank v. Lowrey*, 36 Neb., 290; *Costello v. Chamberlain*, 36 Neb., 45; *Kilpatrick-Koch Dry Goods Co. v. McPheely*, 37 Neb., 800; *Meyer v. Union Bag & Paper Co.*, 41 Neb., 67.) The question of fraud is one of fact. The evidence adduced by plaintiff was sufficient to have justified the attachment, but the trial court thought otherwise,

and its decision being based upon conflicting evidence, it will not be molested.

It is argued that the mortgage of Bowen to McGuire is fraudulent and void, because it was the first mortgage executed, and covered property largely exceeding in value the debt thereby secured. This was the only mortgage given on August 7, 1893, all the others being given on the succeeding day. The disproportion between the value of the mortgaged chattels and the amount of debt secured does not raise a conclusive presumption of fraud, but is mere evidence tending to prove fraud, to be considered in the light of surrounding circumstances. (*Kilpatrick-Koch Dry Goods Co. v. Strauss*, 45 Neb., 793; *Grand Island Banking Co. v. Costello*, 45 Neb., 119; *Dayton Spice-Mills Co. v. Sloan*, 49 Neb., 622.) It cannot be determined as a matter of law that the McGuire mortgage was fraudulent and void. The order dissolving the attachment is

AFFIRMED.

MCCORD, BRADY & COMPANY V. GEORGE S. BOWEN.

FILED APRIL 21, 1897. No. 7041.

1. **Right of Defendant to File Motion to Discharge Attachment: ESTOPPEL.** Under section 235 of the Code of Civil Procedure, defendant may, at any time before judgment, upon reasonable notice to plaintiff, move to dissolve an attachment, and the fact that the attached property does not belong to the defendant, or is incumbered for its full value, does not bar or estop him from filing a motion to discharge.
2. ——: ——. An attaching plaintiff is estopped to assert that the defendant has not sufficient interest to defend against the attachment.
3. ——: ——. *Smith v. Bowen*, 51 Neb., 245, decided herewith, followed.

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

Rich, O'Neill & Sears, T. J. Doyle, and *J. R. Hanna,* for plaintiff in error.

J. R. Swain, M. B. Gearon, and *Heald & Leavens, contra.*

NORVAL, J.

This is a proceeding to review an order of the district court dissolving an attachment issued upon an affidavit alleging substantially all the grounds for an attachment set forth in the statute. The motion to discharge assigns the following reasons therefor:

1. The facts stated in the attachment affidavit are insufficient to justify the issuing of the writ.

2. No action was pending when the affidavit for attachment was filed.

3. The statement of facts in said affidavit are untrue.

There is no merit in either of the first two grounds of the motion, since the attachment affidavit is sufficient in form and substance to authorize the granting of the writ, and the suit was brought and the attachment affidavit was filed simultaneously. The statute (Code of Civil Procedure, sec. 198) authorizes the issuance of an attachment against the property of the defendant, at, or after, the commencement of an action.

It is insisted, in argument, that the defendant was in no position to assail the attachment, because he had no residuary or contingent interest in the attached property at the time the motion was filed. This contention is predicated upon the fact that the defendant had incumbered the property by mortgages for more than its value, and the mortgagees were in possession. But this does not preclude him from moving the dissolution of the attachment. Section 235 of the Code of Civil Procedure provides: "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." The legislature, it is clear, has not by the

provision quoted limited the right to urge the discharge of an attachment to a defendant who had not parted with the title and possession of the property attached. But the right to move for the dissolution of an attachment by controverting the grounds upon which the writ was issued is conferred upon every attachment debtor. In *Salmon v. Mills*, 49 Fed. Rep., 333, the circuit court of appeals ruled, under a statute similar to ours, that an attaching defendant may move to vacate an attachment notwithstanding he disclaims any interest in the property. In *Claussen v. Easterling*, 19 S. Car., 515, Chief Justice Simpson, in delivering the opinion of the court, observed: "As to the ground most strongly urged by appellant, that defendant having admitted that the property attached did not belong to him, he could not move to dissolve the attachment, we do not see the application here. The motion below was made on the ground that the property in question did not belong to the defendant. The title to the property was not in issue. The attachment was issued on an allegation of fraud by the defendant, and the only question involved below was the truth of that allegation. If, because that allegation being found untrue, the attachment is vacated and incidentally thereby the property is released, that is a result which does not concern the defendant. He certainly should not be compelled to submit to the charge of fraud, when he has the means of overthrowing it, simply because if he should do so, some one else may be benefited." *Keith v. Armstrong*, 65 Wis., 225, was an appeal by the plaintiffs from an order vacating and discharging an attachment. The ground for the attachment was that the defendants had assigned, conveyed, and disposed of their property for the purpose of defrauding their creditors. The defendants having made a voluntary assignment of their property for the benefit of their creditors, it was urged that the defendants had no right to traverse the affidavit for attachment. The supreme court overruled this contention. Of the same purport are *First National Bank of Winona v. Randall*, 38

Minn., 382; *Tolerton v. Casperson*, 63 N. W. Rep. [S. Dak.], 908. The supreme court of Kansas has decided that a defendant is not estopped from filing a motion to discharge an attachment upon the ground that the affidavit upon which the writ was issued is false and untrue, merely because he had executed chattel mortgages to various creditors upon the property attached. (*Smith v. Dersc*, 41 Kan., 150; *Hosea v. McClure*, 42 Kan., 403.) The defendant should be permitted to move for the vacation of an attachment, if, as between himself and the plaintiff, he is entitled to a discharge of the writ. Such right is given by statute, and it cannot be taken from him under the guise of judicial interpretation. Instead of the defendant being estopped, by the giving of the mortgage, from insisting on a dissolution, the plaintiff by attaching the property as belonging to the defendant cannot be heard to say that the defendant has no such interest in the property as to question the attachment. This doctrine has more than once been asserted by this court. (*Grimes v. Farrington*, 19 Neb., 44; *Kilpatrick-Koch Dry Goods Co. v. Bremers*, 44 Neb., 863; *Dayton Spice-Mills Co. v. Sloan*, 49 Neb., 622.) In the last case, HARRISON, J., speaking for the court, said: "The point is raised that the defendants had no interest in the property attached which entitled them to be heard on motion to discharge the attachment. A levy of the writ was made on the property mortgaged to the wives as the property of the defendants, and the banks were made garnishees in an effort to reach the property mortgaged to them, the ground being that the mortgagees had property of defendants in their possession or under their control. The plaintiffs had the writ levied upon the property as belonging to defendants, and claim a lien on other of the property by virtue of a garnishment based on allegations that the garnishees had in their possession property which belonged to defendants, and they cannot now successfully urge that the defendants have not interests in the property such as would permit them to attack the attach-

ment." The doctrine stated is sound, and supported by the authorities, with the exception of those from Michigan, which were decided under statutory provisions unlike those in force in this state.

In support of the proposition that the defendant has no standing in court to move the dissolution of the attachment, counsel for plaintiff have cited *McCord v. Krause*, 36 Neb., 764, in which case it was said: "As between plaintiff and defendant alone, upon motion to dissolve an attachment of the chattels mortgaged, the defendant can be heard only because of his residuary, contingent interest, which may remain after the said mortgages are satisfied." The same principle was subsequently recognized and applied in *Darst v. Levy*, 40 Neb., 593, and *Kountze v. Scott*, 49 Neb., 258. To the extent any language used in those cases is susceptible of being construed as not in accord with the principle laid down in *Grimes v. Farrington*, *Kilpatrick-Koch Dry Goods Co. v. Bremers*, and *Dayton Spice-Mills Co. v. Sloan*, *supra*, it is disapproved. If a plaintiff in attachment is estopped or barred from asserting that the defendant has not sufficient interest to defend against an attachment, it logically follows that the latter may move to dissolve the attachment, at least upon the ground the affidavit upon which it was based is untrue, even though he may not at the time be the owner of the property. Doubtless, it is not competent for a defendant to move the discharge of an attachment on the ground that the property seized does not belong to him. (*Langdon v. Conklin*, 10 O. St., 439; *Mitchell v. Skinner*, 17 Kan., 563.) In other words, he cannot set up title in a third party to defeat the attachment. A debtor who has conveyed the property subsequently attached to one not a party to the suit will not be permitted on the hearing of the motion to dissolve to establish the validity of the sale, by showing that the transferee was innocent of any fraud, and therefore acquired a perfect title. As said in *Landauer v. Mack*, 43 Neb., 430: "In order to sustain an attachment against the defendant it is, for obvious reasons, sufficient

to establish the existence of ground therefor as against him without regard to the rights of other parties. The character of the title or interest acquired by purchase or mortgage from an insolvent debtor is wholly immaterial unless put in issue by creditors." But this principle does not prevent a debtor from defending himself against an unfounded attachment. To illustrate: If an attachment is issued on the ground that the defendant has disposed of his property for the purpose of defrauding his creditors, the debtor, on a motion to dissolve, may show that the charge of fraud is false, and that the transfer was made in good faith, even though the dissolution of the attachment might inure to the benefit of one not a party to the suit. The rule contended for by plaintiff, and implied in the language employed in some of our decisions already mentioned, would prevent an attachment debtor from defending himself against the charge of fraud in an affidavit in attachment, where he had transferred in good faith the property subsequently seized under the writ. To so hold would be adding a proviso to said section 235 of the Code, which this department of the state government is powerless to do. The conclusion is irresistible that the defendant had the right to defend against the attachment.

The facts bearing upon the merits of the motion to dissolve are identical with those in *Smith v. Bowen*, 51 Neb., 245, decided herewith, and, upon the authority of that case, the order dissolving the attachment is

AFFIRMED.

BATES & COMPANY V. ANDREW J. STANLEY.

FILED APRIL 21, 1897. No. 6983.

1. **County Courts: REPLEVIN: JURISDICTION.** The appraised value of the property, and not its actual value proved on the trial, is made the criterion for determining whether a county court has jurisdic-

tion to hear and determine an action of replevin; and where jurisdiction has attached, it continues to judgment, except such court cannot render a judgment for a larger sum than $1,000 exclusive of costs. Per NORVAL, J.; HARRISON, J., concurring.

2. ———: ———: JUDGMENT. A defendant who prevails in replevin before the county court may, where the property has been delivered to the plaintiff under the writ, recover the value thereof or the value of his right of possession not exceeding $1,000. Per NORVAL, J.; HARRISON, J., concurring.

3. ———: ———: APPEAL: JUDGMENT IN APPELLATE COURT. Where, in a replevin action brought in the county court, the appraised value of the property, as well as its actual value found by the court, is less than $1,000, and the plaintiff appeals from the judgment entered against him, the district court may give judgment for the defendant for an amount in excess of the jurisdiction of the county court, if warranted by the facts. Per NORVAL, J.; all concurring.

4. **Review:** JUDGMENTS. In case two separate and distinct judgments are entered in a replevin action,—one for the plaintiff covering a portion of the property and the other in favor of the defendant for the remainder,—and an appeal is taken alone from one of them, the other is final and conclusive as to all matters thereby adjudicated. Per NORVAL, J.

5. **Courts:** VACATING SUPERSEDEAS BONDS. The district court has jurisdiction to vacate or set aside a supersedeas bond approved by the clerk of such court, where the surety on the bond is insufficient, and no transcript of the record has been lodged in the appellate court for the purpose of appeal or error proceedings. Per NORVAL, J.; all concurring.

6. **County Courts:** JUDGMENT IN REPLEVIN. Where, in an action of replevin, the property has been delivered to the plaintiff, the county court on finding for the defendant may render judgment for the value of the property, although it exceed $1,000. Per IRVINE, C.; POST, C. J., RYAN and RAGAN, CC., concurring.

7. ———: ———: FORM OF JUDGMENT: REVIEW. In replevin the county court found for the plaintiff as to certain of the goods taken under the writ and for the defendant as to the residue. Appropriate judgment was entered on each finding. *Held*, To constitute a single judgment, so that an appeal by the plaintiff brought the whole case up to the district court for trial *de novo*. Per IRVINE, C.; POST, C. J., HARRISON, J., and RYAN and RAGAN, CC., concurring.

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

Winfield S. Strawn, for plaintiff in error.

Arthur C. Wakeley, contra.

NORVAL, J.

Bates & Co. commenced an action in replevin in the county court against the defendant for the possession of a kiln of brick, a lot of brickmaking tools, sheds, etc. The property was taken under the writ and appraised at $806, and on the execution of the required undertaking the possession of the whole of the property was delivered to plaintiff. The county court found the value of the kiln of brick to be $700, and the value of the remainder of the property was fixed at $200; that the defendant was entitled to the possession of the kiln of brick, and an alternative judgment was rendered in his favor for the return thereof, or its value so found in case a return could not be had. The right of possession for the remainder of the chattels was found to be in the plaintiff, and a judgment therefor in its favor was also entered. Plaintiff appealed from the judgment against it to the district court, but the defendant took no appeal. By stipulation, the case was tried upon the same pleadings as in the county court, which resulted in a judgment for Stanley for a return to him of all the property taken under the replevin writ, including the tools, sheds, etc., or the value of the same, assessed at $1,755.

The first contention of counsel for plaintiff is that the district court had no jurisdiction to render a judgment in the case for more than $1,000. It is the settled law of this state that the district court acquires no jurisdiction of a cause on appeal, if the lower court had no jurisdiction of the subject-matter of the action. (*Brondberg v. Babbott*, 14 Neb., 517; *Keeshan v. State*, 46 Neb., 155.) Did the county court have jurisdiction to hear, try, and decide the cause? The determination of the question necessitates an examination of the constitutional and statutory provisions relating to the jurisdiction of county courts. Section 16, article 6, of the constitution declares: "County

courts shall be courts of record, and shall have original jurisdiction in all matters of probate, settlements of estates of deceased persons, appointment of guardians and settlement of their accounts, in all matters relating to apprentices, and such other jurisdiction as may be given by general law. But they shall not have jurisdiction * * * in civil actions where the debt or sum claimed shall exceed one thousand dollars." By this provision jurisdiction in express terms is conferred upon county courts in certain enumerated matters and causes (among which are not actions in replevin), and also such other jurisdiction as may be authorized by legislative enactment not within the inhibited subjects contained in said section of the constitution. The legislature has, by section 2, chapter 20, Compiled Statutes, conferred on such courts jurisdiction in replevin suits where the appraised value of the property does not exceed $1,000. The appraised value of the property, and not its actual value as proved on the trial, is made the criterion for determining whether a county court has jurisdiction of a replevin case; but said section of the statute, and the constitution, limit the sum for which judgment may be entered by such court at $1,000. This limitation applies to all actions, including replevin. Whenever in replevin, before the county court, the defendant is entitled to recover the value of the property replevied, judgment may be rendered in his favor for the real value established by the evidence, not exceeding $1,000, the limit fixed by the constitution and statute. (*Gottschalk v. Klinger*, 33 Mo. App., 410; *Henderson v. Desborough*, 28 Mich., 170; *Chilson v. Jennison*, 60 Mich., 235.)

The Michigan cases are quite similar to the one before us. In that state, by statute, the affidavit in replevin determines the jurisdiction of the justice of the peace in replevin, jurisdiction attaching according to the value of the property as fixed in such affidavit. By section 18, article 6, of the constitution of that state justices of the peace, in civil cases, are given "exclusive jurisdiction to

the amount of one hundred dollars, and concurrent jurisdiction to the amount of three hundred dollars, which may be increased to five hundred dollars, with such exceptions and restrictions as may be provided by law." The supreme court, in construing said constitutional and statutory provisions, decided that whenever a defendant prevails in replevin before a justice of the peace, the judgment for the value of the property replevied and for damages in the aggregate cannot exceed $500, the constitutional limit. In Michigan the value of the property claimed in the replevin affidavit fixes the jurisdiction, while in this state it is determined by the appraisement; hence, the decisions already mentioned are directly in point upon the question under consideration. The jurisdiction of our county courts is limited in civil actions where the debt or sum claimed does not exceed $1,000. If a party cannot claim in that court a larger sum, it is obvious the court is powerless to render a judgment for an amount exceeding the limit fixed by the constitution. The jurisdiction of such courts in replevin depends upon the appraised value of the property. If the actual value, ascertained on the trial, should be more than $1,000, it would not oust the court of jurisdiction, but in case the defendant in replevin should be entitled to recover the value of the property taken from him on the writ, the judgment may not exceed $1,000. If the appraised value is the test for ascertaining jurisdiction in replevin for all purposes, then where the appraised value is less than $1,000, and plaintiff fails or refuses to give an undertaking, there is nothing to prevent his recovering the full value of his property, even though it should exceed the sum named, the constitutional limit. Such was not the intention of the framers of the constitution. In holding that the defendant in replevin cannot recover in the county court a larger sum than $1,000, it does not follow that he must lose the excess in the value of the property above that amount. He may obtain redress through an appeal to the district court, and possibly by separate action to recover such excess.

The record before us shows that the appraised value of the entire property was but $900, which sum, nor the judgment entered by the county court, did not exceed its jurisdiction, therefore that court had jurisdiction of the subject of this action. This counsel for plaintiff, with commendable frankness, concedes, but he strenuously insists that the district court had not the power to render any other or different judgment than the court from which the appeal was taken could have entered, to which argument attention will now be given. The cause was not brought to the district court by the exercise of its original, but appellate jurisdiction. Such being the case, had the suit been one for the recovery of money only, ordinarily, the judgment could not have been rendered on the appeal for an amount beyond the jurisdiction of the county court. Such was the holding in *Union P. R. Co. v. Ogilvy*, 18 Neb., 638. But the rule stated is not inflexible. Suppose, in an action brought in the county court upon a promissory note, judgment is rendered therein for $950, the full amount then due, and an appeal is taken by the defendant to the district court, where, by subsequent delays, the interest has accumulated so as to make the plaintiff's demand exceed $1,000, could not the appellate court give judgment for the full amount then due? Most assuredly, for the obvious reason the county court had jurisdiction when the judgment was pronounced, and no fact subsequently arising in the case could take it away. (*Tindall v. Meeker*, 1 Scam. [Ill.], 137; *Mitcheltree v. Sparks*, 1 Scam. [Ill.], 198; *Dressler v. Davis*, 12 Wis., 65.) The same principle was recognized and applied in *Deck v. Smith*, 12 Neb., 389, which was an action of replevin brought in a justice's court and appealed to the district court. Pending the appeal the property increased in value from $100, the maximum sum for which a justice could at that time render judgment, to $130. It was ruled that the appellate court could render judgment for the full value of the property, even though it ex-

ceeds the jurisdiction of the lower court. In the opinion it is said: "The district court having obtained jurisdiction of the case by the appeal, it not only had the authority, but it was its duty to so rule as to do as complete justice between the parties as possible. And if to do this it became necessary to increase the amount claimed, there is no rule of practice preventing it being done. Indeed, such a course is fairly within the contemplation of the Code, as by the following provisions is clearly shown. By section 1010, which provides that in cases appealed to the district court 'the parties shall proceed in all respects in the same manner as though the action had been originally instituted in the said court,' and by section 144, which confers upon the court an almost unlimited power of amendment 'in furtherance of justice.'" The writer has failed to find any case opposed to the views expressed above and none such has been cited in the briefs; nor is he aware of any principle of law or morals which would prevent the defendant from recovering the full value of his property which was taken from him under the writ. Moreover, the statutory provisions sanction the course pursued.

Section 26, chapter 20, Compiled Statutes, authorizes appeals from judgments of the county court in civil actions in the same manner as provided by law in cases tried and determined by justices of the peace.

Section 1010 of the Code provides that in appeals from justices' courts "the parties shall proceed in all respects in the same manner as though the action had been originally instituted in the said court."

Section 191, relating to judgments in actions of replevin in the district court, declares: "In all cases, when the property has been delivered to the plaintiff, where the jury shall find upon issue joined for the defendant, they shall also find whether the defendant had the right of property or the right of possession only, at the commencement of the suit; and if they find either in his favor they shall assess such damages as they think right

and proper for the defendant; for which, with costs of suit, the court shall render judgment for the defendant."

"Sec. 191*a*. The judgment in the cases mentioned in sections one hundred and ninety and one hundred and ninety-one, and in section one thousand and forty-one of said Code shall be for a return of the property or the value thereof in case a return cannot be had, or the value of the possession of the same, and for damages for withholding said property, and costs of suit."

This action is not for the recovery of money beyond the jurisdiction of the county court, but one *in rem*, and that court having jurisdiction of the subject-matter, the appeal authorized the district court to try the case *de novo* as if it had been originally instituted in such court. The statute required the rendition of an alternative judgment for a return of the property or its value, in case a return could not be had, although such value exceeded the sum for which the county court could have entered judgment. A judgment for the full value was indispensable in this case in order to do complete justice between the parties. The defendant did not voluntarily come into court, but was an unwilling suitor. The plaintiff selected the forum, and, not being satisfied with the judgment, appealed to a court of general jurisdiction. It ought not now to be permitted to urge that the latter court had no authority to render a judgment for more than $1,000, on the ground that the county court had not jurisdiction to render so large a one. The county judge unquestionably had the power to hear and determine the cause when it was, and as it was, before him, and the appeal prosecuted by plaintiff having conferred jurisdiction of the subject-matter upon the district court, it retained it for the determination of all questions properly presented for adjudication.

The judgment is claimed to be erroneous, in that it was for the return to the defendant of the whole of the property taken under the writ, or its value. This objection is well taken. As previously stated, the county court

rendered two separate and distinct judgments in the case, both in form and substance, as much so as if they had been given in different actions, one in favor of the defendant for the kiln of brick, and the other for the plaintiff for the remainder of the property. This latter judgment was final as to the property adjudged to belong to the plaintiff, no appeal having been taken therefrom, yet the court below found for the defendant for all the property replevied. The appeal from one of the judgments did not authorize the defendant to have heard and determined anew the matters which the record shows were adjudicated by the judgment against him, from which no appeal was prosecuted.

Defendant asks to enter a remittitur of the amount of the judgment in excess of what the testimony shows to be the value of the kiln of brick. Such action is allowable in case of a money judgment where the assessment of the amount of recovery is too large, and the amount of excess definitely appears from an inspection of the record. Doubtless a remittitur can be had in a proper case in replevin, as where the only error is in the assessment of the amount of recovery. (*Durrell v. Todd*, 31 Neb., 256; *St. John v. Swanback*, 39 Neb., 842; *Regier v. Shreck*, 47 Neb., 667.) But the error in this case is not confined alone to the assessment of the value of the property. It extends as well to that portion of judgment providing for the return of the property. Where a judgment is rendered against a plaintiff in replevin in the alternative for a return of the property, or for its value, he has the option of satisfying the same by either making restitution of the property or by paying its assessed value. (*Reavis v. Horner*, 11 Neb., 479; *Frey v. Drahos*, 10 Neb., 594; *Rinker v. Lee*, 29 Neb., 783; *Lee v. Hastings*, 13 Neb., 508; *Manker v. Sine*, 35 Neb., 746; *Goodwin v. Potter*, 40 Neb., 553.) The judgment of the district court was for the return of the entire property replevied, the ownership of all of which, except the brick kiln, by the judgment of the county court was determined in favor of the plaintiff.

If the record disclosed, which it does not, that Bates & Co. still had the entire property in a condition to be returned, manifestly it would be unjust to affirm the judgment upon condition that a remittitur to a specified sum be filed, since to escape the payment of the money portion of the judgment it would be forced to return all the property, including the portion which belonged to plaintiff. The testimony shows that Bates & Co., after acquiring the property under the writ, sold it, and therefore a return cannot be had. It would not have been error calling for a reversal had no judgment been rendered in the case for a return of the property (*Goodman v. Kennedy*, 10 Neb., 270; *Lee v. Hastings*, 13 Neb., 508); and it follows that a proper remittitur would cure all substantial errors in the judgment. The number of bricks in the kiln the evidence shows to be 170,000. There is a conflict in the testimony as to the value of the same, defendant fixing it at $6.50 to $7.50 per thousand, and Charles Furst, one of his witnesses, at $5.50 to $6.50 per thousand. The estimated value placed thereon by M. P. Sutherland, a witness for plaintiff, was $5.50 to $6 per thousand. From a consideration of the value of the whole property so found by the court, and the testimony in the record relating to the value of the property other than the kiln of brick, it is obvious the trial court in making its findings must have allowed not to exceed $5.50 per thousand for the bricks, making on that basis their total value $935. To which should be added $83.98, being interest thereon from the date the property was taken under the writ until the first day of the term of court at which the judgment was entered. Defendant should be permitted to file a remittitur of $736.02 within thirty days as of the date of the rendition of the judgment in the court below as a condition of affirming the judgment for $1,018.98, the value of the brick, with interest. If such remittitur be not so filed within the time stated, the judgment should be reversed and the cause remanded for a new trial.

One other matter remains to be considered, and that is

the action of the district court in striking from the files the supersedeas bond filed in the case, because of the insufficiency of the surety thereon, and in ordering that the defendant have execution upon the judgment whenever he shall request it. It appears that the decision referred to was made upon testimony adduced before the court, and that the same was not preserved by bill of exceptions, so the sufficiency of the evidence to sustain the finding is not involved in this court. The sole question is whether the district court had any power to make the order, and before discussing the subject a brief summary of the facts will be stated. The judgment was entered December 30, 1893. Plaintiff filed a supersedeas bond in due form in the penal sum of $3,510 on the 19th day of January, 1894, for the purpose of staying proceedings pending a hearing of the cause in this court, which bond, and the surety thereon, were approved by the clerk of the district court. On the 7th of April, 1894, the order now assailed was made on motion of the defendant. The transcript and petition in error were filed herein June 1, 1894. By section 588 of the Code of Civil Procedure provision is made for the stay of execution pending proceedings to obtain a review of the judgment or final order of the probate court or district court, by the plaintiff in error executing to the adverse party, and depositing with the clerk of the court in which the judgment or final order was entered, a written undertaking, with one or more sufficient sureties, conditioned as required by said section, and in such penal sum as therein specified, or as shall be prescribed by the court, according to the nature of the case. Section 590 declares: "Before the written undertaking herein mentioned in section five hundred and eighty-eight shall operate to stay execution of the judgment or order, a petition in error must be filed in the appellate court, and the execution of the undertaking and the sufficiency of sureties must be approved by the court in which the judgment was rendered or order made, or by the clerk thereof; and the clerk shall indorse said

approval, signed by himself, upon the undertaking, and file the same in his office for the defendant in error." By this section the authority to approve a supersedeas bond is conferred upon either the court or the clerk, one possessing no more power in that regard than the other. The latter could lawfully discharge that duty without any direction of the court, and he did so in this case by approving the bond. But it does not follow that the district court was without jurisdiction to make the order in question. That the clerk could not reconsider his action in the premises is clear, as no such authority is conferred upon him by statute. Nor could this court have passed upon the sufficiency of the bond or ordered a new one to be given, because the transcript had not at that time been lodged in this court; hence no jurisdiction over the case had been acquired. Until the error proceedings were perfected by the filing of the transcript and petition in error the judgment was not suspended, and the district court, in the exercise of its general jurisdiction, had the right to vacate the supersedeas, if sufficient cause therefor existed, in case a new bond with sufficient surety was not seasonably filed. Whether it could have done so had the jurisdiction of this court at that time attached, it is unnecessary to decide. It does not appear that an application to file an amended bond was made in the court below, or that a new bond was offered to be substituted for the one previously filed. The order vacating the supersedeas is sustained.

The judgment, in my view, should be reversed unless a remittitur for the amount, and within the time already stated, is filed with the clerk of this court.

IRVINE, C.

The first contention of the plaintiff is that the district court had no jurisdiction to render judgment for more than $1,000, and the basis of this contention is that the jurisdiction of the district court was appellate merely and depended upon the jurisdiction of the county court from

which the case was appealed; that the county court had no jurisdiction to render a judgment for more than $1,000, and therefore the district court in this proceeding could not render a judgment exceeding that sum. It is the settled law of this state that appellate courts acquire no jurisdiction by virtue of an appeal where the court from which the case was appealed had no jurisdiction of the subject-matter. (*Brondberg v. Babbott*, 14 Neb., 517; *Keeshan v. State*, 46 Neb., 155.) The jurisdiction of the district court therefore depended upon that of the county court. By section 16, article 6, of the constitution it is provided: "County courts shall be courts of record and shall have original jurisdiction in all matters of probate, and such other jurisdiction as may be given by general law. But they shall not have jurisdiction * * * in civil actions where the debt or sum claimed shall exceed $1,000." The constitution therefore vests certain jurisdiction in the county courts and empowers the legislature to vest in those courts jurisdiction not *ex vi termini* conferred by the constitution; but in civil actions the legislature may not confer jurisdiction where the debt or sum claimed exceeds $1,000. The legislature, in the execution of the power conferred upon it, enacted as follows: "County judges in their respective counties shall have and exercise the ordinary powers and jurisdiction of a justice of the peace and shall in civil cases have concurrent jurisdiction with the district court in all civil cases in any sum not exceeding $1,000, exclusive of costs, and in actions of replevin where the appraised value of the property does not exceed that sum." (Compiled Statutes, ch. 20, sec. 2.) By this statute the appraised value of the property taken under the writ and not its actual value as determined at the trial is made the test for ascertaining the jurisdiction of the court. If the statute is constitutional in this respect the county court had jurisdiction of this cause because the property was appraised at less than $1,000. We think it is constitutional. Where jurisdiction depends upon the amount in controversy there

must be some means of determining that amount. The language of the constitution is, in effect, that jurisdiction in civil cases may be conferred where "the debt or sum claimed" does not exceed $1,000. This language excludes the hypothesis that jurisdiction depends upon the amount finally ascertained to be due. It is the amount claimed which under the constitution limits the jurisdiction. (*Beach v. Cramer*, 5 Neb., 98; *Brondberg v. Babbott, supra.*) In ordinary civil actions this can be readily determined from the petition, the summons, or both. (*Brondberg v. Babbott, supra.*) In replevin cases a difficulty arises. The demand is for the recovery of the possession of specific chattels. There is no prayer for any sum of money except for unlawful detention. The plaintiff, by causing the writ to issue and the property to be seized, sets in motion the process resulting in the appraisement. The amount of his bond is determined by the appraisement, and that appraisement measures more correctly than anything else at the commencement of the action the "sum claimed." Jurisdiction should be determined *in limine* and should not remain in doubt until the end of the action. The plaintiff, having selected his forum, may not at any stage of the proceedings claim an amount beyond $1,000 without passing the constitutional bounds; but the defendant is a party *in invitum*. Property in his possession has been taken from him by process of the court. If the result of the trial shows that it was his property, then he is entitled to its return, or to its value. If we should hold that when it appears, as the result of a trial, that property so taken was of the value of more than $1,000, the proceedings were from the beginning *coram non judice*, then it would follow that the defendant can have no relief except by a new action; that he would have no remedy on the bond, at least when treated as a judicial bond; that the officer serving the writ, good on its face, was in fact a trespasser, and would be liable. Should we hold that the proceedings originally were *coram judice*, but that no jurisdiction existed to enter a

judgment for the value of the property in excess of $1,000, then one of two results must follow. Either the defendant whose property has been seized, and who has not chosen the forum, must lose the excess in value beyond $1,000, or else he is driven to an appeal or separate action to recover it. The former hypothesis invades all constitutional notions of rights of property and process of law; the latter presupposes the right of a court to assist a wrongdoer and require the person injured to enter another forum to obtain his remedy. In Michigan it has been held in similar cases that judgment might be rendered for the defendant for an amount beyond the statutory jurisdiction of the justice, but not beyond the constitutional limit. (*Henderson v. Desborough*, 28 Mich., 170; *Chilson v. Jennison*, 60 Mich., 235.) But the constitution of that state provides that the justices of the peace "shall have exclusive jurisdiction to the amount of $100, and concurrent jurisdiction to the amount of $300, which may be increased to $500, with such exceptions and restrictions as may be provided by law." (Constitution of Michigan, art. 6, sec. 18.) The language of that constitution is that jurisdiction shall extend to "the amount" specified, while our constitution fixes the limit only upon "the debt or sum claimed." Claimed by whom? Why necessarily by the plaintiff, or by the defendant who, by set-off or counter-claim, invokes the jurisdiction of the court. In order to prevent the processes of the court from being abused, and the limitation being made a means of working injustice to unwilling suitors and of depriving them of rights clearly guarantied, we must hold that in a replevin case, where the defendant recovers, the county court, having obtained jurisdiction to try the case by virtue of the affidavit, the writ, and the appraisement, has jurisdiction to render judgment for the value of the property as found on the trial, even if such value exceed $1,000. We think this was the intention of the constitution evidenced by the adoption of its peculiar language. Cases holding that the plaintiff, or moving party, cannot

recover beyond the jurisdictional amount are not in point, although even in such cases it has been held that on appeal, to prevent the failure of justice, the plaintiff himself may amend to claim an amount beyond the jurisdiction of the court which he himself selected in which to institute the action. (*Deck v. Smith*, 12 Neb., 389.)

It is next contended that the judgment is erroneous because rendered in the district court for the whole of the property described in the writ, and not merely for that portion found by the county court to belong to the defendant. This contention depends for its soundness upon the proposition that the county court rendered two judgments and the plaintiff appealed only from the one against him. In form it may be conceded that the judgment was double, but we should look rather to the substance than the form. We have quoted the recital of the appeal bond because it is claimed that that fixed the intention of the plaintiff to appeal only from so much of the judgment as was against him. If the judgment was, however, inseparable in its nature, so that an appeal brought the whole case up, the plaintiff could not restrict the appeal to a portion of the judgment by a recital in the bond. The parties stipulated in the district court to try the cause on the same pleadings as were used in the county court. By these pleadings the plaintiff asserted title to all the property and the defendant by general denial put the title to all in issue. The case seems to have been tried on the theory that the whole matter was involved. We think it was. Suppose the action had been for goods sold and delivered; the plaintiff had set out a number of items of goods; judgment had been entered for plaintiff for the value of certain items, and the plaintiff had appealed. He could not contend that as to those items the judgment he appealed from was final, and that his appeal only presented the items for which he had not recovered. This, we take it, would be true even if the court had specifically rendered judgment against him for the items not found in his favor, because a judgment for part

implies a judgment against him for the remainder. It would be *res judicata* in favor of the defendant for the remainder and could be pleaded in bar of another action, as well as if a specific judgment had been entered. So we cannot see that the entry of a formal judgment would affect the situation. To take a case more closely analogous, suppose in this case the property had not been taken under the writ and the action had proceeded as one in trover, resulting in a judgment for the plaintiff for the value of the tools, etc.; suppose he appealed from that judgment. It would certainly open up the whole case. Such a judgment would be expressly in his favor for the tools and impliedly against him for the kiln of bricks, but it would be a single judgment which he would not be permitted to accept so far as it operated in his favor and reject so far as it was against him. The fact that the peculiar nature of a replevin suit requires an express finding and an express judgment as to every part of the property taken does not affect the case. In some states statutes expressly permit appeals to be taken from portions of judgments or decrees. Cases based on such statutes are not applicable, nor are cases applicable where the appeal was from one of several distinct orders or decrees entered at different stages of the same case or entered at the same time as a determination of distinct proceedings, as for instance, appellate proceedings from orders in attachment not bringing up for review the judgment in the principal action. We are without the light of direct authority, but cases quite closely in point are *Barkley v. Logan*, 2 Mont., 296, and *Plaisted v. Nowlan*, 2 Mont., 359. The substance of these cases is that where an appeal is statutory and does not provide for appealing from a portion of a judgment the whole case is brought up. The statutes referred to in the opinions are in this respect very similar to our own.

AFFIRMED.

COCKRELL BROTHERS v. B. E. WOOD.

FILED APRIL 21, 1897. No. 7213.

Sale: ACTION FOR PURCHASE PRICE: PLEADING AND PROOF. A verdict and judgment on a petition, by which it was sought to recover the unpaid purchase price of personal property, are not sustained by proof that while in fact such payment had actually been made, yet that by false representations the defendant had induced the plaintiff to pay the defendant an amount equal to the amount of such purchase price.

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

John P. Maule, for plaintiffs in error.

S. L. Geisthardt, contra.

RYAN, C.

There was rendered a judgment in this case in the district court of Lancaster county for the amount prayed in the petition of B. E. Wood. The averments of this petition were as follows: "The plaintiff complains and for cause of action alleges that heretofore, to-wit, on April 15, 1892, the plaintiff sold to defendants and shipped to the city of Burlington, Iowa, at their request, one car-load of corn, for which the defendants agreed to pay plaintiff the sum of thirty-six cents per bushel of thirty-six pounds, if said corn should grade number three, and at the market rate of discount if said corn should prove of a lower grade, less the freight from the town of Eustis, Nebraska, to Burlington, Iowa; that said corn was duly received at Burlington and the amount thereof was 56,200 pounds, and the market rate of discount on the same was one and one-half cents per bushel; that the freight on the same to Burlington was $112; that said defendants duly accepted said corn, but that they have at all times wholly neglected and refused to pay for the

same as agreed, though often demanded, and there is now due to the plaintiff from the defendants the sum of $240, for which, with interest from April 15, 1892, and costs, plaintiff prays judgment." The answer was a general denial of all the averments of the petition.

By the terms of the agreement for the purchase of the corn, Mr. Wood was required to bill the car containing it to his own order at Burlington, Iowa, and notify J. F. Harris & Co., a corporation doing business as a grain dealer at the city last named. In his testimony Mr. Wood admitted that owing to the fact that he was then unacquainted with the business and terms connected therewith he billed the car directly to J. F. Harris & Co. As directed, however, he drew on Cockrell Bros. for the net value of the corn. The draft, with the bill of lading attached, was sent through the Farmers State Bank at Eustis for collection. The draft was payable to that bank, and for its amount Mr. Wood received a credit, of which he still has the benefit. Cockrell Bros., to evidence the fact that they had sold the corn, delivered to J. B. Christian & Co., of Omaha, the aforesaid bill of lading. Mr. J. B. Christian testified that the firm of which he was a member was then having some trouble with J. F. Harris & Co., and that Mr. Johnson, the vice president of the Citizens Bank at Omaha, was in the office when this draft for this particular corn came in, and took the bill of lading and drew on J. F. Harris & Co. for the amount named in the bill of lading, on account of J. B. Christian & Co. To this draft J. B. Christian signed the name of J. B. Christian & Co., and the Citizens Bank, the payee, forwarded it, with the bill of lading attached, for collection from the drawee, J. F. Harris & Co. It appears from testimony of J. F. Harris that the firm of J. F. Harris & Co. had received notice that a car of corn had been shipped to that firm, and that without the bill of lading being required the railroad company had delivered this car to the consignee. When the draft on J. F. Harris & Co., with the bill of lading attached, was presented to

J. F. Harris & Co., that firm refused to honor the draft, because J. B. Christian & Co. was already indebted to Harris & Co. in the full amount of such draft. Neither of the Cockrells testified, and we are not advised just why the Cockrells did not pay the draft drawn on them by Wood until after the dishonored draft of J. B. Christian & Co. had been returned from Burlington to the Citizens Bank at Omaha. On April 26, 1892, at any rate, Mr. Wood wrote Cockrell Bros. that the draft drawn by him on that firm had not been paid as the Citizens Bank had notified him, and he requested Cockrell Bros. to pay it. The firm of Cockrell Bros., on April 27, 1892, from Omaha, wrote Mr. Woods as follows: "Yours of the 26th recd. Your shipt. was all O. K., but you did not bill as directed. Your order was to bill the same shipper's order. Notify J. F. Harris & Co., Burlington, Iowa, and draw on us with B. L. to draft; but you billed the corn direct to J. F. Harris & Co., Burlington, and in that case you should have drawn on them instead of us. We have paid your draft to the Citizens Bank and they have delvr. us the B. L., and we have made a draft on you for the amount of $240 with B. L. attached. You can pay Dr. and sell your corn to J. F. Harris & Co. and make draft on them, and you can sell your corn now for about 38 cts. We will not hold you to your sale."

Mr. Wood testified that as a matter of business integrity he paid this draft. From this involved statement it will be profitable, perhaps, to single out the facts which bear upon the merits of this suit. In the first place, Wood drew on Cockrell Bros. for the value of the corn. This draft Cockrell Bros. paid to the Citizens Bank at Omaha, where it had been sent for collection. The transaction ends here so far as there is involved the rights of the parties with reference to the sale of the corn. By various representations, Cockrell Bros. afterwards induced Wood to pay back to that firm the amount previously paid to take up the draft drawn against the shipment of corn. The payment of the draft drawn by Cock-

rell Bros. on Wood may have been procured by false representations that, by reason of being repossessed of the bill of lading, Wood had it in his power to sell the corn to J. F. Harris & Co. and so reimburse himself the said amount which had been paid by him to Cockrell Bros. upon the demand of that firm. It is easy to imagine how these circumstances might be so connected with others, which need not be stated, that a cause of action would be shown in favor of Wood against Cockrell Bros. But this was not the cause of action that was stated. Plaintiff claimed simply the right to recover the value of a certain shipment of corn, which, by his own statement, he showed to have already been paid. It is true he was afterwards induced to part with his money, but that did not entitle him a second time to collect the contract price of the corn as such. The proofs did not entitle plaintiff to a verdict in the district court, for they were not relevant to the averments of the petition. The judgment is therefore reversed and this case is remanded to the district court, with directions to permit an amendment of the petition, if Mr. Wood so elects, and, in that event, for subsequent proceedings in accordance with the views above expressed.

REVERSED AND REMANDED.

CHARLES H. GODFREY ET AL. V. CITY OF BEATRICE.

FILED APRIL 21, 1897. No. 7201.

1. **Contract to Supply Water:** BREACH: DAMAGES. In an action for the recovery of damages sustained by a city by reason of the failure of a contractor to furnish a stipulated number of gallons of water within a limited space of time, an instruction which, in effect, directed the jury, if they found for plaintiff, to return a verdict for the sum of such payments as had been made to the contractor for supplying boilers, an engine, pipe line, and machinery upon estimates as the work progressed, *held* erroneous in view of the fact

that by the terms of the contract there had been recognized no such contingency as the return of such payments to the city in any event.

2. **Principal and Surety.** An undertaking will be strictly construed in favor of sureties and their liability will not be extended by construction beyond their specific agreement. (*Curtin v. Atkinson*, 36 Neb., 110; *Gran v. Houston*, 45 Neb., 813.)

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

Frick & Dolezal, for plaintiffs in error.

L. M. Pemberton and *Alfred Hazlett, contra.*

RYAN, C.

The city of Beatrice recovered judgment in this case in the district court of Gage county on a verdict in the sum of $24,545.14 as against all the plaintiffs in error. As it will be necessary to quote from the pleadings and instructions, we shall give the parties the respective designations under which they were referred to in the district court. In the petition it was alleged that Charles H. Godfrey and A. J. Meals had constituted a partnership firm throughout all the transactions described; that on September 12, 1891, said firm entered into a contract with plaintiff for the putting in of a system of wells and appurtenances, including a pipe line, pumps, an engine, a condenser, a boiler, and other machinery, and guarantying said well system to continue supplying not less than two millions of gallons of water per day continually thereafter from the date of the completion of said contract by said Godfrey and Meals. The defendants Long, Wrede, Matthews, and Walker were joined as defendants by reason of their contract of guaranty, the conditions of which were stated in this language: "If the said Godfrey & Meals shall well and truly keep and perform all the terms and conditions of said contract on their part to be kept and performed, including any and all future changes or

modifications in said contract as therein set forth, and shall indemnify and save harmless the said city of Beatrice and the said city council and officers thereof as therein stipulated, then this obligation to be of no effect; otherwise, it shall remain in full force and virtue." The breach of the contract alleged was the failure to furnish a supply of water equal to two millions of gallons per day. Following immediately after the statement of the failure to furnish water as stipulated the petition contained this language: "And plaintiff alleges that it has paid to the defendants, Godfrey & Meals, on the aforesaid contract as the work progressed thereon various sums of money and in the total amount of $20,992. And plaintiff alleges that by reason of the failure of Godfrey & Meals to comply with the terms of their said contract herein above referred to, and by reason of their failure to furnish to this plaintiff a well system and daily water supply of two million gallons, as provided in said contract, that the plaintiff herein has been damaged in the amount of the sums so paid to Godfrey & Meals, as hereinbefore set forth, and in the total sum of $20,992. Wherefore plaintiff prays judgment against the defendants for the sum of $45,000, with interest thereon at seven per cent from date, and costs of suit."

In the contract with Godfrey & Meals, which was made a part of the petition as an exhibit, there were these provisions: "It is mutually understood and agreed that the parties of the second part shall furnish all materials, tools, and labor to put in his system of wells complete and demonstrate to the satisfaction of the mayor and city council that said wells will give and furnish a daily supply of at least two million (2,000,000) gallons of water each twenty-four hours before any installment of the above consideration shall be paid by the party of the first part; and provided further, in case of the failure of the parties of the second part to find or secure that quantity of water, the party of the first part will relieve the parties of the second part from a further compliance with their

contract, and in that event the party of the first part to be relieved of all liability for said work and materials and shall not be required to pay anything therefor." In the part of the contract immediately following the language just quoted it was provided that in case two million gallons of water should be obtained the consideration was to be paid in pursuance of the terms and specifications attached to said contract under the head of "payments." Turning to this particular head we find the following language: "Payments to be made of eighty per cent between the first and tenth of each month on estimates of all material furnished and labor performed the preceding month; ten per cent on completion of the work, and ten per cent on final acceptance of the work, to be paid in good and lawful money." The price to be paid for the completed works with the full supply of water guarantied was $45,000. From the quotations just made it is evident that there were conflicting provisions as to payment of this consideration. By the first it was provided that the work should be completed and the stated quantity of water furnished before anything was required to be paid; by the last provision it was required that eighty per cent should be paid on estimates of materials furnished and labor performed; ten per cent on the completion of the work, and ten per cent upon its acceptance. The payment pleaded was, we suppose, the eighty per cent on certain estimates, for this, being by the evidence left to conjecture, we have assumed that these payments were made under contract provisions.

The second instruction given to the jury was in this language: "If you find for plaintiff, from the evidence and the law as given you by the court, the amount of damages which plaintiff is entitled to recover from the defendant or defendants against whom you find is the sum of money paid by plaintiff to the defendants Godfrey & Meals under the contract set out in the petition, which is admitted to be $20,992, with interest thereon at the rate of seven per cent per annum from the time said Godfrey & Meals

failed to perform said contract on their part and finally abandoned the work on said system of wells and waterworks." We do not understand the theory on which it was assumed that the recovery of the money paid was the correct measure of plaintiff's damages. It was not pleaded that there was any agreement to refund payments if upon completion of the efforts of Godfrey & Meals the stipulated amount of water had not been furnished. In one provision of the contract it seems as though the city expected to protect itself by withholding all payments until a satisfactory amount of water was assured. In another part of the said contract, however, there were payments to be made as the work progressed based upon estimates of materials furnished and labor done. The payments actually made to the amount of $20,992 must, therefore, have been for materials furnished and labor done without reference to the required flow of water having been secured. As to this amount there was no provision in the contract in case of failure to obtain water as required, that Godfrey & Meals would refund payments already made to that firm. Such a claim was not asserted in the petition, and whatever may be the rights of the plaintiff, if it has any remedy because of the alleged failure to furnish water, it certainly was not, under this condition of the contract and pleadings, to recover payments by it made to Godfrey & Meals merely because such payments had been made. The injustice of adopting this measure of recovery is specially marked as against the sureties who had merely guarantied the faithful performance of the undertakings of Godfrey & Meals and contracted to indemnify and save harmless the city of Beatrice and its officers. The rule is that an undertaking will be strictly construed in favor of sureties, and their liability will not be extended by construction beyond their specific agreement. (*Curtin v. Atkinson*, 36 Neb., 110; *Gran v. Houston*, 45 Neb., 813.) The judgment of the district court is reversed and the cause is remanded

for further proceedings not inconsistent with the views above expressed.

REVERSED AND REMANDED.

BROWN COUNTY V. ROCK COUNTY.

FILED APRIL 21, 1897. No. 7236.

Counties: DIVISIONS: RIGHTS IN REAL ESTATE. In an action for the recovery of a proper proportion of the value of real property retained and used by a county from the territory of which the territory of another county has been segregated, it is no defense to show that said real property was originally conveyed by a deed with conditions, when thereafter the said property was dedicated as county property by a plat duly recorded by the grantor and as such was accepted by the county and at great expense improved by the erection thereon of county buildings.

ERROR from the district court of Brown county. Tried below before BARTOW, J. *Affirmed.*

J. S. Davisson, R. M. Logan, and *Munger & Courtright,* for plaintiff in error.

Robertson & Wighton and *J. J. Carlin, contra.*

RYAN, C.

This action was brought in the district court of Brown county by Rock county and its board of county commissioners to recover from Brown county the alleged value of the interest of Rock county in certain real property. There was a judgment for the sum of $4,386 against the defendant, which prosecutes this proceeding in error.

It was alleged in the petition that "on the 28th day of December, A. D. 1888, the plaintiff, Rock county, was, in the manner provided by law, duly created and erected out of a portion of the territory of said Brown county as then existing." By the answer the above averments of

the petition were admitted. This admission, however, was immediately followed by the statement that "plaintiff county was a duly organized and existing county on November 6, 1888, and that plaintiff and defendant counties were divided by reason of an election held therefor on said 6th of November, 1888." By the reply the averment of the answer that Rock county was duly organized and existing on November 6, 1888, was denied. In view of this condition of the pleadings, we think it should be assumed that by the pleadings themselves it was established that Rock county was duly created and erected out of a portion of the territory of Brown county, on December 28, 1888. This disposes of some contentions made in argument based upon the assumption that Rock county was created and erected on November 6, 1888. Between themselves, the authorities of Brown and Rock counties agreed to a division of the personal assets held and debts owing by Brown county before Rock county was created out of a portion of the territory of Brown county. The matter in litigation in this case was the value of the square upon which stood the court house and jail. This square is in the territory which at present constitutes a portion of the territory of Brown county, and that county uses it, with all of its appurtenances, for county purposes. It denies, however, that it should be held to account for its proportion of the value of this real property to Rock county, for the reasons which shall now be considered.

It is insisted that Brown county does not hold a fee-simple title, and that, therefore, it should not be held liable for anything more than a nominal sum. This contention is grounded on the proposition that the conveyance of the square in question was with the express condition therein contained that "the county buildings of Brown county, such as court house, jail, etc., shall not be erected and maintained anywhere except upon these premises, and this deed shall be of no force or effect, and all right and title herein conveyed shall at once revert to the said grantors, if at any time the county seat of Brown

county shall be removed from said town of Ainsworth." After the above mentioned conveyance had been made it was apparently discovered that it had not been witnessed, and subsequently, on March 8, 1887, a duly witnessed deed was executed, which contained the provisions above recited as existing in the first deed. Between the dates of the execution of these two instruments, however, the grantor filed for record a plat of "Osborn's Second Addition to the town of Ainsworth." In this plat the square as to which this controversy has arisen was designated and described as "Court House Block." After this plat had been filed the county of Brown built on "Court House Block" a court house, which it is stipulated cost $9,750, and ever since has continued without question to use said building for the purpose for which it was erected. Under these circumstances the plaintiff in error cannot be permitted to assert that it has no ownership of the square or in the buildings thereon.

It is insisted that this court house was constructed with the proceeds of bonds voted by the Ainsworth precinct to induce the location of the county seat of Brown county within the boundaries of said precinct, and that, therefore, Ainsworth precinct has such an interest in the square in question that Brown county should not be compelled to account to Rock county with respect to this property. There was attached to the answer the submitted proposition on which the precinct bonds were voted, and in this proposition there was no reservation of any equitable or other rights with respect to the improvements to be made with the proceeds of the bonds proposed to be voted. We do not say that a proposition might or might not properly contain a condition of the character indicated; it is sufficient for our purposes to say there was no attempt to embody such a condition.

There was sufficient evidence to justify the finding of the amount due Rock county on account of the real property above indicated on the basis afforded by the statute, and the judgment of the district court is

AFFIRMED.

MARILLA E. DOANE ET AL. V. SMITH BROTHERS LOAN & TRUST COMPANY ET AL.

FILED APRIL 21, 1897. NO. 7234.

1. **Review:** CONFLICTING EVIDENCE. A verdict on consideration of fairly conflicting evidence will not, in this court, be disturbed as lacking support in the proofs.
2. **Immaterial Special Findings:** REVIEW. Where a question for a special finding, which, answered either way, must be immaterial to issues in view of the evidence, was submitted to a jury, and such question was not answered, there was no prejudicial error in rendering judgment on the general verdict without previously requiring a finding on the question indicated.

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

E. W. Metcalfe, for plaintiffs in error.

H. D. Travis and *J. H. Grimm, contra.*

RYAN, C.

In the district court of Saline county the Smith Bros. Loan & Trust Company obtained a decree of foreclosure, under which there was sold a certain quarter section of land in said county. By the sale the amount found due by this decree was paid, and there was left in the hands of the clerk of said court a balance of $664.97. By her application, in the nature of a motion, Rebekah Coggswell, as administratrix of the estate of her deceased husband, James W. Coggswell, asked that this surplus be paid to her. She based this right upon a note and mortgage executed by Marilla E. Doane and J. C. Doane to her intestate. The Doanes are the owners of the mortgaged premises above referred to and claim the money in the hands of the clerk by reason of that fact. They averred in their answer that they had purchased the mortgaged premises from James W. Coggswell, but alleged that they

had fully paid and accounted to him for the purchase price, and that said note and mortgage formed no part of the consideration for said purchase, but that said consideration had by them been fully paid. In respect to the note and mortgage made to James W. Coggswell, the Doanes further answered that said note and mortgage were given to James W. Coggswell, under and by reason of an arrangement with him that neither the same, nor any part thereof, should ever be paid by them; and the express agreement of Coggswell that he, in a few days, would release the same; and that he was prevented from making this release only by his sickness and death, which occurred shortly after the making of his said agreement. It was also alleged by the Doanes that their note and mortgage were made to Coggswell solely to enable him to effect certain purposes of his own. To this answer there was a reply denying each fact pleaded. The district court was liberal in allowing the defenses to be presented to the jury, and there was accordingly determined upon conflicting evidence the above described issues, and for this reason we cannot disturb the verdict.

It is urged that the jury were not governed by the instructions of the court as to matters of law, but we find no evidence of this misconduct of the jury in the record.

It is urged that the jury failed to answer a special interrogatory, which was in this language: "How much money did Coggswell receive on the mortgage on the farm?" To this the answer was: "Unable to determine." This question referred to a mortgage in existence before that to James W. Coggswell was executed. Under the issues presented in this case which are now sought to be reviewed this question presented an immaterial inquiry, and, therefore, there was no error in receiving the general verdict without insisting upon an answer to this special interrogatory. The facts bring this case within the rule laid down in *Town v. Missouri P. R. Co.*, 50 Neb., 768, which rule was stated in the syllabus in this language: "Where questions for special findings are sub-

mitted to a jury, the answers to which would be immaterial to the issues as prescribed by the pleadings and evidence, and in view of the other findings of the jury, and the jury fails to answer one or more of such questions, it is not prejudicial error for the court to render a judgment over the objection of a party on the general verdict returned."

It is finally urged that there has been no final judgment. We are rather surprised that this is urged by plaintiffs in error, for if their position is well taken they would have no standing in any court to review the alleged errors in the district court. This order was made upon a motion, and we think it was a final order. (*Clarke v. Nebraska Nat. Bank*, 49 Neb., 800.)

No error has been found in the record and the judgment of the district court is

AFFIRMED.

JOSHUA F. MCGINNIS, APPELLANT, V. ROBERT KYD, SHERIFF, APPELLEE.

FILED APRIL 21, 1897. No. 7250.

Review: CONFLICTING EVIDENCE. A judgment on fairly conflicting evidence will be affirmed when the sufficiency of such evidence is the only question presented by the record.

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

S. L. Webb and *J. N. Rickards*, for appellant.

J. A. Smith, contra.

RYAN, C.

In this case appellant obtained an injunction to prevent the appellee, the sheriff of Gage county, from executing a deed in pursuance of a sale previously made

and confirmed. From an order dissolving this injunction this appeal was taken.

The grounds on which the injunction was sought were that in respect to the pendency of the original suit, which resulted in a judgment against him, the appellant had never been served with summons or a notice, and had no knowledge of such suit, and there had subsequently been a revivor of said judgment, in respect to which the appellant was equally ignorant. The evidence was conflicting, and as there was sufficient, if accepted as true, to support the finding of the court, it will not be disturbed.

It was pleaded in the petition for the injunction that the property sold was a homestead; and while the judgment purported to be for labor performed for appellant, it was in fact on some other cause of action. Unfortunately for this contention, the evidence failed to sustain it. The preponderance was in favor of the proposition that labor performed was the cause of action, which had been properly established by the judgment against appellant.

No other question is presented by the record, and the judgment of the district court is

AFFIRMED.

C. W. LYMAN & COMPANY v. D. WATERMAN.

FILED APRIL 21, 1897. No. 7223.

Trial to Court: REFUSAL TO STATE FINDINGS SEPARATELY. When a jury was waived and questions of fact were tried by the court and in due time a request was made of the court to state in writing the findings of fact separately from conclusions of law, it was prejudicially erroneous for the court to deny such request. (*Wiley v. Shars*, 21 Neb., 712.)

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

Good & Good and *L. E. Gruver*, for plaintiff in error.

Simpson & Sornborger, contra.

RYAN, C.

On May 12, 1890, Oliver Eaton and D. Waterman executed a promissory note to plaintiff in error for $52.70, due ninety days after date. Suit was brought against Waterman on this note, and upon a trial to the court there was a finding for the defendant and judgment accordingly. The defense of Waterman was that he was surety on said note, and that for a valuable consideration paid by Eaton the time of payment was extended by the payee without the knowledge of Waterman, who thereby was discharged. This was denied by a reply of plaintiff. On the trial, a jury being waived, plaintiff in writing requested the court to make a finding of facts separate from the findings and conclusions of law. This request was denied and plaintiff excepted, and by a motion for a new trial and a petition in error the correctness of this ruling has been challenged. The same question was presented in *Wiley v. Shars*, 21 Neb., 712, and it was then held that the refusal noted was prejudicially erroneous. The judgment of the district court is therefore

REVERSED.

CHARLES H. MORRILL, RECEIVER, APPELLANT, V. CLARK M. CRAWFORD ET AL., APPELLEES.

CHARLES H. MORRILL, RECEIVER, APPELLANT, V. CHARLES E. SHAW ET AL., APPELLEES.

FILED APRIL 21, 1897. No. 7247.

Review: CHANGE OF THEORY IN APPELLATE COURT. Where an action was brought by the receiver of an insolvent bank against one who had held some of its unpaid stock, and his transferee thereof, for the amount of an assessment thereon, in which action it was

sought to obtain judgment against one defendant if certain allegations of fraud against him should be sustained by the proofs to be adduced, and if not so sustained then against the other defendant, the cause must be tried on appeal as one for alternative relief; and the evidence not being found sufficient to charge the original holder of the stock on the theory proceeded on against him in the district court, he cannot be held liable in the supreme court on a different theory.

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

Sawyer, Snell & Frost, for appellant.

Pound & Burr, contra.

RYAN, C.

There were tried two cases in the district court of Lancaster county upon the same evidence, and from an adverse judgment in each C. H. Morrill, as receiver, who was plaintiff in both cases, has appealed. It will not be necessary to describe the issues in both these cases, for the reason that they are alike and the conclusion reached in one must govern in the other. The petition in the case of Charles H. Morrill, receiver, v. Clark M. Crawford and Henry O. White contained averments of the appointment of Morrill as receiver of the Nebraska Savings Bank in July of 1893; that the capital stock of said bank was $250,000, divided into shares of $100 each, and that the defendant Crawford was the owner of ten of these shares, on which there had been paid but twenty per cent of their par value. There was in the petition the following language: "That on or about the 15th day of February, 1893, the said Nebraska Savings Bank was insolvent and known to be insolvent by said Crawford, and, in order to exonerate himself from liability to the creditors of the Nebraska Savings Bank by reason of the unpaid part of his shares of stock, amounting to eighty per cent of the face value thereof, the said Crawford, who was then and had been for some time a di-

rector in said Nebraska Savings Bank, transferred said shares to his co-defendant, Henry O. White, on the books of the said Nebraska Savings Bank, and had a new certificate issued to, and in the name of, the said Henry O. White for said shares, being certificate No. 246; that said transfer was made without consideration and with the view on the part of said defendants of allowing said Crawford to escape his liability thereon; that said Henry O. White was, at the time of said transfer, wholly insolvent, which fact was known to said Crawford at said time; that said White is now and at all times since said transfer has been insolvent, and that the said transfer was made with the view of defrauding the creditors of the said Nebraska Savings Bank and for no other purpose whatever, and was and is void as to them and this plaintiff." Following these averments, there were allegations which need not be described further than in general terms to say that thereby were made to appear an assessment of twenty per cent made on May 19, 1893, on the par value of the shares referred to, and the refusal of the defendants to pay, as well as the insolvency of the bank. The prayer of the petition was as follows: "Wherefore the plaintiff prays that the transfer of the said stock of the Nebraska Savings Bank by the said Clark M. Crawford to the said Henry O. White be set aside as fraudulent and null and void, and that the said stock be decreed to be the property of the said Clark M. Crawford, and that the said Clark M. Crawford may be decreed, ordered, and adjudged to pay to the plaintiff the said assessment on said stock, viz., $200, with interest thereon at the rate of seven per cent per annum from the 15th day of June, 1893; or, in the event that the court hold that said transfer was not fraudulent and void, then that the defendant Henry O. White may be decreed to pay to plaintiff the sum of $200, with interest as aforesaid, and for such other, further, and different relief as may be just and equitable, including costs of suit." There was an answer filed by Crawford, in which there

were denied the averments of the petition by virtue of which his liability was sought to be established. There was no appearance by White, and after he had been duly called in open court his default was entered, upon which judgment was subsequently rendered for the amount above prayed in the alternative against him. At the same time the judgment was rendered against White there was rendered a judgment in favor of Crawford. The receiver, by this appeal, seeks to have Crawford held liable for an amount equal with that of the judgment rendered against White.

It is urged by the appellant in argument that the liability of a transferee of the stock of a bank is merely cumulative, and that, therefore, the transferrer, Crawford, was not released by such transfer. The petition sought to hold Mr. Crawford upon allegations that he had transferred his stock fraudulently to escape liability, and the prayer was accordingly in the alternative that Mr. Crawford alone be held liable if such fraudulent purpose should be made to appear by the evidence, or that, if the proposed proof failed, only Mr. White should be held liable. By taking judgment against Mr. White by default, the receiver might be said to have made his election which of those two alternatives he was satisfied to accept, and that in this court he could not now insist upon relief as though there was no alternative prayer. Ordinarily a cause must on appeal be tried on the same theory as in the district court. (*Shaw v. Robinson*, 50 Neb., 403.) We have carefully examined the evidence and have found that there was sufficient to justify the court in finding that Crawford's transfer of his stock was not fraudulent, and, therefore, consistently with the theory on which this case was tried, the judgment of the district court was right and must be

AFFIRMED.

BOARD OF EDUCATION OF THE CITY OF AURORA V. NELLIE A. MOSES.

FILED APRIL 21, 1897. No. 9048.

1. **Statutes:** AMENDMENTS: CONSTITUTIONAL LAW: HIGH SCHOOL DISTRICTS. An act of the legislature which is clearly amendatory of an existing statute is unconstitutional when such amendatory act in no way mentions or describes that of which it is amendatory.

2. ——: ——: ——: ——. When a part of an act, unconstitutional for the reason above indicated, forms the obvious inducement for the passage of the remainder of such act, the entire act must be declared unconstitutional.

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

John A. Whitmore and *D. A. Scovill*, for plaintiff in error.

M. F. Stanley, contra.

RYAN, C.

This is a proceeding in error to reverse the order of the district court of Hamilton county allowing a *mandamus* on the application of the defendant in error. The respondent was the board of education of the city of Aurora. Plaintiff averred in her application that "said city of Aurora is duly organized under the law of Nebraska as a high school district; that said high school has been designated by the state department of education as a free high school, open to attendance by any person of school age in accordance with the provisions of sections numbers 4726, 4727, 4728, 4729, Compiled Statutes of Nebraska, 1895 edition, and that said high school has been and now is able to furnish accommodations to non-resident pupils without renting or constructing additional buildings." The sections of the statute specially described have been omitted from the above quotation because their purport will be more fully indicated in the course of this discussion. In general terms it will an-

swer all purposes to state that the relator described her own age, residence, and other requirements sufficiently to entitle her to enforce such rights as the statute of 1895, hereinafter referred to, has attempted to confer. There were averments of due demand to be accorded such rights and of the refusal of the respondent board to comply therewith. There was a prayer that said defendants might be compelled to admit plaintiff to attendance as a pupil of said high school with all the rights and privileges pertaining thereto, without charge to said plaintiff. A demurrer was interposed to this petition, and upon this being overruled a *mandamus* was issued as prayed.

By section 1, subdivision 14, chapter 79, Compiled Statutes, each city in the state having more than fifteen hundred inhabitants, together with certain contiguous territory described in exceptional cases, was constituted a school district. Section 2 of this subdivision was in this language: "All schools organized within the limits of said cities shall be under the direction and control of the boards of education authorized by this subdivision. Such schools may be free to all children between the ages of five and twenty-one years whose parents or guardians reside within the limits of said district." The statute was in the above condition when chapter 60 of the Session Laws of 1895 was adopted. The title of this act was, "An act to provide free attendance at public high schools." By the first section of this chapter it was provided: "That all public high schools in this state which shall be determined by the state department of education to be properly equipped as to teachers, appliances, and course of study shall hereafter be open to attendance by any person of school age residing outside the district, who is a resident of the state, and whose education cannot profitably be carried further in the public school of the district of his residence." The right above conferred was dependent upon certain contingencies and under certain restrictions, but as these have no bearing on the questions under consideration they will be omitted.

By reference to the language of section 2, subdivision 14, chapter 79, above quoted, it will be seen that thereby the right of attendance in the high school was limited to children whose parents or guardians were residents within the limits of the district. The act of 1895 so amended these provisions as to permit any person of school age having a certain educational proficiency, though living outside the district, to receive instruction at the high school. This was clearly amendatory to the extent indicated, and yet neither in the title nor in the body of the latter act is there any reference whatever to the section amended. Plaintiff based her right to be received into the high school of Aurora upon this statute of 1895. In her application she described the defendant as the board of said high school, and having alleged that the city of Aurora had been duly organized under the laws of this state as a high school district, and that she was a non-resident of said high school district, she demanded to be accorded the privilege of becoming a pupil of said high school. There was thus predicated her right upon the statute passed in 1895. By the statute in existence prior to 1895 she was not entitled to receive a high school education in the city of Aurora. Neither by the title of the act of 1895, nor by its provisions, was there any reference to the law in existence which stood between herself and the exercise of the privilege demanded. The law of 1895 was not a complete act, but was amendatory of the law which denied non-residents of Aurora the right to receive the benefits of its high school education. In *State v. Moore*, 48 Neb., 870, there was under consideration section 11, article 3, of the constitution of this state, which declares that "No law shall be amended unless the new act contains the section or sections so amended, and the section or sections so amended shall be repealed," and NORVAL, J., in the delivery of the opinion of this court, said: "This constitutional provision has been frequently before this court for consideration, and it is a rule well settled that where an act of the legislature is

not complete in itself, but is amendatory of a former law, to which it does not refer, it is within the constitutional inhibition quoted above. In other words, the fundamental law of the state requires all the parts of an amended law to be incorporated in the act, and the old law so amended to be repealed. If said constitutional provision is disregarded or not complied with in the amendment of a prior act, the new law is void." This language was followed by the citation of many cases previously determined by this court.

The other provisions of chapter 60 of the Session Laws of 1895 are dependent upon that which is open to the objection above noted, and as the invalid portion, without question, formed an inducement to the passage of the entire act, it must be declared unconstitutional and void. (*Trumble v. Trumble*, 37 Neb., 340.) The judgment of the district court is

REVERSED.

AMBROSE EDDY V. GERMAN INSURANCE COMPANY OF FREEPORT.

FILED APRIL 21, 1897. No. 7225.

1. **Costs: ATTORNEYS' FEES: INSURANCE.** In order that a plaintiff in a suit against an insurance company may recover an attorney's fee as part of his costs it must appear that the judgment is based upon a policy or contract of insurance; that the policy must have been written upon real property and be a contract of indemnity against loss by fire, tornado, or lightning; and that the loss must have occurred without criminal fault on the part of the insured or his assigns.

2. ———: ———: ———. When such a judgment is brought to this court on error and affirmed, the district court, on receiving and entering the mandate of this court, has no authority to allow the insured an attorney's fee for services rendered by his counsel in the case in this court.

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

Abbott, Selleck & Lane, for plaintiff in error.

Adams & Scott, contra.

RAGAN, C.

In the district court of Lancaster county, Ambrose Eddy sued the German Insurance Company on an ordinary fire insurance policy. He recovered a judgment and the same was, on error proceedings to this court, affirmed. (See *German Ins. Co. v. Eddy*, 36 Neb., 461.) Subsequently Eddy moved this court to tax to the insurance company as part of his costs a reasonable attorney's fee for services of his counsel rendered in the case, both in the district court and in this court. This motion was overruled. (See *German Ins. Co. v. Eddy*, 37 Neb., 461.) Eddy then moved the district court of Lancaster county for an order to tax the insurance company, as part of the costs in the case, a reasonable attorney's fee for the services of his counsel in the case in both the district and the supreme courts. The court sustained the motion to tax as costs a reasonable attorney's fee for Eddy's counsel in the district court, but overruled the motion to tax the attorney's fee for the services rendered by counsel in the supreme court. To reverse this order Eddy prosecutes here a petition in error.

Section 45, chapter 43, Compiled Statutes, provides: "The court upon rendering judgment against an insurance company upon any such policy of insurance shall allow the plaintiff a reasonable sum as an attorney's fee, to be taxed as part of the costs." The right of a litigant in any case at law to recover costs is a statutory right; and in order that a litigant may recover an attorney's fee as part of his costs in a suit against an insurance company he must bring himself within the provisions of sections 43, 44, and 45 of said chapter 43. He must recover a judgment against an insurance company upon a policy or contract of insurance. The policy of insurance must

be a contract of indemnity against loss by fire, tornado, or lightning. It must be written upon real property. It must have been destroyed or damaged without criminal fault on the part of the insured or his assigns. These things having been made to appear, the court in which the case is tried, and which renders the judgment against the insurance company, may then allow the party recovering the judgment a reasonable sum as attorney's fees and tax such sum as a part of his costs. We do not think it was the intention of the legislature to authorize this court to allow an attorney's fee to a litigant and tax it as part of the costs in an error proceeding by an insurance company to review the judgment of the district court pronounced against it on such an insurance policy as is contemplated by said sections of the statute. Where a suit is brought against an insurance company on a policy of insurance such as is contemplated by the statute, the plaintiff recovers judgment thereon, and the insurance company removes such case to this court on error and the judgment of the district court is affirmed, we do not think the statute authorizes the district court, on receiving and entering the mandate of this court, to allow the insured an attorney's fee for the services rendered by his counsel in the case in this court. The judgment of the district court is

AFFIRMED.

MISSOURI PACIFIC RAILWAY COMPANY v. CROWELL LUMBER & GRAIN COMPANY.

FILED APRIL 21, 1897. No. 7196.

Carriers: MISTAKE IN QUOTING FREIGHT RATES: OVERCHARGES: LIABILITY OF CARRIER. A railway company quoted to a shipper a rate on grain from Nebraska to Colorado, but by mistake the rate quoted was less than the usual rate. The shipper, relying upon the rate quoted, sold large quantities of grain to persons in Colorado, basing the price on such freight rate, the purchasers of the

grain to pay such freight on its delivery and the shipper guarantying that the rate should not exceed the one quoted to him by the railway company. This grain was delivered by the shipper to the railway company in Nebraska to be transported by it and delivered to the purchasers in Colorado. The last carrier, before it would deliver the grain to the purchasers, compelled them to pay a higher freight rate than that quoted to the shipper by the railway company. The shipper then paid to the purchasers this excessive freight and sued the railway company therefor. *Held*, That the mistake made by the railway company in quoting the freight rate caused the shipper to change his status, to his injury, and that the railway company was liable for the overcharge paid by the shipper.

ERROR from the district court of Douglas county. Tried below before BLAIR, J. *Affirmed.*

The opinion contains a statement of the case.

B. P. Waggener, *James W. Orr*, and *A. R. Talbot*, for plaintiff in error:

The special rates were quoted through mistake of the carrier's agent, and the contract based thereon provided for the violation of the interstate commerce law. The judgment for overcharges was therefore erroneous. (24 United States Statutes at Large, p. 79; *Chicago, R. I. & P. R. Co. v. Hubbell*, 54 Kan., 232; *Hawley v. Kansas & Texas Coal Co.*, 48 Kan., 593; *United States v. Michigan C. R. Co.*, 43 Fed. Rep., 26; *United States v. Tozer*, 39 Fed. Rep., 904; *Arkansas & L. R. Co. v. Smith*, 13 S. W. Rep. [Ark.], 929; *Dillingham v. Fischl*, 21 S. W. Rep. [Tex.], 554.)

Connell & Ives, contra.

RAGAN, C.

The Crowell Lumber & Grain Company (hereinafter called the grain company) is a corporation organized under the laws and doing business in the state of Nebraska. Its business consists very largely in buying and shipping grain. The Missouri Pacific Railway Company (hereinafter called the railway company) is a common

carrier doing business in Nebraska, Colorado, and other states. In the district court of Douglas county the grain company sued the railway company, alleging in its petition that on the 11th day of December, 1890, the railway company entered into a contract with it in and by which it agreed to transport grain in car-load lots from certain points in Nebraska to certain points in Colorado at a rate of thirty cents per hundred; that the grain company, relying upon this contract, purchased and shipped a large quantity of grain and sold it to persons at the said Colorado stations at a price based on said freight rate mentioned in said contract with said railway company, the purchasers of said grain to pay the freight on delivery, the grain company guarantying that the said freight should not exceed thirty cents per hundred, as provided by its contract with the railway company; that when the grain reached Colorado the delivering carrier charged and demanded of the grain company's purchasers, as a condition precedent to the delivery of the grain shipped to them, a freight rate largely in excess of the contract rate entered into between the grain company and the railway company; that the said purchasers, in order to obtain said grain, were compelled to and did advance and pay the freight rate demanded by the delivering carrier; and the grain company had been compelled to and had repaid to said purchasers the freight charges in excess of the rate fixed by the contract between the grain company and the railway company. In addition to a general denial, the railway company interposed to this action two defenses: (1) That it was induced to and did enter into the contract sued on, believing that the rate fixed in the said contract was the rate then in force for the transportation of such freight between said points as agreed upon by itself and other carriers then constituting the Trans-Missouri Freight Association; that said rate was, as a matter of fact, not then in force, all of which the grain company knew at the time of making the contract; and (2) that the contract made was void under

the provisions of the interstate commerce act. The grain company had a verdict and judgment as prayed, and the railway company prosecutes here a petition in error.

1. The first assignment of error which we notice is that the verdict is not sustained by sufficient evidence. The issues of fact made by the pleadings in the case were (1) whether the railway company executed the contract sued upon; (2) whether the freight rate on grain from Nebraska to Colorado fixed by the Trans-Missouri Freight Association was in force at the time the contract in suit was made; (3) whether the grain company knew that the rate fixed by the Trans-Missouri Freight Association had been abolished at the time the contract was made; (4) whether the grain company, relying in good faith upon the contract sued on, purchased and shipped grain to Colorado, there sold it, and guarantied that the freight charges should not exceed the rate fixed by its contract with the railway company; (5) and whether the grain company, to make good its guaranty, had paid to its purchasers the excess of freight charged and collected for transporting the grain.

There is practically no conflict in the evidence as to the first and fifth issues.

As to the second issue, the evidence tends to show that the railway company and a number of other carriers, on the 19th of July, 1890, became members of what is known in this record as the Trans-Missouri Freight Association; that this association fixed the rate for the transportation of grain in car-load lots from certain points in Nebraska to certain Colorado points at thirty cents per hundred; that they caused to be printed and published a tariff sheet setting out the rates fixed by this association and filed this tariff sheet with the interstate commerce commission on the 23d of July, 1890. No such thing as a rule, constitution, or by-law of this association is in the record, and we are not certainly advised how any member of this freight association might withdraw therefrom or cease to be bound by the mutual agreement of its members,

But it seems that the association had not given the interstate commerce commission any notice of the modification or abrogation of the tariff fixed by it at least earlier than the 6th day of February, 1891, before which date the transactions had occurred out of which this suit grew.

As to the third and fourth issues, the evidence tends to show that prior to the making of the contract in suit the grain company had heard, or had been informed, that the rate fixed on grain from Nebraska to Colorado by the Trans-Missouri Freight Association had been abrogated or modified; that the officer of the grain company whose duty it was to look after freight rates called upon the assistant general freight agent of the railway company and told him that he had been advised of a modification or abrogation of the thirty-cent rate on grain to Colorado. This freight agent assured him that there had been no modification or change of that rate; that it was still thirty cents per hundred, and thereupon the contract in suit was entered into; that the grain company, relying upon the rate fixed in the contract, purchased and shipped large quantities of grain and sold it to Colorado parties, the purchasers to pay the freight on the delivery of the grain, the grain company guarantying that it should not exceed thirty cents per hundred; that the delivering carrier refused to surrender the grain unless it was paid a rate of thirty-nine cents per hundred; that the purchasers were compelled to pay this in order to receive the grain, and that the grain company, in pursuance of its guaranty with its purchasers, paid the excessive freight charges to their purchasers. The verdict of the jury found all the issues in favor of the grain company, and without further comment on the sufficiency of the evidence, we think the jury's finding is abundantly supported.

2. A second argument is that the contract in suit is void under the provisions of the act of congress known as the "Interstate Commerce Act." Section 2 of this act provides: "That if any common carrier * * *

shall, * * * by any special rate, rebate, draw-back, or other device, charge, demand, collect, or receive from any person * * * a greater or less compensation for any service rendered or to be rendered in the transportation of passengers or property * * * than it charges, demands, collects, or receives from any other person * * * for doing him * * * a like and contemporaneous service, * * * under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful." (U. S. Statutes at Large, vol. 24, ch. 104, p. 379.) Section 10 of said act provides: "Any person and any officer or agent of any corporation or company who shall deliver property for transportation to any common carrier, * * * or for whom * * * any such carrier shall transport property, who shall knowingly and willfully, by false billing, false classification, false weighing, false representation of the contents of a package, or false report of weight, or by any other device or means, whether with or without the consent or connivance of the carrier, * * * obtain transportation for such property at less than the regular rate then established and in force, * * * shall be deemed guilty of fraud * * * be subject for each offense to a fine not exceeding five thousand dollars, or imprisonment in the penitentiary for a term not exceeding two years, or both, in the discretion of the court. If any such person or any officer or agent of such corporation * * * shall, by payment of money or other thing of value, solicitation, or otherwise, induce any common carrier * * * or any of its officers or agents to discriminate in his * * * favor as against any other consignor * * * in the transportation of property, or shall aid or abet any common carrier in any such unjust discrimination, such person or such officer or agent of such corporation * * * shall be deemed guilty of a misdemeanor." (U. S. Statutes at Large, vol. 25, ch. 382, p. 857, sec. 2.) We do not understand that the contract in suit violates any provision of

this interstate commerce act. It is neither pleaded nor proved that by the contract in suit the railway company gave the grain company a special rate, rebate, or a drawback; nor that by the contract was the railway company to collect or receive from the grain company either a greater or less compensation for transporting the grain from Nebraska to Colorado than it charged and collected from other persons for a like and contemporaneous service under substantially similar circumstances and conditions; and there is neither pleading nor proof that the rate of transportation fixed in the contract was obtained by the grain company by false billing, false classification, false weighing, or by any other deception or fraud whatsoever; nor that the railway company intended by the rate fixed in the contract to discriminate in favor of the grain company and against any other person or corporation whomsoever. In other words, there is neither pleading nor proof in this record that by the contract in suit either the railway company or the grain company intended to violate any provision of the interstate commerce act; nor that the contract was a shift or device gotten up for the purpose of evading the provisions of that act. If the agreement of the members of the Trans-Missouri Freight Association, that the rate on grain from Nebraska to Colorado should be thirty cents per hundred, was not in force at the time the contract in suit was made, because some member of that association had refused to be longer bound by its agreements, then there is no pleading or proof in this record which shows that the rate of thirty cents per hundred fixed by the contract was an unjust or unreasonable rate, nor that the railway company, by giving this rate to the grain company, was guilty of unjust discrimination. To give the railway company the benefit of its own theory in this case, it amounts to this: That before and at the time the contract in suit was made it was a member of the Trans-Missouri Freight Association. It had been transporting grain from Nebraska points to Colorado points for thirty cents per hundred

in car-load lots. It charged this rate because that was the rate fixed by the association of which it was a member. Some time before the contract in suit was entered into one of the members of this association withdrew therefrom, thus abrogating the mutual agreement of the members of the association. At the time the contract was made the railway company had not been advised of the withdrawal of this member. It made the contract in suit believing that all the members of the association were maintaining the rate on grain fixed by the association; and that if it had been aware that one member of the association had withdrawn therefrom its freight rate on the grain would have been thirty cents per hundred from Omaha to the Colorado points, plus the local rate from the place of shipment of the grain to Omaha. But conceding all this, we have the finding of the jury, supported by the evidence, that the grain company acted in good faith in obtaining this contract from the railway company, and, relying upon the statements of the railway company's freight agent, that the rate fixed by the freight agent had not been changed, accepted this contract at thirty cents per hundred, and, relying upon the contract, purchased, shipped, and sold the grain at a price based on the freight rate fixed by the contract in suit. We have, then, a contract entered into by one party under a mistake or misapprehension as to the facts, and which he would not have made had he known the facts; this contract accepted by the other party in good faith, relied and acted upon by him, and in consequence of which he has changed his status, to his injury. Conceding, then, that both parties to this contract are innocent, the loss must fall upon the railway company, because its mistake was the proximate cause of the other party's injury.

3. Some criticisms are made upon the instructions of the court. We have examined all of these instructions and reached the conclusion that the plaintiff in error was not prejudiced by any instruction given or refused. The

finding made by the jury is the only one that could have been correctly made under the evidence, and the judgment of the district court is

AFFIRMED.

GEORGE WASHINGTON DAVIS V. STATE OF NEBRASKA.

FILED APRIL 21, 1897. No. 8657.

1. **Murder:** MALICE. Malice is an essential element in the crime of murder, both at common law and under our statutes.

2. **Malice Defined.** "Malice," in common acceptance, means ill-will against a person; but in its legal sense it means a wrongful act done intentionally without just cause or excuse. *Housh v. State*, 43 Neb., 163, followed.

3. **Homicide:** WRECKING OF TRAIN: MALICE: EVIDENCE. The plaintiff in error was indicted for the murder of one Hambell, a passenger on a railway train, by displacing the fixtures of the railway track, thereby causing the wreck of the train and the instant killing of Hambell. *Held*, (1) Whether the prisoner in displacing the fixtures of the railway track acted maliciously was a question of fact for the jury, to be determined from all the circumstances and facts in evidence in the case; (2) that the prisoner's statements as to the motives which induced him to displace the fixtures of the railway track, while competent evidence, were not conclusive in his favor that he did not act maliciously; (3) that in order for the killing of Hambell to be murder in the second degree it was not essential that the evidence should show that the prisoner was possessed of a specific intent to either kill or injure Hambell or any other person upon the train.

4. ———: MALICE: EVIDENCE. When the fact of unlawful killing is proved, and no evidence tends to show express malice on the one hand, or any justification, mitigation, or excuse on the other, the law implies malice, and the offense is murder in the second degree.

5. ———: EFFECT OF DELAY IN TRIAL. The indictment against the prisoner was filed at the September, 1894, term of the court. There was a February, 1895, term, a May, 1895, term, and a September, 1895, term, at which latter term the prisoner was tried and convicted. He was put on trial at the February, 1895, term, and the jury, after hearing the evidence, failed to agree upon a verdict and were discharged. *Held*, Construing sections 390 and 391 of the Criminal Code, that the prisoner was not entitled to be

discharged because not brought to trial either before the end of the second or the third term of court, in which his case was pending, held after the indictment against him was found.

6. ———. By the constitution of the state the legislature is invested with plenary legislative power and the defining of crimes, and prescribing punishment therefor is a legislative function.

7. **Constitutional Law:** LEGISLATIVE POWER. Every legislative act comes before this court surrounded with the presumption of constitutionality, and this presumption continues until the act under review clearly appears to contravene some provision of the constitution.

8. ———: HOMICIDE. Section 93 of the Criminal Code does not violate any provision of the constitution. Said section is not void for uncertainty because the crimes of murder in the first degree, murder in the second degree, and manslaughter, are not defined in the proviso of said section.

9. **Criminal Law:** PUNISHMENT. A criminal statute is not void for uncertainty which prescribes as a punishment for doing a certain act the same punishment which is prescribed for doing another named act, when the same criminal code defines the latter act and prescribes its punishment.

10. ———: INSTRUCTIONS. While it is proper in a criminal case in defining a crime in an instruction to use the language of the statute descriptive of such crime, yet, if the import of the language used in the instruction is the same as the statute, an instruction will not be held erroneous because the language employed by the court is different from the language of the statute. *Long v. State*, 23 Neb., 33, followed.

11. ———: ———: REPETITIONS. The trial court is not obliged to repeat in every instruction the degree of proof required when the jury has been properly instructed that the state must make out its whole case beyond a reasonable doubt. (*Carleton v. State*, 43 Neb., 373.)

12. ———: ———: REVIEW. An instruction should be examined as a whole. All that the instruction contains should be looked to for the purpose of determining whether the party complaining of it was prejudiced by it. To single out a phrase, a word, or a sentence from an instruction and to examine such word or phrase separately from the other parts of the instruction is not a fair method of criticism.

13. ———: ———: ———. In an instruction the trial court used this language: "And if the jury find from the evidence that all the incriminating circumstances upon which the prosecution relies for a conviction will as well apply to some other person or persons as to the defendant, or if such facts and circumstances are reconcilable with any reasonable theory or hypothesis other than

the guilt of the defendant, or if such facts and circumstances, together with the direct evidence offered in this case, do not satisfy the minds of the jury beyond any reasonable doubt of the guilt of the defendant, then you should, by your verdict, acquit him." *Held*, Applying the rule just above stated, that the use by the court of the expression "incriminating circumstances," if error, was without prejudice to the prisoner. *Metz v. State*, 46 Neb., 547, distinguished.

14. ———: JURY: SPECIAL PANEL. In a county of seventy thousand inhabitants or more, where there is pending for trial in the district court a felony case, the judge of said court, if satisfied that a jury cannot be obtained from the regular panel to try such case, may direct the drawing and summoning of a special panel from which to select a jury to try such cause. (Code of Civil Procedure, sec. 668*g*.)

15. ———: ———: ———. And if in the selection of a jury the regular panel be exhausted and the jury selected be discharged before reaching a verdict, the judge of the district court may direct the drawing and summoning of a second special panel from which to select a jury to try said case.

16. ———: ———: ———. And in selecting a jury from such second special panel the accused, unless he demands that the exhausted regular panel shall be recalled and re-examined, cannot be heard to complain that the court erred in not causing that to be done.

17. **Homicide**: WRECKING OF TRAIN: EVIDENCE. The wreck which it was alleged the prisoner caused by displacing the fixtures of the railway track occurred on Thursday. The evidence against him was largely circumstantial. *Held*, Competent for the state to show that the prisoner was possessed of a superstitious belief that Thursday was a lucky day for him; that anything he attempted upon that day would succeed,—as this evidence tended to identify the prisoner as the man who displaced the fixtures of the railway track.

18. **Criminal Law**: CROSS-EXAMINATION OF WITNESS: BIAS. A litigant has the right to cross-examine a witness produced against him to show the interest, bias, or prejudice of such witness, but the extent to which such an examination may be carried is a matter resting very largely in the sound discretion of the trial court. *Consaul v. Sheldon*, 35 Neb., 247, followed.

19. ———: ———: ———: REVIEW. A case will not be reversed because of the limitation placed by the court upon the cross-examination of a witness as to his interest or bias, unless it appears from the record that the party against whom the witness was called was probably prejudiced by such limitation.

20. ———: RULINGS ON EVIDENCE. It is not error for a trial court, on its own motion, to refuse to permit a witness to answer a ques-

tion which calls for incompetent, immaterial, or irrelevant evidence.

21. ———: CROSS-EXAMINATION OF WITNESSES. It is not competent to prove the bias or prejudice of one witness by the cross-examination of another witness without at least first having cross-examined the first witness as to his interest, bias, or prejudice.

22. ———: WITNESSES: EXPUNGING ANSWERS. A litigant who propounds a question to a witness and obtains from him an answer responsive thereto cannot complain that the court erred in refusing on his motion to expunge such answer from the record.

23. ———: ———: ———. A party is not prejudiced by the refusal of the court to strike out testimony of a witness as to when a certain fact happened because the witness admits that he entered such fact in a book at that time and testifies from the entry rather than from his recollection, when it appears that the entry was correct and the party moving to strike out introduced in evidence the entry made in the book by the witness.

24. ———: TRIAL. ORDER OF INTRODUCING PROOF. The order in which a party shall introduce his proof is to a great extent discretionary with the trial court, and its action in that respect will not be cause for reversal when no abuse of discretion is shown. *Basye v. State*, 45 Neb., 261, followed.

25. ———: ———: PLEAS. There can never properly be more than one issue before the court in a criminal case at one time, and so long as the plea of not guilty remains on the record, a plea in bar is improper, and the state is under no necessity of replying or demurring to such plea, and the court, on its own motion, may disregard it. (*Marshall v. State*, 6 Neb., 120; *Korth v. State*, 46 Neb., 631.)

26. ———: ———: ———. If a prisoner, after a plea of not guilty, tenders a lawful and proper plea in bar, stating facts which have occurred or come to his knowledge since the entry of his plea of not guilty, and which facts, if true, entitle him to discharge, then it is the duty of the court to permit the prisoner to withdraw his plea of not guilty and file such plea in bar.

27. ———: ———: FORMER JEOPARDY. The prisoner, after a plea of not guilty and without withdrawing, or requesting to withdraw such plea, filed a plea of "former jeopardy" which was neither signed nor sworn to by the prisoner. *Held*, (1) That such plea in bar was invalid; (2) that the state was under no obligation to demur or reply to it, and that the court was justified in disregarding it and, on its own motion, striking it from the files.

28. ———: ———: ———. It seems that a plea of "former jeopardy" should set out the record; that is, the former indictment and acquittal or conviction, and the statements of fact, viz., the identity

of the person acquitted or convicted and the offense of which he was acquitted or convicted.

29. ———: ———: ———: INSANITY OF JUROR: DISCHARGE OF JURY. The prisoner was put on trial before a jury, and, after part of the evidence for the state was in, one of the jurymen became sick, was examined by a commission appointed by the court, and found and adjudged to be insane, whereupon the court discharged the jury without prejudice to the future prosecution of the prisoner and entered such facts, findings, and orders upon his record. On being brought to trial a second time the prisoner, by an invalid plea in bar, claimed the right to be discharged by reason of these facts. *Held*, (1) That the invalid plea in bar would be treated as a motion to be discharged, grounded on the actions and ruling of the court in the case as disclosed by the record; (2) that the insanity of a juror was an accident or calamity authorizing the discharge of the jury within the meaning of section 485 of the Code of Criminal Procedure; (3) that the action of the court in the premises was fully authorized by said section of the Code, and the record disclosed affirmatively that the prisoner had not been in "former jeopardy."

30. ———: CONFESSIONS. The *corpus delicti* is the foundation of every criminal prosecution, and the confession of an accused that he committed the crime is not alone sufficient evidence to sustain his conviction thereof. (*Ashford v. State*, 36 Neb., 38.)

31. ———: ———: EVIDENCE. The confessions of a prisoner that he committed the crime with which he is accused, if freely and voluntarily made, are competent evidence to be considered by the jury in connection with all other facts and circumstances in evidence in the case in determining whether the accused did in fact commit the crime with which he is charged.

32. ———: INSTRUCTIONS: REVIEW. The burden is upon the party complaining of the refusal of the district court to give an instruction not only to show that he was probably prejudiced by such refusal of the court, but that the entire instruction is correct as a proposition of law and applicable to the facts in evidence in the case.

33. ———: ———: ———. This court will not reverse a case because the court refused to give an instruction asked, when the substance of such instruction is included in other instructions given. (*Bush v. State*, 47 Neb., 642.)

34. ———: ———: REASONABLE DOUBT. The charge of the court on the subject of reasonable doubt set out in the opinion and approved.

35. ———: PRESUMPTION OF INNOCENCE. A defendant accused of a crime is presumed to be innocent, and such presumption begins with the accusation and continues until the state has established

the guilt of the defendant beyond a reasonable doubt. But it is not the law that a jury is bound to acquit an accused simply because one of the jurymen entertains a reasonable doubt of his guilt. In such a case the jury cannot convict; but it does not therefore follow that it then becomes the duty of the other jurymen to surrender their convictions and acquit.

36. ———: INSTRUCTIONS: EVIDENCE. It is not prejudicial error for a court in its charge to say to the jury that the evidence before them is both direct and circumstantial.

37. ———: ———: ———. The court, in an instruction, stated to the jury that there had been offered in the case both direct and circumstantial evidence. He then defined these two kinds of evidence and stated that the circumstantial evidence which had been received was legal and competent, and then said: "And if it is of such a character as to exclude every reasonable theory, supposition, or hypothesis other than that of the defendant's guilt, then, and in that event, it should be given the same weight by you as direct evidence." *Held*, (1) That the last clause of the instruction quoted was erroneous; (2) but when considered in connection with the remainder of the instruction, that it was error without prejudice; (3) that it was not an unconditional instruction to the jury to give the same weight to circumstantial evidence as direct evidence.

38. ———: ———: ———. The charge of the court on the subject of the weight of evidence and the credibility of witnesses set out in the opinion and *held* not prejudicially erroneous.

39. **Homicide**: WRECKING OF TRAIN: EVIDENCE. About 10 o'clock in the evening a train was derailed at a trestle and a passenger thereon killed. The defendant was indicted for causing the derailment of the train and the death of the passenger, by unscrewing the nuts from the fish-plate bolts with a monkey-wrench introduced in evidence, and by removing the spikes holding down a rail on the trestle with a claw-bar introduced in evidence, just prior to the occurrence of the wreck; and the evidence in behalf of the state tended to show that the defendant displaced the fixtures as charged. A witness testified for the defendant that he was fishing near the trestle where the wreck occurred on the afternoon of that day and that he left the locality about dark; that while in the vicinity he saw no one nor heard any noise about the trestle. Another witness testified, as an expert for the defendant, that it was impossible for a man with the monkey-wrench in evidence to unscrew the nuts on the fish-plate bolts of the railway track. The court permitted the state, in rebuttal, to prove by a non-expert that with the monkey-wrench in evidence he unscrewed eight nuts from as many fish-plate bolts on a portion of the said railway track, in all respects like the track on the trestle, with the exception that where the witness experimented the track was on the earth, and with the claw-bar in evidence he

also removed all the spikes which held down a rail, and that he did all this work in twenty-one minutes. *Held*, (1) That this evidence of the state was rebuttal testimony; (2) that the conditions of the track where the experiment was made were substantially the same as the conditions existing on the trestle where the alleged displacement of the fixtures was made, and that therefore the evidence was competent; (3) that the difference in conditions existing between the track where the experiment was made and the track where the displacement occurred did not render the evidence incompetent but was proper for consideration by the jury in determining the weight to be given to the evidence of the experiment.

40. ———: MOTION FOR NEW TRIAL: PRESENCE OF PRISONER. A person convicted of felony, and represented by counsel, cannot, as a matter of right, insist on being present in court either at the time of the filing, the argument, or the ruling upon his motion for a new trial. *Miller v. State*, 29 Neb., 437, followed.

41. New Trial: NEWLY-DISCOVERED EVIDENCE. The denial of a motion for a new trial upon the ground of newly-discovered evidence will not be held erroneous when it appears that the newly-discovered evidence is cumulative and would not probably change the result already reached.

42. Homicide: RAILWAY WRECK: EVIDENCE. The evidence examined, and *held* to sustain the finding of the jury (1) that the railway wreck and the death of Hambell were caused by the displacement of the fixtures of the railway track; (2) that the defendant purposely and maliciously displaced such fixtures.

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

Alex. Altschuler and *George A. Adams*, for plaintiff in error.

C. J. Smyth, Attorney General, Ed P. Smith, Deputy Attorney General, and *W. H. Woodward, County Attorney*, for the state.

RAGAN, C.

In the district court of Lancaster county George Washington Davis was convicted of the crime of murder in the second degree, for the killing of one William O. Hambell, by removing the nuts, bolts, fish-plates, angle bars, and

by displacing a rail of a bridge of the Chicago, Rock Island & Pacific Railway Company, thereby causing the derailment of a passenger train on which said Hambell was riding. Davis brings the judgment of life imprisonment pronounced against him upon such conviction here for review.

1. The first argument made by counsel for Davis is that the evidence is insufficient to sustain a conviction of murder in the second degree; that the evidence at most would sustain only a conviction of manslaughter. Section 4 of the Criminal Code provides: "If any person shall purposely and maliciously, but without deliberation and premeditation, kill another, every such person shall be deemed guilty of murder in the second degree." And section 5 of said code is as follows: "If any person shall unlawfully kill another without malice, * * * every such person shall be deemed guilty of manslaughter." Section 93 of the Criminal Code is as follows: "Every person who shall wilfully and maliciously remove, break, displace, throw down, destroy, or in any manner injure * * * the tracks, or any bridge, viaduct, culvert, trestle-work, embankment, parapet, or railroad in this state, now in operation, or which shall hereinafter be put in operation, or who shall willfully and maliciously place any obstruction upon the rail or rails, track or tracks of any such railroad shall be punished by imprisonment in the penitentiary not less than one year nor more than twenty years; *Provided, however*, That if any person shall, by the commission of either of the aforesaid offenses, occasion the death of any person or persons, the person or persons so offending shall be deemed guilty of murder in the first or second degree, or manslaughter, according to the nature of the offense, and, on conviction thereof, shall be punished as in other cases." The evidence, without controversy, shows that on the evening of August 9, 1894, the said William O. Hambell boarded a passenger train of the railway company at Fairbury, Nebraska, to come to the city of Lincoln, Nebraska; that

when said train was within about four miles of the city of Lincoln it was derailed or fell from a bridge on the railway and said Hambell was instantly killed. The evidence also tended to show that certain fixtures of the railway track on the bridge had been displaced just prior to the time the train reached the bridge; that this displacement of the fixtures of the track caused the derailment of the train; and that Davis displaced the fixtures of said track. Davis' explanation of the motive which prompted him to displace the fixtures of the railway track, as shown by the evidence of the state's witnesses, is that he intended to signal the train on which Hambell was a passenger, stop it, advise the persons on the train that the fixtures of the track had been displaced, in the hope that for his conduct in that respect the railway company would give him employment, or that the passengers on the train would make him a gift of some money; that he was not personally acquainted with Hambell, or any other person upon that train, and that he did not intend to cause the derailment of the train. Aside from the facts and circumstances in evidence in the case this is the only explanation of the motive which influenced Davis in displacing the fixtures of this railway track, and the argument of his counsel is that since Davis was not acquainted with Hambell or any other passenger upon the train, since he had not in mind the specific intent to take the life or to injure any particular person upon the train, this evidence does not disclose that Davis, in removing the fixtures from the railway track, was actuated by malice against Hambell or any other person, and that, therefore the evidence is insufficient to sustain a conviction of murder in the second degree. To do a thing maliciously is to do that thing with malice, and malice is an essential element in the crime of murder, both at common law and under the statute. "Malice," in common acceptation, means ill-will against a person, but in its legal sense it means a wrongful act done intentionally without just cause or excuse. (*Housh v. State*, 43 Neb., 163; *Bromage*

v. Prosser, 4 Barn. & Cres. [Eng.], 255; *Milton v. State*, 6 Neb., 136.) In *McClain v. Commonwealth*, 110 Pa. St., 263, it is said: "The distinguishing criterion of murder is malice aforethought. But it is not malice in its ordinary understanding alone,—a particular ill-will, a spite, or a grudge. Malice is a legal term implying much more. It comprehends not only a particular ill-will, but every case where there is a wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty, although a particular person may not be intended to be injured." (*People v. Taylor*, 36 Cal., 255.) In order then for the jury to find that the spirit or purpose which actuated Davis in displacing the fixtures from this railway track was a malicious one it was not indispensable that the evidence should disclose that Davis was possessed of any ill-will, hatred, or malice towards Hambell, or any other person upon that train, or that he was acquainted with any person upon that train. Whether Davis, in displacing the fixtures of the railway track, was possessed of malice or acted maliciously was a question of fact for the jury, to be determined, like any other question of fact, from all the circumstances and facts in evidence in the case. As already stated, the purpose and intention which Davis had in mind in displacing the fixtures of the track is his statement of his purpose. This statement, while competent evidence, was not conclusive in Davis' favor that he did not act maliciously. The jury was not obliged to disregard all the other evidence in the case and take his statement as to his intention and purpose in displacing the fixtures of this track. Davis, having displaced the fixtures of the track, caused the derailment of the train and the death of Hambell, the law by presumption supplied the proof that Davis' conduct was actuated by malice; and if the evidence had afforded no explanation whatever of the motives which prompted Davis to do what he did, that presumption would have been conclusive that Davis acted maliciously. (*Preuit v. People*, 5 Neb., 377.) In *Davis v.*

State, 25 O. St., 369, it was said: "Where the fact of killing is proven, malice is to be presumed, and all the circumstances of justification, excuse, or extenuation must be made out by the accused, unless they appear from the evidence adduced against him." In *State v. Decklotts*, 19 Ia., 447, it is said: "Malice is presumed from the commission of an act wrongful in itself and without just cause or excuse. Our statute has not altered the common law requisites of murder. What was murder at common law is still murder under our statute. The boundaries of the field of this offense remain unchanged, but it is divided into two degrees: murder in the first and murder in the second degree. A specific intention to kill, to take life, is not essential at common law to constitute murder; nor is it essential, under our statute, to constitute murder in the second degree." In *Wellar v. People*, 30 Mich., 16, it was held: "To constitute murder the intent need not be to take the life of the person killed, or even to inflict a personal injury upon him." In *Harris v. State*, 8 Tex. App., 90, it is said: "When the fact of unlawful killing is proved, and no evidence tends to show express malice on the one hand, or any justification, excuse, or mitigation on the other, the law implies malice, and the offense is murder in the second degree." In *Beauchamp v. State*, 6 Blackf. [Ind.], 319, it is said: "Malice aforethought means the intention to kill; and when such means are used as are likely to produce death the legal presumption is that death was intended." To the same effect see *People v. Taylor*, 36 Cal., 255; *State v. Wisdom*, 84 Mo., 177; *People v. Goslaw*, 14 Pac. Rep. [Cal.], 788; *Conn v. People*, 6 N. E. Rep. [Ill.], 463. In *Mayes v. People*, 106 Ill., 306, Mayes, in an angry and excited state of mind, threw a beer glass at his wife. The glass struck a lamp which she was carrying, breaking the same and causing the oil therein to take fire and burn her, from which she died. The supreme court said that it was immaterial whether Mayes intended the glass should strike his wife or some other person in the room, or whether he had no specific intent,

but acted from general malicious recklessness disregarding any and all consequences; in either case he was guilty of murder. And the court held: "Where an act, unlawful in itself, is done with deliberation, and with intention of mischief or great bodily harm to some particular person, or of mischief indiscriminately, fall where it may, and death ensues from such act, against or beside the original intention of the party, it will be murder. But when the act is unlawful, and manifests a reckless, murderous disposition on the part of the person charged, or, in the words of the old law book, 'A heart void of social duty, and fatally bent on mischief,' the presumption of law is that the mind assented to what the hand did with all the consequences resulting therefrom." Therefore, when the jury came to consider the question as to whether Davis' conduct in the premises was actuated by malice, it had upon one hand the proof which the law furnished by presumption and all the facts and circumstances in evidence in the case, and upon the other hand it had Davis' statement as to his intentions and motives, and we cannot say that the jury reached a wrong conclusion in finding that Davis acted purposely and maliciously.

2. A second argument of counsel for Davis is that the district court erred in overruling his motion to be discharged from custody because more than three terms of court intervened between the time of the filing of the information against him and of his being placed on trial. The contention of counsel is that the information against Davis was filed at the September, 1894, term of the court; that there was a February, 1895, term, a May, 1895, term, and a September, 1895, term, at which latter term Davis was put on trial. Section 390 of the Criminal Code provides that a person indicted for a crime and committed to prison who is not brought to trial before the end of the second term of the court having jurisdiction of the offense held after the indictment is found shall be entitled to be discharged. And section 391 of the Criminal Code provides that a person indicted for an offense who has

given bail for his appearance, and who shall not be brought to trial before the end of the third term of court in which the cause is pending held after such indictment is found, shall be entitled to be discharged. The record shows that Davis was never admitted to bail, and therefore this motion is not based on said section 391. The motion, then, must have been based on the provisions of said section 390, and the discharge of the prisoner claimed upon the ground that more than two terms of court intervened between the filing of the information against him and the term at which he was put upon trial,—the word "three" in the motion having been used inadvertently instead of two; and since to so regard the motion would be to the prisoner's advantage, we will construe it as a motion to discharge because he was not placed on trial before the end of the second term of court held after the information was filed. The record shows that Davis was put on trial in March, 1895, the term which his counsel say was the February, 1895, term, and that the jury failed to agree; and it is not claimed but that the February, 1895, term of court was the first term of the court held after the term at which the indictment was found. If, then, the motion of the plaintiff in error is to be discharged because not brought to trial before the end of the second term of court after the term at which the indictment was found, there is no merit in the motion. If the sections of the Criminal Code just quoted are to be so construed as to entitle one under indictment for a crime and incarcerated to be discharged unless brought to trial before the end of the third term held after the term at which the indictment is found, still the motion was without merit, as the record shows that the prisoner was brought to trial, although the jury disagreed, at the first term of court held after the term at which the indictment was returned. Again, if, within the meaning of said sections of the Criminal Code, the prisoner was not "brought to trial" in March, 1895, because the jury failed to agree; and if, as counsel say, there was a May, 1895,

term of the court, still the prisoner would not be entitled to be discharged because not brought to trial until the September, 1895, term; because in computing terms of court mentioned in said section 391 the term of court at which the indictment was found is to be excluded. (*Whitner v. State*, 46 Neb., 144; *Korth v. State*, 46 Neb., 631.)

3. The third assignment of error is that the district court erred in refusing to give to the jury, at the request of the prisoner, the following instructions:

"28. The jury are instructed that if you believe from the evidence that any witness before testifying in this case has made any statement out of court concerning any of the material matters materially different and at variance with what he or she stated on the witness stand, then this jury are instructed by the court that these facts tend to impeach either the recollection or the truthfulness of such witness, and the jury should consider these facts in estimating the weight which ought to be given to his or her testimony.

"29. The jury are further instructed that if you believe from the evidence that any witness, before testifying in this case at this trial, had heretofore been a witness in this case at a former trial or at the coroner's inquest, and while under oath testified to any matters material to this case materially different and at variance with what he or she stated on the witness stand at this trial, then the jury are instructed by the court that these facts tend to impeach either the recollection or the truthfulness of such witness, and the jury should consider these facts in estimating the weight which ought to be given to such witness' testimony."

The maxim, "*Falsus in uno, falsus in omnibus*," is applicable alone where a witness has willfully testified falsely to a material fact. (*Buffalo County v. Van Sickle*, 16 Neb., 363; *Kay v. Noll*, 20 Neb., 380.) The foregoing requests were faulty and rightly refused, because they omitted the *scienter* that the witness willfully made a statement out

of court or testified on a former trial of a material matter substantially different from his testimony on the last trial.

4. A fourth assignment of error is that the court erred in refusing to give instructions Nos. 7 and 30 requested by the plaintiff in error. These instructions are substantially the same, No. 30 being as follows: "The jury are instructed that in weighing the testimony greater care should be used by the jury in relation to the testimony of persons who are interested in or employed to find evidence against the accused than in other cases, because of the natural and unavoidable tendency and bias of the mind of such persons to construe everything as evidence against the accused and disregard everything which does not tend to support their preconceived opinions of the matter in which they are engaged; and the jury are instructed that if any such persons have testified in this case, it is your duty to criticise such testimony more carefully than that given by witnesses who are wholly disinterested." This instruction is substantially like an instruction requested by the prisoner and refused by the district court in *Preuit v. People*, 5 Neb., 377, and in which case it was held that the instruction should have been given. But the ruling was placed upon the ground that the district court in that case had not in any other instruction given the substance of the one refused. In *Heldt v. State*, 20 Neb., 492, a detective, in the guise of a friend, induced a suspected person to confess to the commission of the crime. It was there held that the credibility of the detective was for the jury, but that the jury should be specially instructed to weigh his evidence with greater care than it would weigh the evidence of a wholly disinterested witness. We do not think, however, that the court erred in refusing to give the instruction under consideration in the case at bar, for the reasons: (1) The court gave the substance of what was proper of the instruction requested and refused in instruction No. 24 given on the court's own motion; and (2) because the

instruction requested was not applicable to the evidence. The record does not disclose that any witness who testified for the state was "interested in" or employed to find evidence against the prisoner. So far as the record shows, none of the witnesses were either informers or detectives.

5. The next contention of counsel for plaintiff in error is that section 93 of the Criminal Code, under which the prisoner was indicted and convicted, is invalid. The theory of counsel seems to be that since the purpose of the adoption of section 93 was to make the willful and malicious displacement of the fixtures of a railway track a felony, punishable by imprisonment in the penitentiary for not more than twenty years, that the legislature was without power to incorporate into said section the proviso that if such displacement of such fixtures should occasion the death of any one, the person displacing the fixtures should be guilty of murder in the first degree, second degree, or manslaughter, according to the nature of the offense. Counsel have not cited us to any provision of the constitution which this section 93 of the Code violates, and we are not aware of any such a provision. By the constitution of the state the legislature is invested with plenary legislative power, and the defining of crimes and prescribing punishment therefor is a legislative function. (*Hallenbeck v. Hahn*, 2 Neb., 377; *Hankins v. People*, 106 Ill., 628.) In Cooley's Constitutional Limitations [6th ed.], chapter 7, page 201, it is said: "The judiciary can only arrest the execution of a statute when it conflicts with the constitution. It cannot run a race of opinions upon points of right, reason, and expediency with the law-making power. Any legislative act which does not encroach upon the powers apportioned to the other departments of the government, being *prima facie* valid, must be enforced, unless restrictions upon the legislative authority can be pointed out in the constitution and the case is shown to come within them." It is no part of the duty of the courts to inquire

into the wisdom, the policy, or the justness of an act of the legislature. Our duty is to ascertain and declare the intention of the legislature, and to give effect to the legislative will as expressed in the laws. Every legislative act comes before this court surrounded with the presumption of constitutionality; and this presumption continues until the act under review clearly appears to contravene some provision of the constitution. The courts are by the constitution not made critics of the legislature, but rather guardians of the constitution; and though the courts might have a doubt as to the constitutionality of the legislative act all such doubts must be resolved in favor of the law.

A second argument in support of the contention under consideration is that the proviso of said section 93 is void for uncertainty, because the crimes of murder in the first degree, murder in the second degree, and manslaughter are not defined in the proviso. In support of this contention counsel cite us to *Johnston v. State*, 14 So. Rep. [Ala.], 629. In that case a statute provided that one who should take away with intent to steal or hold for a reward a dog registered under the provisions of the act should, on conviction thereof, be punished as in other cases of larceny. It appears that under the law of Alabama there were two classes of larceny,—grand and petit,—and that by the statutes of the state dogs were not property nor declared to be of any value. The court admitted that it was competent for the legislature to make the taking and carrying away of dogs a crime of any nomenclature or degree, but held the statute void for uncertainty, for the reason that when a party was convicted under the statute the court was unable from the act to determine what judgment to pronounce,—whether to punish the convicted party for petit or grand larceny,—since the dog was not property and was of no value. Another case cited by counsel for plaintiff in error in support of the contention under consideration is *State v. Gaster*, 12 So. Rep. [La.], 739. A statute of that state denounced and

punished as a crime any civil officer guilty of "any misdemeanor in the execution of his office." The court held that this statute was void for uncertainty, because it did not on its face define what act should constitute a misdemeanor, and that there was no other act in force which did; and that in Louisiana all crimes were statutory. The court also held that the act was unconstitutional because it remitted the definition of "misdemeanor" to the judiciary. But these authorities do not support the contention of counsel. There is no uncertainty in the proviso of said section 93. If one willfully and maliciously displaces the fixtures of a railway track, and thereby causes the death of another person, he is guilty of murder in the first degree, if the evidence discloses that what he did he did purposely and of his deliberate and premeditated malice; and guilty of murder in the second degree if the evidence discloses that he acted purposely and maliciously, but without deliberation and premeditation; and guilty of manslaughter though he acted without malice and the killing was unintentional, since it resulted from the displacement of the railway fixtures, declared by the statute to be an unlawful act. It is for the jury to say from the evidence which of these three crimes, if either, the person accused has committed, and this having been found, the court has but to pronounce the judgment prescribed by other sections of the Criminal Code for the commission of such crime. A criminal statute is not void for uncertainty which prescribes as a punishment for the doing of a certain act the same punishment that is prescribed for doing another named act, when the same criminal code defines the latter act and prescribes its punishment.

6. The sixth assignment of error is that the court informed the jury in his charge that the crimes of murder in the first degree and murder in the second degree and manslaughter were charged in each of the two counts of the indictment on which Davis was tried; whereas, as a matter of fact, only the first count of such indictment

charged him with murder in the first degree. The court did err in this respect, since only the first count of the indictment charged Davis with the crime of murder in the first degree. But the jury found Davis not guilty of murder in the first degree as charged in the first count of the indictment, and we are unable to see how this error of the court in making the statement he did was prejudicial to the plaintiff in error.

7. The seventh argument is that the court erred in defining the crime of murder in the first degree in its fourth instruction to the jury. We have examined this instruction and we do not think the court did err in defining therein the crime of murder in the first degree; and if it did, it was error without prejudice to Davis, as he was found not guilty of that crime.

8. The eighth assignment of error is that the court erred in giving instructions Nos. 5 and 6 of the instructions given on its own motion. These instructions are as follows:

"5. The statutes define murder in the second degree, and provide as follows: 'If any person shall purposely and maliciously, but without deliberation and premeditation, kill another party, such person shall be deemed guilty of murder in the second degree, and on conviction thereof shall be imprisoned in the penitentiary not less than ten years or during life, at the discretion of the court.'

"6. The statutes define manslaughter and provide as follows: 'If any person shall unlawfully kill another without malice, either upon a sudden quarrel or unintentionally, while the slayer is in the commission of an unlawful act, every such person shall be deemed guilty of manslaughter, and upon conviction thereof shall be imprisoned in the penitentiary not more than ten years nor less than one year.' "

The criticism made on these instructions is that the court did not say to the jury that they applied to either the first or second counts of the information. The court

had already told the jury with what crime Davis was charged in the first count of the information, and with what crime he was charged in the second count of the information; and in giving these instructions the court not only quoted the exact language of the statute, but stated the conclusions of fact which the jury must find in order to convict the plaintiff in error of either manslaughter or murder in the second degree. It was wholly unnecessary for the court to say to the jury, in so many words, that these instructions applied to the second count of the information. The district court had a right to presume that the jury was possessed of average intelligence; and the court having told the jury that Davis was charged in the second count of the indictment with murder in the second degree, in which charge was also embraced the charge of manslaughter, and then having instructed them what the law required to be proved in order to a conviction of murder in the second degree or of a conviction of manslaughter, he was not obliged to specifically say to the jury: These two instructions have reference only to the charge in the second count of the indictment. The jury would understand that without their attention being in this specific manner directed thereto.

9. We have already disposed of the ninth assignment of error by what we have said in the sixth, as the error of the court complained of in the ninth assignment consisted in stating to the jury that the second count of the indictment charged murder in the first degree.

10. The tenth assignment of error is that the court erred in giving instruction No. 8 of the instructions given to the jury on its own motion. The instruction is as follows: "You are instructed that in prosecutions on an information for murder in the first degree, if the evidence fails to sustain the charge of murder in the first degree the jury may, under such information, if the evidence shall justify and warrant it under the law now given you, find the defendant guilty of murder in the second degree

or manslaughter, as the case may be." Counsel for plaintiff in error, speaking of this instruction, say: "The objection to this instruction is that nowhere in the instruction has the court instructed the essential requirements of the statute to authorize the jury in finding the defendant guilty of murder in the second degree or manslaughter." These criticisms are unwarranted by the record. The court in the fourth instruction to the jury defined murder in the first degree, in the fifth instruction it defined murder in the second degree, and in the sixth instruction it defined manslaughter. The instruction was correct as a matter of law, and if the court had failed to give such instruction as this, it would probably have been reversible error, because the crimes of murder in the second degree and manslaughter are both included in the crime of murder in the first degree; and if Davis had been indicted only for the crime of murder in the first degree, the jury, if the evidence warranted it, might have found him guilty of the crime of manslaughter or murder in the second degree. The giving of this instruction was not prejudicial to the prisoner; on the contrary, it was intended to be and was to his advantage. In this connection counsel for the prisoner ask us to define the crimes of murder in the second degree and manslaughter as contemplated by section 93 of the Criminal Code. Counsel misunderstand this section of the Code. It does not define nor does it attempt a definition of murder in the second degree nor of manslaughter. Murder in the second degree is defined by section 4 of the Criminal Code and manslaughter is defined by section 5 of the Criminal Code; but section 93 of the Criminal Code simply declares that if one shall willfully and maliciously displace the fixtures of a railway track, and such displacement shall cause the death of a person, the person so displacing the fixtures shall be guilty of murder in the second degree, if the evidence warrants the conclusion that such person acted purposely and maliciously, and whether he was so actuated or not is a question of fact.

11. The eleventh argument is that the court erred in giving instruction No. 11 of the instructions given on its own motion. The instruction is as follows: "Deliberation and premeditaton are not elements of the crime of murder in the second degree, but malice is an essential ingredient of such a crime. To constitute murder in the second degree there must have been a willful killing done purposely and maliciously, but without deliberation and premeditation; but if the evidence establishes the fact that the killing was unlawful and was done with deliberate and premeditated malice, then the offense is murder in the first degree if the evidence further shows that the killing was intentionally, purposely, and unlawfully done." The first criticism on this instruction is that the court, in enumerating the essential ingredients of murder in the first degree, did not use the language of section 3 of the Criminal Code. This section provides that if any person shall purposely and of deliberate and premeditated malice kill another, etc.; while in the instruction complained of the court said that if the killing was unlawful and was done of deliberate and premeditated malice, then the offense was murder in the first degree if the evidence further showed that the killing was intentionally and purposely and maliciously done. We think that the language used by the court is substantially the language of the Code. The arrangement of the court's language is somewhat different from the arrangement of the language of the statute, but no sensible man could have been misled as to the meaning of the instruction. In *Long v. State*, 23 Neb., 33, it was held: "While it was advisable to use the statutory language descriptive of a crime in an instruction, yet, if the import of the words used in the instruction was the same as the statute, an instruction would not be held erroneous because the language employed by the court was different from the language of the statute." A second criticism of the instruction is that in it the court did not tell the jury that the fact that the killing was done purposely with delib-

erate and premeditated malice must be established beyond a reasonable doubt. The court had already explained to the jury the material allegations in each count of the indictment, and had told the jury that in order to a conviction of Davis under either count of the indictment it was incumbent upon the state to establish beyond a reasonable doubt each of the material allegations of such count. The court was not obliged to repeat in every instruction the degree of proof required, since the jury had been told that the state must make out its whole case beyond a reasonable doubt. (*Carleton v. State*, 43 Neb., 373.)

12. The twelfth argument is that the court erred in giving instruction No. 21 of the instructions given on its own motion. It is as follows: "Where circumstances alone are relied upon for conviction the rule of law is, to warrant a conviction, such a state of facts and circumstances must be shown that they are all consistent with the guilt of the defendant, and such as cannot upon any reasonable theory and hypothesis be true and the defendant be innocent; and in this case this rule should be applied by the jury to that portion of the evidence offered by the state wholly of a circumstantial nature, and if the jury find from the evidence that all the incriminating circumstances upon which the prosecution relies for a conviction will as well apply to some other person or persons as to the defendant, or if such facts and circumstances are reconcilable with any reasonable theory or hypothesis other than the guilt of the defendant, or if such facts and circumstances, together with the direct evidence offered in this case, do not satisfy the minds of the jury beyond any reasonable doubt of the guilt of the defendant, then you should by your verdict acquit him." The criticism made upon this instruction is the use by the district court of the phrase "incriminating circumstances." "Incriminate" means to charge with a crime, and an incriminating circumstance is one which tends to show that a crime has been committed, or that some particular person committed it. An instruction should be examined as a whole. All that the

instruction contains should be looked to for the purpose of determining whether the party complaining of it was prejudiced by it. To single out a phrase, a word, or a sentence from an instruction and to examine such word or phrase separately from the other parts of the instruction is not a fair method of criticism. In the case at bar the state had introduced in evidence a number of circumstances which tended to show that the fixtures of the railway track of the Rock Island railway had been removed; that in consequence thereof a passenger train had been derailed and in consequence of this said Hambell and others were killed; and that Davis removed these fixtures. An analysis of the instruction under consideration shows that the court, mindful of the presumption of the innocence with which the law surrounded the prisoner, by it, for the prisoner's benefit, cautioned the jury against a hasty conclusion of the guilt of the prisoner by reason of the circumstances in evidence. The court in the first sentence of the instruction told the jury that to warrant the conviction of Davis upon circumstantial evidence not only must the circumstances be consistent with his guilt, but that they must be such as could not upon reasonable theory be true and Davis be innocent. In the second sentence the court told the jury to apply that rule to the circumstantial evidence in the case produced by the state, and if they should find that all the circumstances offered in evidence by the state which tended to show that a crime had been committed and that Davis committed the crime would apply as well to some other person as to Davis, or if this evidence was reconcilable with any reasonable theory other than the guilt of Davis, or if this evidence, when taken in connection with the other evidence in the case, did not convince them beyond a reasonable doubt that Davis was guilty, they should acquit him. When all parts of this instruction are considered together it turns out to be an instruction very favorable for the prisoner, and it would require a stretch of the imagination to conclude that Davis was

prejudiced by the giving of the instruction even if the court should not have used the term "incriminating circumstances." The instruction is in substance the same as instructions 1, 8, 9, 10, and 11 which the prisoner requested the court to give in his behalf. To adopt the theory of counsel for the prisoner here and hold that this conviction should be reversed because the court used the phrase "incriminating circumstances" in the manner and in the connection in which it used it, would be to lay down a rule which would make it practicably impossible for a district court to safely instruct a jury in a criminal case. It never was the intention of the law that the district judges of the state should abdicate their reason because a man was on trial charged with the commission of a crime; nor does the law of the land place the district judges in a strait-jacket in criminal trials, nor make of them mere machines to repeat certain general propositions of law in their instructions. *Metz v. State*, 46 Neb., 547, is relied on here by counsel for Davis as an authority for counsel's contention that the use by the district court of the phrase quoted is reversible error. But the Metz case does not sustain the contention made here. In that case Metz was on trial charged with the crime of burglary of a storehouse, or warehouse, and the larceny of certain corn therefrom. Under his plea of not guilty, in order to his conviction, it was necessary for the state to prove first that a burglary and larceny had been committed, and second that Metz was the person who committed the crime. The court instructed the jury as follows: "If you believe from the evidence, beyond a reasonable doubt, that soon after the burglary of the storehouse, or warehouse * * * and the larceny of the corn therefrom, a portion of the said corn so stolen was in the exclusive possession of the defendant George Metz, you are instructed that this circumstance, if so proven, is presumptive, but not conclusive, evidence of the defendant's guilt." Reviewing that instruction, we said that it was

erroneous because by it the court assumed that a burglary and larceny had been committed, and this took away from the jury one of the material allegations of the indictment which it was incumbent upon the state to prove, viz., that the burglary and larceny had been committed. But the district court in this case, by using the phrase "incriminating circumstances," did not assume either that a crime had been committed, or that Davis had committed it.

13 and 14. The thirteenth and fourteenth assignments of error are directed to instructions 22 and 23 of the instructions given by the court upon its own motion. By these instructions the attention of the jury was directed to the evidence of certain admissions made by Davis and told that they should give to the evidence of such statements and admissions the weight and consideration to which they deemed it entitled. The only criticism upon the instructions is that the court did not instruct the jury that unless they believed the evidence as to the admissions and statements made by Davis beyond a reasonable doubt they should acquit him. The criticism is without merit. The court had already fully and fairly, and in language which no man of average intelligence could misunderstand, instructed the jury that every doubt was to be resolved in favor of Davis, and that the state, in order to convict him upon either count of the indictment, must establish every material allegation of such count beyond a reasonable doubt. To use the term "reasonable doubt" or "beyond a reasonable doubt" in every instruction in which evidence was referred to was not only unnecessary, but might have tended to obscure that which the district court sought to make plain.

15. The subject-matter of sections 668*a* to 668*n*, both inclusive, of the Code of Civil Procedure, is grand and petit jurors in counties having a population of seventy thousand inhabitants or more. These sections provide when, how, and from what class of citizens grand and petit jurors for such counties shall be selected and drawn. It appears from the record before us that prior to the Sep-

tember, 1895, term of the district court of Lancaster county, the regular panel of petit jurors to serve at such term of court was drawn, selected, and summoned as provided by said sections of the statute; that in making up the jury to try the defendant at that term of court the regular panel so summoned was exhausted and a special panel was summoned in pursuance of said sections of the Code. From the regular and special panels so summoned a jury was selected, before whom Davis was placed upon trial. The trial proceeded for some days, when one of the jurymen became sick and was found, by a commission appointed by the court, to be insane, and thereupon, on the 13th day of November, the court discharged the jury and set down the trial of Davis' case for the 15th of said month. The record then recites: "And thereupon the court, being convinced that a jury cannot be obtained from the regular panel, and the special panel already drawn being exhausted, it is therefore ordered that there shall be drawn and summoned in the manner provided by law two hundred and ten (210) qualified persons as a second special panel, to report November 15, A. D. 1895, at 9 o'clock A. M., as petit jurors to serve on this case." These 210 men were summoned in pursuance of the provisions of said section of the Code, and from their number another jury was selected, which tried and convicted Davis. The fifteenth argument of counsel for Davis is that by this action of the court their client was deprived of a trial by the regular panel of petit jurors. The contention is without the slightest merit. In the first place, Davis was present in court when the jury was discharged because of one of its members becoming insane, when his case was continued and set for trial on the 15th of November, and when the court made the order for the summoning of 210 persons from whom to select a jury. He interposed no objection whatever to any of these proceedings. In the second place, the selection of grand and petit jurors for the county of Lancaster is governed by the said sections of the Civil Code mentioned above. Section 668*g* ex-

pressly provides: "That whenever there shall be pending for trial in said court any criminal cause wherein the defendant is charged with a felony, and the judge holding such court shall be convinced from the circumstances of the case that a jury cannot be obtained from the regular panel to try said cause, such judge may, in his discretion, prior to the day fixed for the trial of said cause, direct the clerk to draw (in the same manner as the regular panel is drawn) such number as the judge may direct, as a special panel from which a jury may be selected to try said cause, which panel shall be notified and summoned for said day the same as the regular panel." Davis was not denied a trial by the regular panel of petit jurors called for the September, 1895, term of court. That panel was exhausted in the selection of the first jury and a special panel summoned to complete the first jury, and when that jury was discharged because of the insanity of one of its members the court was by the statute invested with authority to cause to be summoned the second special panel, which it did. When the selection of the second jury began from the second special panel the court did not err nor deprive Davis of any right by not causing the regular September panel that had been examined and exhausted to be recalled and re-examined. Certainly this is true in the absence of any request or demand by Davis that the exhausted regular panel should be recalled.

16. The state called one Cobb as a witness, who testified to his acquaintance with Davis; that Davis had been working for him for some months and had left his employ on the 14th of March, 1894. He was then asked to state what, if any, peculiarities Davis had, and, over objections of the defendant, he answered, in substance, that Davis was superstitious; that he regarded Thursday as a lucky day for him, and that whatever he was about to undertake he preferred to begin on Thursday. The admission of this evidence is the next assignment of error presented for consideration. The evidence showed that the wreck in which Hambell was killed occurred on a

Thursday, and the circumstances tended to show that Davis caused the wreck by displacing the fixtures of the railway track; that prior to the wreck he had said that the place where the wreck occurred was a favorable one for causing a wreck; that he was tired of farming and that the railroad company must give him a job, and that his motive in displacing the fixtures was to procure railway employment or a reward. The evidence then objected to was not incompetent. The superstition or belief of Davis that Thursday was a lucky day for him, that anything he attempted upon that day would succeed, was a circumstance competent for consideration by the jury in connection with all other circumstances and evidence in the case tending to identify Davis as the man who displaced the fixtures of the railway track.

17. One Rosenthall, a passenger upon the train at the time it was wrecked, a showman traveling about the country exhibiting a giant, was called as a witness for the state. It appears that he was in court and testified on the trial which failed because of the insanity of a juror, and after that jury was discharged, and before the case came on for trial again, he returned to Kansas City. He came back to the last trial, was examined by the state, and on cross-examination by the defendant he was asked:

Q. You live in Kansas City?

A. Yes, sir.

Q. You have been there all the time?

A. No, sir; I am traveling around.

Q. Did you go home last week?

A. Yes, sir.

Q. What road?

The state objected to this and the court sustained the objection. Counsel for Davis then offered to prove by the witness that he went from Lincoln to Kansas City over the road of the Rock Island Railway Company and returned by that road from Kansas City to Lincoln without expense to himself. In other words, the offer to prove was that the Rock Island Railway Company fur-

nished the witness free transportation from Lincoln to Kansas City and return. The court excluded the offer and this ruling is the next argument here. It is true that a litigant has the right to cross-examine a witness produced against him to show the interest, bias, or prejudice of such witness, but the extent to which such a cross-examination may be carried is a matter resting very largely in the sound discretion of the trial court. (*Consaul v. Sheldon*, 35 Neb., 247.) Doubtless there may be cases in which such a cross-examination should be allowed to take a very wide range, while in other cases such a cross-examination may properly be limited. Each case depends upon its own circumstances, including the disposition, temperament, and conduct of the witness on the stand. But a case will not be reversed because of a limitation placed by the court upon the cross-examination of a witness as to his interest or bias, unless it appears from the record that the party against whom this witness was called was probably prejudiced by such limitation. We do not think the court would have abused its discretion had it permitted the witness to answer the question asked him; and we are quite clear that the court did not abuse its discretion in refusing to permit the witness to answer. The cross-examination of this witness was a very lengthy one, and failed to disclose that he had any interest in the result of this suit, or any bias or prejudice for or against the defendant. The ostensible object of the question put by counsel for Davis was to show that the witness for the Rock Island Railway Company was taking an interest in the prosecution of Davis; but its real object was a very different one, viz., to have the jury understand that the Rock Island Railway Company was furnishing free transportation to this witness in order that he might appear and testify in this case against the prisoner, and thereby awaken the prejudices of the jury, in the hope that it might take the view that the real prosecutor of Davis was not the state of Nebraska, but a powerful and wealthy corporation. We have already

said that we do not think the court would have abused its discretion had it permitted the witness to answer the question, nor do we. For if the Rock Island Railway Company furnished this witness free transportation from his place of residence to the place of trial, that was not a matter which even tended to show that the witness was unduly interested in prosecuting Davis or biased against him. The property of this railway company had been destroyed. A great crime had been committed through the displacement of the fixtures of its track, and the railway company should have been, if it was not, interested in finding out the perpetrator of this crime and in bringing him to punishment. Its duty in that respect was like that of every other citizen of the state.

18. One Lonsdale was called as a witness for the state and testified to a conversation which occurred between him and Davis in the presence of a man named Enlow. This conversation occurred within a day or two after the wreck, and in this conversation Davis explained that he thought the wreck was caused by the fixtures of the track having been removed; while Lonsdale expressed his opinion to the effect that he thought the wreck resulted from the spreading of the rails, and that one man could not have displaced the fixtures. This witness was cross-examined at length by Davis' counsel and was asked the following questions:

Q. What did Enlow say?

Q. Why did you not think a man could not do that? [That is, not displace the fixtures.]

Q. The fact is, you do not remember much about that, do you? [That is, what witness told Davis in the conversation.]

The court, on motion of the state, refused to permit the witness to answer these questions, and this ruling is the next assignment of error argued here. It appears that counsel for the state gave no reasons for objecting to the questions and it is insisted that the court, without a reason being given, had no right to sustain the objections.

We do not agree to the proposition that a district court must permit every question asked to be answered unless, when objected to, a proper reason is given for such objection. We think that a trial court may on its own motion, refuse to permit a witness to answer a question if such question calls for incompetent, immaterial, or irrelevant evidence. The first question required the witness to testify as to what some other witness had said. This called for incompetent and hearsay evidence. The other two questions were immaterial, and the court did not err in sustaining the objections to each of the questions.

19. The next assignment of error relates to the ruling of the court in refusing to permit the witness Lonsdale to answer whether he had talked over the facts in the case on trial with one Billingsley and one Greene. Counsel in their brief here say that Billingsley and Greene were attorneys for the Rock Island Railway Company, and that that corporation and its attorneys had taken a prominent part in the prosecution of their client and that the object of the questions propounded to the witness Lonsdale was to ascertain if he had been unduly interested or influenced as a witness by the railway company or its attorneys. If the trial court was aware that the object of the questions was to ascertain the interest or bias of the witness, then it was a matter in the discretion of the trial court to say how far that cross-examination might be conducted, and on that theory the record does not disclose that the court abused its discretion in limiting the cross-examination. As a matter of fact the record shows that the witness answered that he had never talked with Billingsley about the case; that he had talked with hundreds of people about it, among others, an officer or officers of the Rock Island Railway Company, so that, in any view we take of the assignment under consideration, the plaintiff in error was not prejudiced by the action of the trial court.

20. The state called as a witness one Daniel Sullivan, who testified to having been for twenty-three years in

railroad business, having worked upon railroads in Canada and the United States, and generally to being an experienced railroad trackman. He then testified that he resided in Lincoln and had lived there for fifteen years, and that about 7 o'clock on the morning after the wreck he went to the place thereof, on his own motion, for the purpose of examining and ascertaining the cause of the wreck. The state then asked him this question: "Mr. Sullivan, tell the jury what investigation you made and what you found as to the causes of that wreck." The plaintiff in error objected to this question as incompetent, irrelevant, and immaterial. The objection was overruled and the witness answered at length as to what examination he made and what he saw. Among other things, he stated that he saw fresh marks upon the ties where the car wheels had struck them after they left the rails; the fresh marks of a wrench upon the nuts of the bolts which held the rails together; the fresh holes left where the spikes had been pulled from the ties; some spikes where the heads had been recently pulled off in attempting to remove the spikes; the marks of the claw-bar that had been used in removing the fixtures. It is now insisted that the court erred in permitting this question to be answered, and it is argued that by the question the witness was required to state what caused the wreck. We do not think so. But if the question is open to that criticism the plaintiff in error was not prejudiced by the answer of the witness, as he expressed no opinion as to the cause of the wreck, but simply stated what he saw and what he learned.

21. One Tyrer was called as a witness for the state and testified that he was then living and had for several years lived with one Lonsdale. On cross-examination Davis' counsel asked him this question: "You know that Lonsdale is expecting a reward in this case in case Davis is convicted?" On objection of the state the court refused to permit this question to be answered, and this is the next assignment of error argued here. The court

did not err in refusing to permit this question to be answered. It would have been proper to ask Lonsdale, who had also testified as a witness for the state, on his cross-examination, if he was expecting a reward in case Davis should be convicted, for the purpose of showing his interest in the result of the prosecution. But it was not proper to show this fact by the cross-examination of some other witness. Davis' counsel did not show, nor attempt to show, by Lonsdale when they cross-examined him that he was expecting a reward in case of Davis' conviction. We do not understand that it is competent to prove the interest or bias or prejudice of one witness by the cross-examination of another witness without at least first having cross-examined the first witness as to his interest, bias, or prejudice.

22. While the witness Tyrer was being cross-examined by counsel for Davis as to a conversation which the witness had had with Davis prior to the wreck, counsel asked him these questions:

Q. What were the exact words? [That is, the exact words of the conversation between the witness and Davis.]

A. He said, farming does not agree with me and the railroad will have to do something for me.

Q. What railroad, if any, did he say would have to do something for him?

A. He didn't say.

Q. Didn't he say the Rock Island?

A. No, sir.

Counsel for Davis then moved the court to strike from the record the answers made by the witness to the questions they had propounded. The overruling of this motion is the next assignment of error argued. The answers were responsive to the questions, and we have never before heard that counsel might propound a question to a witness, have the witness furnish an answer responsive to the question, and then demand of the court as a matter of right to strike out the answer made. If counsel did

not wish the exact language that Davis used in his conversation with Tyrer they should not have asked for it. Having propounded the question, and having obtained an answer responsive thereto, counsel are in no position to complain of the action of the court in refusing to expunge the answer from the record.

23. One Shouse was called and examined as a witness for the state and identified the claw-bar which the state claimed had been used in displacing the fixtures of the railway track. He testified that he at that time lived in the city of Lincoln; that he was at that time working on the track of the Missouri Pacific Railway; that in the years 1892, 1893, and 1894 he was working on the track of the Northwestern railway system; that he had never worked for the Rock Island Railroad; that the claw-bar in question was in his possession from 1887 until October, 1893, at which time he lost it, or it was stolen from him; that the first time he saw it after October, 1893, was at the coroner's inquest held after the wreck; that while it was in his possession he had had it repaired some two or three times. He was cross-examined by counsel for Davis as follows:

Q. Didn't one of the men that fixed it [the claw-bar] live at Ashland?

A. No, sir.

Q. Didn't you testify the other day that he did?

A. No, sir; not that I know of.

Q. Do you know Mr. Altschuler? [One of the counsel for Davis.]

A. I have heard of him.

Q. Don't you know him?

A. Only as I see him.

He was then asked if he did not tell Altschuler at a certain time and place that one of the men who had repaired the claw-bar lived at Ashland and that the last time he saw the claw-bar it was in the possession of the Rock Island Railway Company. He answered: "No, sir; I never saw it in the possession of the Rock Island Company."

Q. Didn't you tell Mr. Altschuler that?

A. No, sir.

Q. Or words in substance that?

A. No, sir.

Q. Didn't you go with Mr. Altschuler and all three of you go up to Altschuler's office at that time?

A. Upstairs?

Q. Yes, sir.

A. No, sir; I didn't.

Q. You have been in Mr. Altschuler's office?

A. Yes, sir.

Q. How many times?

A. Once.

Q. In his office?

A. I went to the edge of the door.

Q. Didn't you go into the office with him and have a conversation with him about this bar?

A. No, sir; I didn't. I went up to the dentist's office.

Q. I will ask you if you didn't go in there two or three times after that and inquire for Mr. Altschuler?

A. No, sir.

Q. Of Mr. Eager?

A. No, sir.

Q. No time after that?

The court, on the objection of the state, refused to permit the witness to answer this last question.

Q. You have been taking considerable interest in this case?

A. No, sir.

Q. You testified the other day about the condition of the wreck, didn't you?

This last question the court also refused to permit the witness to answer. The action of the court in refusing to permit the witness to answer these two questions is the next assignment of error argued by counsel for Davis. The witness denied telling Altschuler that the man who repaired the claw-bar lived at Ashland and denied telling Altschuler that the first time he saw the claw-bar after

October, 1893, it was in the possession of the Rock Island Railway Company, and that he had ever told Altschuler so, either in so many words or in substance; that he had ever been in Altschuler's office but once, and then only went to the edge of the door. If the object, then, of the first of these two questions was to lay a foundation for impeaching the witness, that foundation was sufficiently laid, and the court did not abuse its discretion in refusing to permit the cross-examination to be further extended. As to the second question objected to, if the object of this was to show that the witness on a former trial had testified to something in reference to the wreck different from what he had testified at the present trial and thus lay the foundation for impeaching him, counsel should have asked him whether or not he testified to certain specific things on that trial. They did not do this, and we cannot see how their client was prejudiced by the refusal of the court to permit the witness to say whether or not he had testified on a former trial as to the condition of the wreck.

24. The next assignment of error argued is that the court erred in striking out the evidence of one Ringer, a witness who was called and sworn on behalf of the defense. This witness testified that he visited, on the 4th of November, 1895, the place where the wreck occurred. He then detailed the condition of the track and the trestle where the wreck occurred as it was at the time he made his visit. He had never been to the place of the wreck before this time. We are unable to determine from the record whether the court sustained the motion of the state to strike out all of this evidence. The court did sustain the motion to strike out the answer to the last question made to the witness. That was a question propounded by the court. The record then discloses that the state moved to strike out all the evidence of the witness, and that the court overruled the motion. We assume, however, for the purposes of the assignment under consideration, that the court did sustain the state's mo-

tion to strike out all the evidence of this witness, and if he did so his ruling was correct. The evidence shows that soon after the wreck occurred the trestle and track were repaired and the trains began running as usual. This witness had never seen this track or trestle until fifteen months after the wreck occurred, and in the absence of evidence which at least tended to show that the track and trestle were in the same condition on the 4th of November, 1895, that they were immediately prior to the wreck, or immediately afterwards, the evidence was incompetent.

25. One Spelts was also called as a witness for the defendant, and testified that he lived about three-quarters of a mile from the place where the wreck occurred; that he had been over that trestle several times before the wreck; that he passed there some two or three weeks before the wreck; that he knew the claim was that the wreck was not caused by the displacement of a rail; that he could not say that he had ever noticed that rail; that he had noticed the end of the trestle. He was then asked to state what he saw or noticed the time he passed there some three weeks before the occurrence of the wreck. The refusal of the court to permit this question to be answered is the next assignment of error argued here. The theory of the defense was that the wreck was not caused by the displacement of the fixtures of the track by Davis, but by defective construction of the trestle and track, or its being out of repair. Any and all evidence which tended to show the condition of this track and trestle at the time of the wreck, immediately before, or after that time, was competent. Counsel did not attempt or offer to show by this witness that there was any defect of construction in either the track or trestle, and we cannot say that the court erred in refusing to permit the witness to state what he saw or observed as to the condition of this track and trestle three weeks before the time of the wreck.

26. Rokeby is a station on the Rock Island Railroad

between the cities of Lincoln and Fairbury. One Young, the Rock Island Railway Company's agent at said station, was called as a witness for the state and testified that the wrecked train left Rokeby at twenty-two minutes after 9 o'clock in the evening. He was then cross-examined by counsel for Davis and asked whether he testified from his recollection or from the record kept of passing trains, and he answered that he testified from the record. Counsel for Davis then moved to strike out the testimony of the witness, and the overruling of this motion by the court is the next argument here. The record itself, the proper foundation having been laid, was competent evidence to prove the time at which the wrecked train left Rokeby. (*Imhoff v. Richards*, 48 Neb., 590.) But the record does not disclose that the witness, in testifying as to the time when the wrecked train left Rokeby, was reading from his train record, but the effect of his evidence is that he remembered the time it left because he had consulted his train record. Since the witness had made the entry in the train record,—made it at the time the event recorded occurred,—it was competent for him to consult this record before testifying for the purpose of refreshing his memory. (*Anderson v. Imhoff*, 34 Neb., 335.) But whether this ruling of the court was right or wrong, the plaintiff in error is in no position to complain of it, as the bill of exceptions discloses that the entry in the train record corresponded exactly to the testimony of the witness; and this train record, this entry, the plaintiff in error himself offered in evidence to the jury.

27. It will be remembered that when the state's witness Shouse was being cross-examined he was asked whether, at a certain time and place, he did not tell Altschuler that the man who mended the claw-bar lived at Ashland, and that the first time he saw the claw-bar after October, 1893, it was in the possession of the Rock Island Railway Company; and that Shouse denied making such statements to Altschuler. He was also asked if he did

not go up to Altschuler's office two or three times inquiring for him, and that he testified that he did not. One Eager was called as a witness for the plaintiff in error and testified that he was an attorney at law living in the city of Lincoln, and kept his office with Altschuler; that he was acquainted with the witness Shouse. Counsel for Davis then offered to prove by Eager that he had seen the witness Shouse at Altschuler's office inquiring for the latter two or three times before the trial. The refusal of the court to admit this evidence is the next argument here. Counsel for Davis made no effort to show by the witness Eager that Shouse ever had the conversation with Altschuler which he denied having, or ever made the statements to Altschuler which he denied making as to the claw-bar being repaired at Ashland and being seen by him the first time after October, 1893, in the possession of the Rock Island Railway Company, and the trial court held, in effect, that the proof offered was immaterial, unless in connection with proof or offer of proof to show that Shouse had made the statements to Altschuler which he had denied making; and in this ruling we think the district court was correct. Shouse having denied telling Altschuler that one of the men who repaired the claw-bar lived in Ashland and that the first time he saw the claw-bar after October, 1893, it was in the possession of the Rock Island Railway Company, it would have been competent for the defendant to prove by the witness Eager that in his presence Shouse did make such statements to Altschuler; but in the absence of making that proof, or of any effort or intention to furnish that proof, the single fact whether Eager had seen Shouse at Altschuler's office inquiring for the latter was wholly immaterial. (*Johnston v. Spencer*, 51 Neb., 198.)

28, 29, 30, and 31. The next four assignments may be considered together. They are to the effect that the court erred in permitting the state to introduce in rebuttal certain evidence. The contention is that the evidence introduced was a part of the state's case in chief—that it

was not rebuttal evidence. It would subserve no useful purpose to quote this evidence here. We have carefully examined it all, and we have not the slightest doubt that all the evidence about which complaint is here made was competent evidence and was competent in rebuttal. Furthermore, if any of this evidence should have been introduced by the state in making out its case in chief, the record does not disclose that the court abused its discretion in permitting it to be put in as rebuttal testimony. The order in which a party shall introduce his proof is to a great extent discretionary with the trial court and its action in that respect will not be cause for reversal when no abuse of discretion is shown. (*Basye v. State*, 45 Neb., 261, and cases there cited.)

32. The record before us discloses that the prisoner was arraigned and pleaded not guilty and put on trial before a jury November 6, 1895, in the Lancaster county district court; that after the taking of testimony had proceeded for some days a juror became sick; that the court appointed a commission to examine the juror and this commission found the juror insane and so reported to the court; that thereupon and for that reason the court discharged the jury and caused the case to be set down for trial on the 15th of November, 1895. The prisoner was in court when all these proceedings were had and neither objected nor consented to any of them. On the 15th of November the selection of the jury which convicted Davis began, he making no objection to the selection of such jury. After this jury was selected and sworn, and before the taking of testimony began, Davis filed what he denominates a "plea of former jeopardy," in which he alleged that on the 6th of November, 1895, he was brought to trial in the Lancaster county district court upon the same information upon which he was about then to be tried; that he pleaded not guilty to that information; that a jury was thereupon called and sworn in the case and he was put upon trial on said information under a plea of not guilty thereto; that witnesses were called and sworn

and evidence submitted to the jury on behalf of the state and thereupon, "without the knowledge, consent, or connivance of this defendant, and without legal cause therefor, the said jury was discharged." He further alleged that the offense charged in the first information was the same offense charged in the information on which he was about to be tried; that the two informations were the same. By reason of the facts alleged the prisoner claimed that he ought to be discharged; and he then demanded of the court a jury for the trial of the facts stated in said so-called plea of former jeopardy. The district court denied the request for such jury trial and on its own motion overruled and disregarded the so-called plea of former jeopardy. These actions of the court constitute the next assignment of error argued here. We shall for a moment, and for the purposes of the argument under consideration only, regard this plea of former jeopardy as a valid plea in bar within the meaning of the Code of Criminal Procedure of this state.

In *Korth v. State*, 46 Neb., 631, Korth pleaded not guilty on the general issue to the indictment against him and afterwards, without withdrawing such plea, he filed a plea alleging that more than four terms of court had intervened between the term of court at which the indictment was found and the term at which he was brought to trial thereon, and claimed the right to be discharged. This plea the district court, on its own motion, struck from the files, or overruled; and this court held that so long as the plea of not guilty remained on the record the plea made by Korth was not proper.

Section 447 of the Code of Criminal Procedure provides that after a demurrer to an indictment has been overruled the accused may plead not guilty or in bar; and section 448 of that Code provides that the accused shall be arraigned by reading to him the indictment, etc. And section 449 provides that the accused may then—that is, after he has been arraigned and the indictment read to him—offer a plea in bar, etc.; and section 451 of said Code

provides that if the issue on a plea in bar be found against the defendant, or if upon his arraignment he offers no plea in bar, then he shall plead guilty or not guilty, and if he pleads evasively or stands mute he shall be taken to have pleaded not guilty. We think the true construction of these provisions of the Criminal Code is that there can never be more than one issue before the court in a criminal case at one time; and that so long as the plea of not guilty remains on the record a plea in bar is improper; that the state is under no necessity of replying or demurring to such plea, and that the court on its own motion may disregard it. This point was presented to this court, and ruled as we have just stated it, in *Marshall v. State*, 6 Neb., 120. In other words, a plea in bar will not lie while there is of record a plea of not guilty, unless the latter plea be withdrawn; and it seems to be a matter left by the law to the sound discretion of the trial court whether he will permit a prisoner to withdraw a plea of not guilty and file a plea in bar. We have no doubt, however, that if a prisoner, after a plea of not guilty, tenders a lawful and proper plea in bar, stating facts which have occurred or come to his knowledge since the entry of his plea of not guilty, and which facts if true would entitle him to a discharge, then it would be the duty of the court to permit the prisoner to withdraw his plea of not guilty and file the plea in bar. (*State v. Salge*, 2 Nev., 321.)

Again, section 450 of the Code of Criminal Procedure provides: "No plea in bar or abatement shall be received by the court unless it be in writing, signed by the accused, and sworn to before some competent officer." The so-called plea under consideration was in writing, but it was not signed by Davis, nor was it sworn to. It was, therefore, invalid as a plea in bar. The state was under no obligation to demur or reply to it, and the court would have been justified in entirely disregarding it or on its own motion striking it from the files. Of course, if this had been a valid plea in bar within the meaning of the

Code of Criminal Procedure,—if it had been a good plea stating the facts upon which the prisoner relied,—then the prisoner would have had the right to compel the state to join issue upon this plea either by demurrer or by replication, and if the state joined issue by replication the prisoner would have been entitled to a jury to try the issue so made. (*Arnold v. State*, 38 Neb., 752; *Smith v. State*, 42 Neb., 356.) But not only was the plea invalid because not signed and sworn to by the prisoner, but the plea did not set out the record of the actions and omissions of the court which the prisoner claimed entitled him to a discharge. It did not even avouch such record, and it is at least doubtful, if the plea had been in all other respects sufficient, whether it stated such facts as required the state to take issue upon it. Whether it did or not it is not necessary for us now to decide, nor do we decide that point. As to what a plea in bar should state see *Priest v. State*, 10 Neb., 393; *State v. Blanut*, 2 S. W. Rep. [Ark.], 190; *State v. Emery*, 7 Atl. Rep. [Vt.], 129; *Williams v. State*, 13 Tex. App., 285.

It seems to be the rule that a plea of former jeopardy should set out the record,—that is, the former indictment and acquittal or conviction and the statement of facts, viz., the identity of the person acquitted or convicted and the offense of which he was acquitted or convicted. But while this so-called plea of former jeopardy, for reasons already stated, cannot be examined or considered as a plea in bar, we think it should be regarded as a motion made by the prisoner to be discharged from further prosecution grounded on the actions and ruling of the court in the case as disclosed by the record; and treating it as a motion we proceed to inquire whether the prisoner, under the facts stated in the record, had already been once in jeopardy, and whether the court, with these facts on record before it, erred in not so holding and discharging the prisoner. Section 485 of the Code of Criminal Procedure provides: "In case a jury shall be discharged on account of sickness of a juror, or other accident or

calamity requiring their discharge, or after they have been kept so long together that there is no probability of agreeing, the court shall, upon directing the discharge, order that the reasons for such discharge shall be entered upon the journal; and such discharge shall be without prejudice to the prosecution." When the district court discharged the jury first impaneled to try Davis because of the insanity of one of its members he entered or caused to be entered upon the record all the facts which caused him to so discharge the jury, and he made such discharge without prejudice to a future prosecution of the case. It would seem that the insanity of a juror is an accident or calamity requiring the discharge of a jury within the meaning of said section of the Criminal Code.

In *State v. Hall*, 9 N. J. Law, 256, after the jury was sworn in a criminal case and departed from the room, one of the jurors separated from his fellows and went home. Thereupon the court, without the consent of the defendant, discharged the jury, and it was held that the discharge of the jury was not a bar to the prisoner's further prosecution.

In *United States v. Perez*, 22 U. S., 579, a capital case, the jury was discharged without the consent of the prisoner because they were unable to agree upon a verdict. The court held that this discharge did not bar the further prosecution of the prisoner upon the indictment. The court said: "We think that in all cases of this nature the law has invested courts of justice with the authority to discharge a jury from giving any verdict whenever in their opinion (that is, the court's opinion), taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated."

In *State v. Emery*, 7 Atl. Rep. [Vt.], 129, a jury in a criminal case was discharged before verdict because one of the jurors was taken sick and unable to proceed with the trial, and the court held that the discharge of the jury

under such circumstances did not bar the further prosecution of the prisoner.

In *McFadden v. Commonwealth*, 23 Pa. St., 12, it was said: "A discharge of the jury, in a capital case, after the trial has begun, is not a continuance of the cause. It is the end of it. And for all purposes of after protection, it is the same to the prisoner as an acquittal, unless it was done with his own consent or demanded by some overwhelming necessity, such, for instance, as the sickness or death of a juror."

A case precisely in point is *United States v. Haskell*, 4 Wash. [U. S. C. C.], 402. That was a capital case, and the jury was discharged on the ground of the insanity of one of its members. This discharge was without the consent of the prisoner or his counsel, and it was held that such discharge was not a good plea in bar to the further prosecution of the prisoner with which he was first put upon trial.

Whether the plea be considered as a valid plea in bar or be considered as a motion based on the facts disclosed by the record, the court did not err in refusing to discharge the prisoner, as the discharge of the first jury because of the insanity of one of its members, without prejudice to the after prosecution of the prisoner, was authorized both by the Criminal Code of the state and by the rules of the criminal law.

33. The thirty-third assignment of error is that the court erred in refusing to give instruction 20½ requested by the plaintiff in error. The instruction is as follows: "The defendant asks the court to instruct the jury as follows: 'In a criminal prosecution the confessions or admissions of the accused are not alone sufficient to justify a conviction. That the crime has been committed must be established by other testimony.'" It is true that the *corpus delicti* is the foundation of every criminal prosecution, and it is also true that the confession of the defendant that he committed the crime is not alone sufficient evidence to sustain his conviction thereof. (*Dodge v.*

People, 4 Neb., 220; *Priest v. State*, 10 Neb., 393; *Ashford v. State*, 36 Neb., 38.) But by the instruction under consideration the court was also requested to charge the jury that the *corpus delicti* must be established by other evidence than the confessions of the accused. This is not the law. We understand the law to be that while the confessions of the accused are not alone sufficient to establish the *corpus delicti*, yet such confessions, if made without inducement or duress,—that is, if they are freely and voluntarily made,—are competent evidence to be considered by the jury, together with all other facts and circumstances in evidence in the case which tend to show that the accused committed the crime with which he is charged. When complaint is made of the refusal of the district court to give an instruction asked, the burden is upon the party complaining to show, not only that he was probably prejudiced by the refusal of the court to give the instruction, but he must also show that the entire instruction was correct as a proposition of law and applicable to the facts in evidence in the case. The court did not err in refusing to give instruction 20½, because it is not the law that confessions of an accused are not competent evidence to be considered with other evidence and circumstances in the case in determining whether the accused committed the crime with which he is charged.

34. The next assignment of error is that the court erred in refusing to give instruction 21½ asked by the plaintiff in error. The instruction, so far as material here, is as follows: "The court instructs the jury that, although proof of the admissions of a party to a suit, when it appears that the admissions were understandingly and deliberately made, often affords satisfactory evidence, yet as a general rule the statement of a witness as to the admissions of the party should be received by the jury with great caution, as that kind of evidence is subject to much imperfection and mistake; the party himself may not have clearly expressed his meaning, or the witness may have misunderstood him; and it frequently

happens that the witness by unintentionally altering a few of the expressions really used gives an effect to the statements completely at variance with what the party did actually say." This instruction would have been a good argument for counsel to address to the jury; but we do not think the court erred in refusing to give it. The court in its own charge carefully and properly left it for the jury to say whether Davis made the confessions attributed to him by the witnesses for the state.

35. The next assignment of error is that the court erred in refusing to give instructions 22½, 23, 24, and 25 at the request of the plaintiff in error. The substance of these instructions is embraced in the charge of the court, and this court will not reverse a case for refusing an instruction when the substance thereof has been given in other instructions. (*Ford v. State*, 46 Neb., 390; *Brumback v. German Nat. Bank*, 46 Neb., 540; *Korth v. State*, 46 Neb., 631; *Bush v. State*, 47 Neb., 642.)

36. The next assignment of error is that the court refused to give instructions Nos. 1 and 8 requested by the plaintiff in error. No. 1 is as follows: "Where, in a criminal case, the evidence is circumstantial, the circumstances established must, to warrant a conviction, be such as to exclude every reasonable hypothesis except that of the defendant's guilt." And instruction No. 8 was to the same effect. It is true that in order to warrant a conviction on circumstantial evidence it must be of so conclusive a character as to prove beyond a reasonable doubt that the accused and no other person committed the offense charged. (*Kaiser v. State*, 35 Neb., 704.) But the court did not err in refusing to give these instructions, as it gave the substance of them in its charge to the jury.

37. The thirty-seventh assignment of error is that the court erred in refusing to give instruction No. 3 asked by the plaintiff in error and in giving instruction No. 19 of the instructions given on the court's own motion. Both instructions were directed to the law of reasonable doubt. The instruction given by the court was as follows: "The

law requires before you can find the defendant guilty the evidence must have established his guilt beyond a reasonable doubt. Mere suspicion of guilt, however strong, or a preponderance of all the evidence in the case against the defendant, will not do upon which to base a verdict of guilty. The doubt which the juror is allowed to retain in his own mind, and under which he should render his verdict of not guilty, must always be a reasonable one. A doubt produced by undue sensibility in the mind of any juror in view of the consequences of his verdict is not a reasonable doubt, and a juror is not allowed to create sources or material of doubt by resorting to trivial or fanciful suppositions and remote conjectures as to possible states of fact different from that established by the evidence. You are not at liberty to disbelieve as jurors if from the evidence you believe as men. Your oath as jurors imposes on you no obligation to doubt where no doubt would exist if no oath had been administered. Hence, if, after a careful and impartial consideration of all the evidence, you can say that you feel an abiding conviction of the guilt of the defendant and are satisfied to a moral certainty, a certainty that convinces and directs the understanding and satisfies the reason and judgment of those who are bound to act conscientiously on the truth of the charges made against the defendant, then, and in that event, you are as jurors satisfied beyond a reasonable doubt. A reasonable doubt does not consist of possible or conjectural doubt, but a doubt that would justify an acquittal must be reasonable, and it must arise from a candid and impartial investigation of all the evidence in the case, and unless it is such that were the same kind of doubt interposed in the graver transactions of life it would cause a reasonable and prudent man to hesitate and pause, it is insufficient to authorize a verdict of not guilty." This instruction included all that was asked in the instruction asked by the plaintiff in error and refused; and instructions similar to the one given by the court have been many times approved by this court. (See

Polin v. State, 14 Neb., 540; *Langford v. State*, 32 Neb., 782; *Willis v. State*, 43 Neb., 102; *Carleton v. State*, 43 Neb., 373; *Collins v. State*, 46 Neb., 37; *Lawhead v. State*, 46 Neb., 607; *Barney v. State*, 49 Neb., 515.) The exceptions to the action of the court are overruled.

38. The next assignment of error is that the court erred in refusing to give instructions 5 and 6 asked by the plaintiff in error. The instructions are substantially the same, and No. 5 is as follows: "The defendant is presumed to be innocent, and that presumption begins with the beginning of the trial and continues all through the case until the state has produced sufficient evidence to satisfy the mind of each juror of the existence of every material fact necessary to show his guilt beyond a reasonable doubt; and so long as there exists in the mind of any one of the jurors a reasonable doubt of the defendant's guilt it is your duty to acquit him." We have no fault to find with the proposition that the defendant is presumed to be innocent and that such presumption begins with the accusation and continues until the state has established the guilt of the defendant beyond a reasonable doubt. But we do not think it is the law that the jury is bound to acquit the defendant if one of the jurymen entertains a reasonable doubt of the defendant's guilt. In such a case of course the jury cannot convict, but it does not therefore follow that it then becomes the duty of the eleven other jurymen to surrender their convictions and acquit. We have not been cited by counsel to any case which supports this contention, nor do we think any such case can be found. In support of this argument we are, however, referred to *Franklin v. State*, 66 N. W. Rep. [Wis.], 107. But that case only holds that a conviction cannot be had if any juror has a reasonable doubt of the defendant's guilt. To the same effect is *State v. Hamilton*, 32 Ia., 572. Still another case cited by counsel is *Stitz v. State*, 4 N. E. Rep. [Ind.], 145. In that case the following instruction was held erroneous: "While each juror must be satisfied of the defendant's

guilt beyond a reasonable doubt to authorize a conviction, such reasonable doubt, unless entertained by all the jurors, does not warrant an acquittal." But that is a very different thing from saying that it is the duty of the jury to acquit if one of its members entertains a reasonable doubt of the guilt of the accused. In *Parker v. State*, 35 N. E. Rep. [Ind.], 1105, it was said that an instruction that the defendant should not be convicted so long as any juror entertains a reasonable doubt of his guilt should be given. *Carter v. State*, 15 So. Rep. [Ala.], 893, holds that on a criminal trial it is error to refuse to charge that each juror must be satisfied beyond a reasonable doubt that the accused is guilty before he can be convicted; but there is a great difference in charging that each juror must be satisfied beyond a reasonable doubt of the defendant's guilt before the jury will be justified in convicting him and charging the jury that if one juror entertains a reasonable doubt of the defendant's guilt that the jury must acquit him. The authorities, then, of counsel for plaintiff in error do not sustain the argument. The court did not err in refusing to give the instruction under consideration.

39. The thirty-ninth assignment of error relates to the refusal of the court to give instructions 31 to 39, both inclusive, of the instructions requested by the plaintiff in error. These instructions were directed to the subject of reasonable doubt. The court in its charge to the jury sufficiently instructed the jury upon that subject and it did not err in refusing to give either of the instructions mentioned in this assignment.

40. The fortieth assignment of error is that the court erred in giving instruction No. 20 given on its own motion. In this instruction the court stated to the jury that there had been offered in the case both direct and circumstantial evidence. He then explained to the jury the meaning of the terms "direct evidence" and "circumstantial evidence;" and charged that the circumstantial evidence which had been received was legal and competent

and then said: "And if it is of such character as to exclude every reasonable theory, supposition, or hypothesis other than that of the defendant's guilt, then and in that event it should be given the same weight by you as direct evidence." The first criticism upon this instruction is that the court had no right to tell the jury that there had been introduced in the case evidence both direct and circumstantial. To sustain this criticism we are cited to *Long v. State*, 23 Neb., 33. In that case we held that an instruction was erroneous because the court told the jury that the evidence introduced included not only the sworn testimony of the witnesses who had testified, but all the circumstances surrounding the tragedy. This, of course, left the jury to wander outside of the evidence; but the instruction under consideration is not open to that criticism. Here the court stated what was a fact and one every juryman of average intelligence must have known as well as the court, viz., that there was before the jury evidence both circumstantial and direct. The second criticism is that the court erred in saying to the jury that it should give the same weight to the circumstantial evidence as to the direct evidence. We think this remark of the court was not a happy one, and the instruction would have been better without it; but we do not think the plaintiff in error was prejudiced by the remark when it is considered in connection with the remainder of the instruction. The court did not unconditionally instruct the jury to give the same weight to circumstantial evidence as direct evidence, but properly submitted the weighing and consideration and effect to be given to the circumstantial evidence to the jury, and then told them that if, after weighing and considering it, they were satisfied beyond a reasonable doubt of the defendant's guilt they should give it the same weight as they did the direct evidence. The case of *Gill v. State*, 27 S. W. Rep. [Ark.], 598, cited by counsel in this connection to show that the instruction of the court under consideration was erroneous, does not sustain counsel's contention. In that case

the court instructed the jury that "If the facts and circumstances proven by the preponderance of evidence are such as to satisfy the jury beyond a reasonable doubt," then such evidence is entitled to the same weight as direct or positive testimony. This instruction the court held was erroneous, because it would permit the defendant to be convicted upon a preponderance of the evidence.

41. The forty-first assignment of error is that the court erred in giving instruction No. 24 of the instructions given upon its own motion. That instruction is in the following language: "A large number of witnesses have appeared before you in this case; and the court now instructs you that you are the sole judges of the credibility of their testimony, and in determining the weight to be given the testimony of the several witnesses you shall take into consideration their interest in the event of this prosecution, if any such interest is proved; their motive for testifying as they have, if any is shown; their conduct and demeanor while testifying; their apparent fairness or bias, if any such appears; their appearance on the witness stand; the reasonableness of the stories told by them; their means of information concerning the matters and things about which they testify; and all the evidence and circumstances tending to corroborate or contradict any witness,—and then give to the testimony of each witness such weight and credit as to you it shall seem entitled. If the fact appears that witnesses disagree in minor points in their recollection and recital of the several matters and transactions sought to be proved in this case it does not necessarily militate against the candor of any of them; it may only indicate a failure of observation; and the court instructs you as jurors you have not the right to captiously or unreasonably disregard the testimony of witnesses, but unless there appears to be something that indicates a lack of candor or truthfulness on the part of any witness, the testimony of each witness should receive proper and careful consideration by the jury. You are to determine this case and arrive at your

verdict from the evidence now before you, and are not to be influenced by statements or insinuations or any other fact or circumstance that is not in evidence in this case." The plaintiff in error has no reason to complain of this instruction.

42. The forty-second assignment of error is that the court erred in giving instruction No. 10 of the instructions given upon its own motion. This instruction was directed to the subject of malice, correctly stated the law, and has been sufficiently considered.

43. The forty-third assignment of error is directed to the subject of the plaintiff in error's alleged "former jeopardy." This we have already disposed of.

44. The railroad wreck frequently mentioned in this opinion occurred about 10 o'clock on a moonlight evening. The evidence for the state tended to show that just prior to the occurrence of the wreck some person with a monkey wrench and a claw-bar, introduced in evidence, had unscrewed the nuts on the bolts which held together two of the rails on the trestle and pulled out some of the spikes which fastened one rail to the ties on the trestle; that this displacement caused the wreck of the train and the death of Hambell, and that Davis, with said monkey wrench and claw-bar, displaced the fixtures as just stated. Davis called as witnesses a man and his daughter, who were fishing within six or seven hundred feet of the trestle where the wreck occurred, and until about dark of that day, and they testified that they did not see anyone on the trestle nor hear any noise there before they left that locality. The object of this evidence, of course, was to show that these fixtures had not been displaced when the fishermen left the vicinity of the trestle and to raise the inference that Davis could not have displaced the fixtures from that time until the wreck occurred. Davis also called as witnesses one or two men who testified as experts, being machinists or railroad men, and they swore that it was impossible for a man to remove the nuts from the bolts of the track with the monkey

wrench in evidence. The state in rebuttal called a witness who was not an expert, nor a railroad man, nor a machinist, who swore that in the presence of some other men and with the monkey wrench in evidence he removed eight nuts from as many bolts from a portion of the Rock Island Railway similar to the track on the trestle, except that it was not on a trestle, and with the claw-bar in evidence he pulled all the spikes which held down one rail on a part of the track of the Rock Island Railway similar in all respects to the track on the trestle, except that it was not on a trestle, and that he did all this work in twenty-one minutes. The next assignment of error is that the court erred in admitting this evidence of the state. It is first said that the evidence was not rebuttal. We think it was. The evidence of the state's witness that with the monkey wrench in evidence he did remove eight nuts from as many bolts of the railway track tended to rebut the expert testimony of Davis' witness that it was impossible for a man to remove one of those nuts with that monkey wrench. The evidence of the state's witness that he unscrewed these nuts and with the claw-bar in evidence pulled all the spikes which held down a rail, and did the whole work in twenty-one minutes, tended to rebut the inference that one man could not have displaced these fixtures from the time the fisherman left the vicinity of the trestle until the time the wreck occurred. Another argument is that the evidence was incompetent. When the oral argument made at the bar on this question closed, it left the writer under the impression that this evidence was incompetent and that the court had erred in admitting it. But a careful examination of the record and of the authorities leaves no doubt in our minds that the evidence was entirely competent. The fact that the state's witness in removing the nuts and pulling the spikes operated on a part of the track not on a trestle did not go to the competency of the evidence, but simply to its weight,—to the effect to be given it by the jury. The track where the state's witness made

the experiment was in every particular identical with the track on the trestle where the displacement occurred, except the fact that one track was on the earth and the other on a trestle. The ties were the same, both being white oak, the rails were of the same quality, the spikes were of the same quality, the bolts and angle-bars were the same, the nuts were the same, and put on in the same manner, with washers. The place at which the experiment was made was a different one from the place where the displacement of the fixtures occurred, but the experiment was made under substantially the same conditions as the displacement of the fixtures. This was sufficient to make the evidence competent, and it was for the jury to consider the place where the displacement of the fixtures occurred and the place where the experiment was made and then to give such weight to the testimony of the state's witness who made the experiment as they thought it deserved. The cases are too long for review, but the authorities are practically all one way. (See, among others, *Smith v. State*, 2 O. St., 511; *Chicago, St. L. & P. R. Co. v. Champion*, 32 N. E. Rep. [Ind.], 874; *Lake Erie & W. R. Co. v. Mugg*, 31 N. E. Rep. [Ind.], 564; *State v. Justus*, 8 Pac. Rep. [Ore.], 337; *Commonwealth v. Piper*, 120 Mass., 185; *Byers v. Nashville, C. & St. L. R. Co.*, 29 S. W. Rep. [Tenn.], 128; *State v. Isaacson*, 65 N. W. Rep. [S. Dak.], 430; *Moore v. State*, 33 S. W. Rep. [Tenn.], 1046; *Wilson v. State*, 36 S. W. Rep. [Tex.], 587.)

45. The forty-fifth assignment of error is that the district court erred in not granting the plaintiff in error a new trial on account of the misconduct of the jury. It appears that there were introduced in evidence nuts, bolts, angle-bars, spikes, monkey wrench, claw-bar, and a railroad tie, all of which things, except the monkey wrench and claw-bar, constituted a part of the track of the railway where this wreck occurred. It is alleged that during some recess of the court, when the defendant was absent from the court room, the jurymen were permitted to experiment with these fish-plates, nuts, bolts, tie,

spikes, and monkey wrench and claw-bar by driving in the spikes and then removing them with the claw-bar and by putting the nuts on the bolts and then unscrewing them with this monkey wrench. This conduct of the jury was expressly denied by affidavits filed in behalf of the state in opposition to the motion for new trial on that ground, and we cannot say that the court erred in reaching the conclusion that it did,—that the alleged misconduct of the jury had not in fact occurred.

46. In the forty-sixth argument made by the plaintiff in error are embraced a large number of assignments of error which relate to the ruling of the court in permitting and in refusing to permit certain questions to be answered. To review each one of these assignments of error would extend this opinion, already too long, to an unreasonable length, and it must suffice to say that after a careful study of the record and the rulings of the court complained of we find no ruling made which we think was prejudicial to the plaintiff in error.

47. It appears from the record that after the reception and recording of the verdict rendered in this case the prisoner was remanded to jail; that afterwards, in his absence, his counsel filed a motion for a new trial and the same was argued and overruled. It is now argued that the judgment must be reversed because of the absence of the prisoner from the court room at the time the motion for a new trial was filed, argued, and overruled. Whether the record must disclose that a person convicted of a felony was present in court at the time his motion for a new trial was overruled in order to sustain a judgment pronounced against him on such conviction is a question about which there is and has been some diversity of opinion among the courts.

In *Rex v. Hollingberry*, 6 Dow. & R. [Eng.], 344, a defendant was in actual custody of the marshal upon a criminal process in consequence of an indictment in the court of king's bench, and it was held that he need not be present when a motion for a new trial was made on his behalf in the same court.

In *Rex v. Scully*, Alc. & N. [Ir.], 262, it was held that all the defendants convicted upon a criminal information must be in court upon a motion on their behalf for a new trial.

In *Rex v. Spragg*, 2 Bur. [Eng.], 928, several prisoners, after conviction, were in custody and the court in their absence declined to hear a motion filed by their counsel in arrest of judgment. The court declared that it was a fixed and invariable rule that the defendants must, after conviction, be present in court to move in arrest of judgment.

In *Berkley v. State*, 4 Tex. App., 122, the defendant was convicted of a felony, and it was held that it was improper for the trial court to hear and overrule his motion for new trial in his absence.

In *State v. Parsons*, 19 S. E. Rep. [W. Va.], 876, Parsons was convicted of a felony, and the court reversed the judgment pronounced against him because the record did not affirmatively show that he was present when the trial court overruled his motion for a new trial.

The constitution of this state, section 11 of the Bill of Rights, provides that one accused of a crime shall have the right to appear and defend in person or by counsel, and to meet the witnesses against him face to face; and section 464 of the Code of Criminal Procedure provides: "No person indicted for a felony shall be tried unless personally present during the trial."

The constitution and the statute of Missouri are practically the same as our own. In *State v. Brown*, 63 Mo., 439, Brown was convicted of murder. In his absence the court disposed of his motion for a new trial, and the supreme court held that this action of the trial court was not a ground for a reversal of the judgment; that such a motion was not a proceeding during the trial within the meaning of the statute. The point was again presented to the supreme court of Missouri in *State v. Lewis*, 80 Mo., 110, and the court held that unless the record affirmatively showed that the prisoner was denied the

right of being present when his motion for a new trial was argued and determined his absence at that time would not be a sufficient ground for reversing the judgment.

The constitution and statute of the state of Ohio are similar to ours, and in *Griffin v. State*, 34 O. St., 299, a felony case, it was held that it was no ground for reversing the judgment pronounced on conviction if the defendant's motion for a new trial was made, argued, and overruled in his absence, he having made no objection to this action of the court until after the sentence was pronounced.

In *People v. Ormsby*, 12 N. W. Rep. [Mich.], 671, it was held: "After the regular conviction of a person charged with crime he can no longer insist upon being present in court for further proceedings, such as the disposition of a motion for a new trial."

In *State v. West*, 13 So. Rep. [La.], 173, it was held: "The presence of the defendant in court is not essential either at the trial of a motion for new trial or one in arrest of judgment." And this conclusion was reached by the court notwithstanding the fact that on the trial of the motion for a new trial testimony was offered in behalf of the prisoner. To the same effect see *Camp v. State*, 16 S. E. Rep. [Ga.], 379.

In *Miller v. State*, 29 Neb., 437, Miller was convicted of murder in the first degree, and assigned as an error in this court the ruling of the trial court on a motion to quash, and a demurrer to the information, and a plea in abatement, and the motion of the accused for a continuance; all of these rulings having been made in the absence of the prisoner. This court overruled the assignment of error and, speaking through NORVAL, J., after citing section 11 of the Bill of Rights and section 464 of the Criminal Code, said: "We do not believe that either of the above quoted sections have reference to the presentation by counsel of questions of law to the court or interlocutory proceedings prior to the commencement of the selection of the jury, but rather that the accused shall

be present during the trial of the issue of fact raised by his plea of not guilty. The hearing of motions and demurrers prior to choosing the jury is no part of the trial."

The principle decided in the Miller case involves the principle under consideration here. No doubt the defendant charged with a felony has an absolute right to be present in court in person when he is arraigned and pleads to the indictment; to be present when the trial begins, and at all times during the trial; to be present when the verdict is received and recorded; and when he is arraigned for sentence and the sentence is pronounced; and the record, to support a judgment of conviction or sentence for a felony, must affirmatively disclose the prisoner's presence at all those times. But neither the filing, the argument, nor the ruling upon a motion for a new trial is any part of such trial within the meaning of the constitution or the section of the Criminal Code quoted. Our conclusion is that a person convicted of felony and represented by counsel cannot as a matter of right insist on being present in court either at the time of the filing of the argument or the ruling upon his motion for a new trial.

48. Another assignment of error is that the court erred in refusing the plaintiff in error a new trial on the ground of newly-discovered evidence. We do not think that the record shows that the plaintiff in error could not have discovered and produced at the trial the evidence which he now claims to be newly discovered had he exercised reasonable diligence. But assuming that all reasonable diligence was exercised for the discovery and production of this evidence, and that it was material for the plaintiff in error, it remains to be said that the evidence was cumulative in its nature; and had the new trial been granted and this newly-discovered evidence admitted we cannot say that we think it would probably have changed the result. The assignment of error must therefore be overruled. (*Tolleson v. State*, 23 S. E. Rep. [Ga.], 993; *Fitzgerald v. Brandt*, 36 Neb., 683; *Smith v. Hitchcock*, 38

Neb., 104; *People v. Demasters*, 109 Cal., 607; *Porter v. State*, 32 S. W. Rep. [Tex.], 695; *Turner v. State*, 36 S. W. Rep. [Tex.], 87.)

49. Another ground of the motion for a new trial was that two of the jurymen stated on their *voir dire* examination that they had neither formed nor expressed any opinion as to the guilt or innocence of Davis; and that he discovered, after the verdict was rendered, that each of such jurors had, prior to being called as a juror, made statements to the effect that they thought he was guilty and ought to be hung. The argument is that the court erred in not setting aside the verdict because of the unfairness of these jurors as disclosed by this showing. But the district court by its ruling found in effect that neither of the jurors had made the statements attributed to them, and as they expressly denied having made any such statements, we cannot disturb the finding of the district court in that respect.

50. The final argument is that the verdict is not supported by sufficient evidence. The record shows without conflict that about 10 o'clock on the evening of the 9th of August, 1894, a passenger train on the Rock Island railway fell, or was thrown, from a trestle some four miles from the post-office in the city of Lincoln; that by such derailment William O. Hambell was instantly killed, and ten other persons either instantly killed or died from the effect of injuries there received. The record further discloses that the engine and cars of said train before its wreck were in good repair; that the trestle and the track were in good repair; that they were comparatively new; that numerous trains had been daily running over said trestle and track since its construction; that the trestle and track had been patrolled and examined that day. Immediately after the occurrence of said wreck said trestle and track were examined, and it was found that a number of the spikes which fastened one of the rails on such trestle to the ties thereon had been recently removed. On the ties were the marks or indentations

made by an instrument known as a claw-bar, made and used expressly for the purpose of pulling railroad spikes from ties. Some of the extracted spikes found showed fresh marks of the claw-bar. The nuts upon the bolts which held together two of the rails had been removed. These nuts showed the fresh marks of a wrench. The rail from which the spikes had been removed had been moved from its alignment and in a direction from its companion rail. One at least of the spikes which had held down said rail and had not been completely removed furnished an indication of the rail having been pushed against it and thus bending it down after it had been partly pulled out. On the ties on the trestle next to the rail which had been moved from its alignment were marks or indentations where the wheels of the locomotive had struck on the ties after leaving the displaced rail, while no such marks or indentations were found on the ties next to the companion rail of the one displaced. A monkey wrench was found on the trestle, and in the weeds near by the trestle was found a claw-bar and the heel of this claw-bar fitted in the indentation in the ties supposed to have been made by it in removing the spikes. The plaintiff in error was seen at the wreck both by the passengers and crew of the train who were left alive after the wreck. He was seen there within a very few minutes after the wreck occurred, and was the first person seen in the vicinity after the wreck save and except the survivors of the crew and passengers. A track of the Union Pacific Railroad passes under the trestle of the Rock Island railway where this wreck occurred. Late in the afternoon, or early in the evening, of August the 8th a colored man, afterwards identified as Davis, was seen going down this Union Pacific track towards the trestle. He had on his shoulder some instrument resembling a claw-bar or hand-spike. In his hand he had a sack in which was something. Prior to the occurrence of the wreck Davis was laboring on a farm near the city of Lincoln, and said to certain persons that he was tired of

farming and that the railroad or a railroad would have to give him a job. One day during the summer he was passing, with another man, by this trestle and observed to his companion in substance that that would be a good place to "hold up" a train. A few days before the wreck he purchased a new suit of clothes, which he wore. The coat of this suit had on it a certain kind of buttons and the buttons were fastened on with rings. Just prior to the wreck Davis was seen to have in his possession a photograph, or picture, of some theatrical woman. After the wreck this coat of Davis was found in the weeds near the trestle where the wreck occurred. In the pocket of the coat was this picture. Very soon after the wreck Davis told various persons that he was present at this wreck, and when asked how he happened to be there he told some persons that he was at the club in Lincoln, heard the noise of the wreck, and ran down there. Now this club house is four miles from the place of the wreck. He told other persons that he had been to Kearney and was returning from Kearney and came over the Rock Island railroad, and on being told by these parties that the Rock Island railroad did not pass through Kearney, he stated that he had walked across the country and taken the train. He told other persons that he boarded the Rock Island train at Rokeby, a station between Lincoln and Fairbury. No passenger or employe of the railroad saw any colored man on the train. He told other witnesses that at the time the wreck occurred he was in a shed stealing chickens about three-quarters of a mile from the place of the wreck; that he heard the noise and ran down there. On Sunday after the wreck he was out at a farm where he had been employed; told the people there that he was at the wreck and explained to them, or to at least one of them, how he thought it occurred; that he thought the wreck had been caused by some one removing the nuts from the fish-plate bolts and by pulling up the spikes that held down the rails; on his companion saying that he did not think one man could do

that, he said he thought it could be done. After he was arrested he voluntarily told several persons that he displaced the fixtures on this trestle and caused this wreck; that he did not do it intending to kill anybody, but that he did it intending to flag and stop the approaching passenger train, call attention to the displacement of the track, and for his conduct in that respect he expected the railway company to give him a job, or the passengers to raise him a purse. He also explained to these witnesses that when he heard the passenger train approaching he signalled the engineer with his coat, but he either did not see him or paid no attention to it, and that the train was on him sooner than he expected, and that he threw the claw-bar into the weeds. To another witness he stated that he saw the engineer and fireman on the locomotive put their arms around each other as the engine went over the trestle. This is not all the evidence by any means, either direct or circumstantial, but it is sufficient in our judgment to sustain the finding of the jury (1) that the wreck and the death of Hambell were caused by the displacement of the fixtures of the track, and (2) that Davis purposely and maliciously displaced these fixtures. There are, doubtless, in this record some errors, but after spending weeks upon its examination our deliberate conviction is that the record contains not one error prejudicial to the interests of the accused. Indeed, this record of itself affords conclusive evidence of the humanity and liberality of our criminal laws. This prisoner is a man without property and without influential friends, and yet this commonwealth, whose laws he has so shamelessly violated, has, at an enormous expense to itself, furnished him all witnesses whose presence he required, and employed counsel for him, who have waged in his behalf a legal battle which redounds to their credit. Possibly the jury might have been justified in finding him guilty of only manslaughter; but if the evidence in this record is true, and the jury—the only tribunal which the law has designated to pass upon the credibility of evidence—has

by its verdict said that the evidence is true, then this prisoner is an enemy to the human race, and his liberty a menace to society; and the verdict of the jury and the judgment of the court are the ones best calculated for the vindication of the criminal laws of the state and the protection of the lives and property of its citizens. The record contains no reversible error and the judgment of the district court must therefore be, and it is in all things,

AFFIRMED.

HENRY G. KOBARG, APPELLEE, V. GEORGE GREEDER, APPELLANT.

FILED APRIL 21, 1897. No. 7286.

1. **Husband and Wife:** GIFTS OF REALTY. Where a husband purchases real estate with his own funds and causes the legal title thereof to be conveyed to his wife, the presumption is that the husband intended such real estate as a gift to his wife.
2. **Trusts:** PAROL DECLARATION. In order to fasten a trust upon real estate by means of a parol declaration the words employed must amount to a clear and explicit declaration of trust. They must also point out with reasonable certainty the subject-matter of the trust and the person who is to take the beneficial interest. Loose and indefinite expressions and such as indicate only an incomplete and executory intention are insufficient for this purpose. *Roddy v. Roddy*, 3 Neb., 96, followed.
3. ———: GIFTS: EVIDENCE. Evidence examined, and *held* insufficient to sustain the finding of the district court that the property in controversy was held in trust by the wife for the husband.

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

W. S. Shoemaker, for appellant.

George F. Wittum and *Frank H. Gaines, contra.*

RAGAN, C.

In 1878 Bernard Carstens (hereinafter called Bernard) purchased ten acres of land in Douglas county and caused his vendor to convey the same to his, Bernard's, wife Dora by an ordinary warranty deed, which was then and there duly recorded. Bernard and his wife and their children lived upon this land until 1888, when Bernard died. The widow and her children continued to make their home upon the land, and in 1891 she married George Greeder. Some time after her marriage to Greeder Dora conveyed, through a third party, this real estate to Greeder, and some time after this conveyance she died. Henry Kobarg, as next friend for the minor children of Bernard and Dora, brought this suit in the district court of Douglas county against George Greeder to have it decreed that Dora held the real estate conveyed to her in trust for her husband Bernard and the title thereto quieted and confirmed in his heirs. Kobarg had a decree as prayed and Greeder has appealed.

1. We assume for the purposes of this case that the evidence establishes that Bernard purchased and paid for the real estate in question; and there is no controversy as to the fact that Bernard's vendor, at the time of said purchase, conveyed the real estate by warranty deed to Dora. The record is silent as to what, if anything, occurred at the time this conveyance was made. Neither witness nor paper tells us anything that was said or done by any of the parties connected with the conveyance at the time it was made. The evidence shows that Bernard purchased and negotiated for the property. It tends to show,—and we assume that it does show,—that he paid the consideration named; and at the time of the purchase the title was conveyed to his wife. Where a person purchases real estate with his own funds and places the title in the name of a stranger the law presumes that he made such purchase for his own use and that the stranger holds it in trust for him. But where the purchaser is a married man and the title of the real

estate purchased is conveyed to his wife, the presumption is that the purchaser intended the real estate as a gift to his wife. (*Creed v. Lancaster County Bank*, 1 O. St., 1; *Brownell v. Stoddard*, 42 Neb., 177; *Gray v. Gray*, 13 Neb., 453; *Klamp v. Klamp*, 51 Neb., 17.) We have, then, but to inquire whether the finding of the district court, that Dora held the title to this property in trust for her husband, is sustained by sufficient evidence.

In *Roddy v. Roddy*, 3 Neb., 96, it was held: "In order to fasten a trust on property of any description by means of a parol declaration the words employed must amount to a clear and explicit declaration of trust. They must also point out with reasonable certainty the subject-matter of the trust and the person who is to take the beneficial interest. Loose and indefinite expressions and such as indicate only an incomplete and executory intention are insufficient for this purpose." To the same effect see *Falsken v. Harkendorf*, 11 Neb., 82; *Robinson v. Jones*, 31 Neb., 20.

A brother of Bernard was called as a witness for the plaintiff below, and after testifying that Bernard bought and paid for the real estate in controversy, that he had a conversation with him and his wife in reference to the land purchased about two years after its purchase, he was asked what his brother said, and answered as follows: " 'I tell you if I was in my brother's place I would have the property in my name;' and she says she would like to do it, but then my brother objected. He didn't want it. I says, 'It always looks like a man; if the property is in the lady's name, it looks like he worked only for her;' and then she says to my brother: 'Well, if you think it is better, then we do it. I don't care; that property belongs to you and I would like to see it better done,' and then they agreed together to do that, and I never asked him after that time if they did it." This evidence shows that the propriety of the witness was shocked and his vanity wounded because his brother's wife held the title to the real estate on which

they lived, and that the wife was willing to convey the real estate to the husband if the husband demanded it, but he did not want it conveyed to him; and though the wife may then and there have agreed to convey the real estate to her husband, the promise was without consideration and was not one which Bernard could himself have enforced.

Another witness called for the plaintiff below testified to his acquaintance with Bernard, and that soon after the time the property was purchased and Bernard and his wife took up their residence upon it he was at their house. The witness then proceeds as follows: 'I went out there and I had a little work to do for them,—killing a hog,—and when I was there he told me to come into the house with him, and we went in and had a cup of coffee, and after a little he asked me how I liked his place and how I liked everything,—if it didn't look like home. I said, 'Yes; it looks very much like it;' and he pointed to his wife and called her by name,—called her Dora, or something like it,—and said: 'That is my pretty wife.' And he said: 'I gave her that property,' and she objected. She didn't object, but she raised right up and says: 'For me to take care of for the children for him.' "

Another witness called for the plaintiff below testified to a conversation with Dora as follows: "Why, she told me that August Carstens [this was a brother of Dora's husband] had objected to her holding the property in her name and she told her husband she did not care whether she would have the title or not; that he should take it back in his name because it was his." On cross-examination she related the conversation with Dora as follows: "She said she was willing; she didn't care whether it was in her name or in his name; that she wanted him to take it back."

It does not clearly appear whether this alleged conversation with Dora occurred before or after she conveyed the real estate in controversy to the appellant, but we assume that it occurred before. This is all the com-

petent and relevant evidence upon which the decree appealed from rests, and it is entirely insufficient to overcome the presumption that Bernard caused this real estate to be conveyed to his wife Dora because he intended thereby to make her a gift of it. This record shows that Bernard Carstens, at the time he was married, was a man past middle age; that he had been for some years a sailor; that he was rather fond of intoxicating liquors, but nevertheless an industrious and frugal man; that at the time he married Dora she was about seventeen years of age; that he was very fond of her, and the probability is that this real estate was conveyed to Dora in pursuance of a promise that he made her to purchase and give her a home if she would marry him. The evidence discloses that they lived upon this real estate from 1878 until Bernard died, some ten years later; that four or five children were born to them, and that they all lived happily together. They were laboring people. They followed the business of gardening for a living. Before Bernard's death he purchased other real estate besides this in controversy, and he had the title to that taken in his own name. Nowhere in this record is there evidence of an explicit declaration made by Dora that she held this real estate in trust for her husband. No witness swore that Bernard Carstens at any time or place ever claimed that his wife held this real estate in trust for him. The decree of the district court is reversed and the action dismissed at the cost of Henry Kobarg.

REVERSED AND DISMISSED.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY V. CASS COUNTY ET AL.

FILED APRIL 21, 1897. No. 8923.

1. **Appeal and Error**: ELECTION OF REMEDIES. If the judgment which a litigant seeks to have reviewed in this court is appealable he may have it reviewed on appeal or error at his election. He may

make such election at any time before the final submission of the case in this court. He may dismiss his appeal and stand on his petition in error, or *vice versa*, but if he makes no such election this court will review the judgment of the district court on error only when there is filed with the transcript here a petition in error.

2. **Motion for New Trial.** Though the grounds of a motion for a new trial are not stated in the exact language of section 314 of the Code of Civil Procedure, if they are in substance the same the statute is satisfied.

3. ———: ASSIGNMENTS OF ERROR: REVIEW. Where the grounds of a motion for a new trial are in substance those prescribed by section 314 of the Code, and the assignments in the petition in error are based upon those grounds, this court is not without jurisdiction to review a case on error simply because the petition in error does not specifically allege that the court below erred in overruling the motion for a new trial.

4. **School Districts:** TAXATION: RAILROAD BRIDGES: EVIDENCE: INJUNCTION: ESTOPPEL. The tax agent of a railroad company in the year 1895, and for several years prior thereto, listed for taxation with the officers of a school district a bridge which was a part of his principal's railroad, erroneously believing that such bridge was within the limits of such school district. The railroad company paid the taxes assessed by the school district against the bridge for all the years prior to 1895. It then brought suit to enjoin the 1895 tax on the ground that said bridge was, as a matter of fact, not within the limits of such school district. *Held*, (1) That the action did not call into question the legality of the organization of the school district; (2) that if jurisdiction to levy the tax was a franchise or privilege within the meaning of section 8, subdivision 3, chapter 79, Compiled Statutes, and such franchise or privilege was called into question by the action, still the court was not required by said statute to conclusively presume anything further than the legal organization of the school district; (3) that the court was not required to conclusively presume that the bridge was within the limits of the school district because it had assumed the right to tax it for more than one year; (4) that the court was not bound to presume that the bridge was within or without the limits of the school district; (5) that the *situs* of the bridge was a question of fact to be determined from the evidence; (6) that the railroad company was not estopped from maintaining the action because of its conduct in listing the property for taxation; (7) that a proper remedy of the railroad company was injunction, and not *quo warranto*.

5. **District Courts:** VOID TAXES: INJUNCTION. The district courts of this state are, by the constitution, invested with general equity jurisdiction, and this includes the authority to enjoin the collec-

tion of a void tax; and this jurisdiction the legislature can neither take away nor impair.

6. **School Districts:** TAXATION. In the absence of express legislative authority the officers of a school district are without jurisdiction to levy a tax upon real estate not within the limits of their school district, and a tax so levied, no matter for what purpose, is absolutely void.

7. ———: ———: BOUNDARIES: RAILROAD BRIDGES. The evidence examined, and *held* to establish (1) that the eastern boundary of school district No. 2, in Cass county, coincides with the eastern boundary of section 20, in township 12 N., and range 14 E., of the sixth P. M.; (2) that the eastern boundary of said section 20 is the high-water line of the west bank of the Missouri river; (3) that no part of the bridge in controversy is within the limits of said school district.

ERROR from the district court of Cass county. Tried below before RAMSEY, J. *Reversed.*

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

A. J. Graves, C. S. Polk, and *Beeson & Root, contra.*

RAGAN, C.

In the district court of Cass county the Chicago, Burlington & Quincy Railroad Company (hereinafter called the "railroad company") brought this suit against said county, the county treasurer, school district No. 2, and Plattsmouth precinct thereof to enjoin the collection of certain taxes levied for school purposes by said school district No. 2 against the west half of the railroad company's bridge across the Missouri river, basing its right to the injunction upon the contention that no part of the west half of said bridge was within the limits of said school district. The district court dismissed the railroad company's petition, and it brings the decree here for review. The connection of the county and the county treasurer thereof with the case is unimportant, so far as this opinion goes, and in what we have to say no reference will be made to Plattsmouth precinct, as the rights of all the parties will be determined by the decision of

the question as to whether any part of the west half of the railroad company's bridge is in said school district No. 2.

1. The defendants below contend that the case is here on error, while the railroad company insists that it is here on appeal. It appears that upon the rendition of the decree by the district court the railroad company filed a motion for a new trial, and upon this being overruled took an exception to such ruling. Within six months after the date of the rendition of the decree the railroad company filed in this court a certified transcript of the proceedings in the case; that thereupon a summons in error was issued by the clerk of this court and served upon the defendants below. The record does not contain this summons in error, but it is admitted by counsel here that it was issued and served; nor does the record disclose that this summons in error was issued in pursuance of a written *præcipe* filed therefor by the railroad company as provided by section 585 of the Code. But since the clerk of this court would have had no authority to issue a summons in error without such written *præcipe* therefor having been filed, we will presume that such *præcipe* was filed. Within a year from the date of the rendition of the decree below the railroad company filed with the clerk of this court a paper which is substantially a petition in error, although denominated "assignments of error on appeal." In *Beatrice Paper Co. v. Beloit Iron Works*, 46 Neb., 900, it was said: "If the judgment which the litigant seeks to have reviewed is appealable, he may have it reviewed on appeal or error, at his election; and he may make such election at any time before the final submission of the case in this court. He may dismiss his appeal and stand on his petition in error or *vice versa;* but if he makes no such election this court will review the judgment of the district court on error [only] when there is filed with the transcript [here] a petition in error." To the same effect see *Shaw v. Robinson*, 50 Neb., 403; *Woodard v. Baird*, 43 Neb., 310; *Monroe v. Reid*, 46 Neb.,

316. Since the railroad company made no application to this court before the submission of this case to withdraw or dismiss its petition in error and stand upon its appeal, and taking into consideration its other conduct in the premises, we think the railroad company must be held to have elected to have this case tried in this court on error.

2. The defendants in error insist that the decree of the district court must be affirmed without an examination of the assignments of error in the petition in error because it is not specifically alleged by the railroad company in its petition in error that the district court erred in overruling its motion for a new trial. To sustain this contention we are cited, among others, to *Carson v. Funk*, 27 Kan., 524. In that case the petition in error did not aver that the court below erred in overruling the plaintiff in error's motion for a new trial; but the petition in error did aver that "there were errors of law occurring at the trial of the case;" and the court held that, since the action of the court in overruling the motion for a new trial was not assigned as error, under the assignments in the petition in error, "there were errors of law occurring at the trial," the supreme court should not review the action of the district court in admitting and rejecting evidence or in giving and refusing to give instructions. The case does not support the contention of the defendants in error. Section 314 of the Code of Civil Procedure specifies the causes for which a new trial may be granted on motion of the defeated party. Section 317 of the Code provides that in assigning the grounds in a motion for a new trial it shall be sufficient to assign the same in the language of the statute. We do not understand this section of the Code to be mandatory, and though the grounds of a motion for a new trial are not stated in the exact language of the statute, if they are in substance the same the statute is satisfied, and where the grounds of a motion for a new trial are in substance those prescribed by section 314 of the Code, and the assignments

in the petition in error are based upon those grounds, we do not think this court is deprived of jurisdiction to review the case on error simply because the plaintiff in error does not specifically allege that the court below erred in overruling the motion for a new trial.

3. The issues made by the pleadings in the case at bar were: (1.) Whether any part of the west half of the railroad company's bridge was in said school district No. 2. This was an issue of fact. (2.) Whether the railroad company, by voluntarily listing the west half of the bridge for taxation by the school district in the year 1895, and prior years, had estopped itself from resisting the collection of the taxes levied for 1895. The undisputed evidence shows that the railroad company did list the west half of its bridge for taxation by the school district for the year 1895 and prior years. There remains, then, of these the issue of law, whether the railroad, because of its conduct in the premises, is estopped from resisting the collection of the taxes in suit. The third issue made by the pleadings was also one of law, viz., whether the remedy of the railroad company, if it had any, was limited to *quo warranto* proceedings. The court found generally against the railroad company, and specially that the west half of the railroad company's bridge was situate in said school district No. 2. The petition in error alleges that the court erred in finding that the west half of the bridge was situate in said school district No. 2; that such finding was not sustained by sufficient evidence; that the court erred in entering the decree it did because such decree was contrary to law. In its motion for a new trial the railroad company alleged that the court erred in finding that the west half of its bridge was situate in said school district No. 2; that its finding in that respect was not sustained by sufficient evidence; that the court erred in rendering the decree it did because such decree was contrary to law. The defendants in error now insist that this decree must be affirmed without an examination of the assignments of error in the petition in

error because these assignments are not based on grounds specified in the motion for a new trial. We think the contention is without merit. While the motion for a new trial is not in the exact language of the statute, the grounds of the motion for a new trial are the same in substance as those specified in section 314 of the Code and the assignments of the petition in error follow the grounds alleged for a new trial. But it is said in this connection that there were other issues in the case besides the one as to whether the west half of the railroad company's bridge was in school district No. 2; and since the court found generally for the defendants in error, his judgment may be based on finding some of these other issues in favor of the defendants in error; and that if the judgment of the court is based on finding the other issues in favor of the defendants in error, the sufficiency of the evidence to sustain such findings of the court is not called in question by the motion for a new trial. The answer to this is that the other issues were issues of law, not of fact, and the motion for a new trial and the petition in error both allege that the judgment pronounced was erroneous because it was contrary to law.

4. Another contention of the defendants in error is that the decree of the district court must be affirmed because the petition filed by the railroad company in the district court does not state a cause of action. The first argument in support of this contention is that the facts averred in the petition of the railroad company show that its remedy, if it has one, is a *quo warranto* proceeding. To sustain this contention counsel for the defendants in error cite us to *South Platte Land Co. v. Buffalo County*, 15 Neb., 675. That was an action to enjoin the collection of certain taxes assessed by the city of Kearney upon lands belonging to the South Platte Land Company and included within the limits of said city. It seems that the lands had been taken into said city in 1866 and when so taken were unplatted; and that under the town site act of 1866 the county commissioners of Buffalo county, who

incorporated the city of Kearney, had no authority to include within its limits unplatted land. But the court held that the action of the county commissioners in taking the unplatted lands into the city limits, while erroneous, was not a void act; that the action of the commissioners in placing said unplatted lands within the limits of Kearney could not be reviewed in a proceeding to enjoin the collection of the taxes levied on said lands. But that case is not an authority for the contention here. There was no dispute in that case but that the unplatted lands of the South Platte Land Company were within the boundaries of the city of Kearney and a part of said city, and the correctness of the action of the board of commissioners in establishing said boundaries could not be tried in a collateral proceeding brought to enjoin the collection of taxes on lands within the boundary limits. To the same effect see *Sage v. City of Plattsmouth*, 48 Neb., 558. When one claims that his land is illegally included within the boundary of a city or village, doubtless *quo warranto* is a proper remedy. (See *State v. Dimond*, 44 Neb., 154, and *State v. Mote*, 48 Neb., 683.) But the railroad company here does not claim that its bridge, or the land on which it stands, is illegally or otherwise included within the corporate limits of school district No. 2. Its claim is that the officers of this school district went outside of its corporate limits and assessed the property in controversy. If the district court, therefore, based its decree in this case upon a finding of law that the remedy of the railroad company here was by *quo warranto* proceedings, that finding is wrong. A second argument in support of the contention that the petition does not state a cause of action, is, in effect, that the petition does not allege that the taxes sought to be enjoined were levied or assessed for an illegal or unauthorized purpose within the meaning of section 144, article 1, chapter 77, Compiled Statutes, and, therefore, the court is without jurisdiction to entertain an action to enjoin the collection of these taxes; that the railroad company must pay the

taxes under protest and then recover them back by proceedings pointed out in said chapter. But the district courts of this state are by the constitution invested with general equity jurisdiction, and this jurisdiction the legislature can neither take away nor impair. It must be remembered that this action is not based upon the theory that the tax sought to be enjoined is erroneous because of some irregularity in the manner of its assessment; but the tax is assailed as absolutely void upon the ground that the property upon which it is levied was not within the jurisdiction of the school district which imposed the tax. A case almost identical in principle with the one at bar is *Touzalin v. City of Omaha*, 25 Neb., 817. In that case Touzalin owned some lots between Twenty-seventh and Twenty-eighth streets, in the city of Omaha, bounded on the south by California street. The city ordered this California street to be graded from Twenty-second to Twenty-sixth street and a tax levied upon abutting property to pay the cost of such grading. The ordinance did not provide that California street should be graded between Twenty-seventh and Twenty-eighth, where Touzalin's property was located, but nevertheless the city authorities assessed a tax upon Touzalin's property to pay for grading the street. Touzalin then brought suit to enjoin the collection of these taxes. The district court dismissed the petition and Touzalin appealed. In this court the point was made by the attorney for the city that, since the taxes were not levied for an illegal or unauthorized purpose, the district court had no jurisdiction to enjoin their collection; that Touzalin's remedy was to pay them under protest in accordance with the provisions of chapter 77, Compiled Statutes. This court overruled that contention, and said: "Injunctions to prevent the collection of taxes are not favored and should only be granted where the relief at law is wholly inadequate. If, however, the tax is void,—in other words, is levied without authority of law,—the forms of law nevertheless being used to cast a cloud upon the title of the party's real

estate and thereby diminish its value, the power of the legislature to close the doors of the courts to aid the taxpayer is very doubtful. A void tax is no tax. How then can the statute debar the taxpayer from enjoining the unlawful sale of his property to pay such alleged taxes?" And it was held that since the property of Touzalin was outside the district which the ordinance of the city of Omaha ordered graded that the taxing authority had no jurisdiction to levy a tax upon it to pay the cost of such grading and that a tax so levied was absolutely void, and that the court, notwithstanding the statute, had jurisdiction to enjoin it. To the same effect see *Bellevue Improvement Co. v. Village of Bellevue*, 39 Neb., 876; *Chicago, B. & Q. R. Co. v. Nemaha County*, 50 Neb., 393. If, then, the allegations of the petition are true, viz., that no part of the west half of the railroad company's bridge is within the limits of said school district No. 2, the officers of that district had no jurisdiction or authority to levy the tax in question, as their jurisdiction to levy taxes upon real estate for school purposes was and is limited to the real estate within the corporate boundaries of their school districts, and the district court, notwithstanding the statute, had jurisdiction to enjoin the sale of this property for such tax.

5. Section 8, subdivision 3, chapter 79, Compiled Statutes, provides: "Every school district shall, in all cases, be presumed to have been legally organized when it shall have exercised the franchises and privileges of a district for the term of one year." Another contention of the defendants in error is that the decree of the district court must be affirmed, because the undisputed facts in the record show that school district No. 2 has existed as a school district and exercised the franchises and privileges of one since the year 1869, and that for several years prior to the levy of the tax sought to be enjoined in this action it had been levying taxes for school purposes upon this identical property, and, if we understand counsel, they deduce from these facts the

proposition that the courts must conclusively presume not only that school district No. 2 is legally organized, but that the west half of the railroad bridge is within its boundaries. In support of this contention counsel cite us to the section of the statute just quoted and to *State v. School District*, 42 Neb., 499. Neither the statute nor the case sustains counsel's contention. This is not an action which calls into question the legality of the organization of school district No. 2; and if it can be said that jurisdiction and authority to levy taxes are a franchise and privilege within the meaning of said section 8, and that this action calls into question the right of said school district to exercise such a franchise and privilege, still the statute requires the courts to presume nothing further than the legal organization of the school district. By this statute the court is not required to presume that any piece of land is within or without the limits of such a school district. By the pleadings in this case the *situs* of the railroad bridge is made a question of fact.

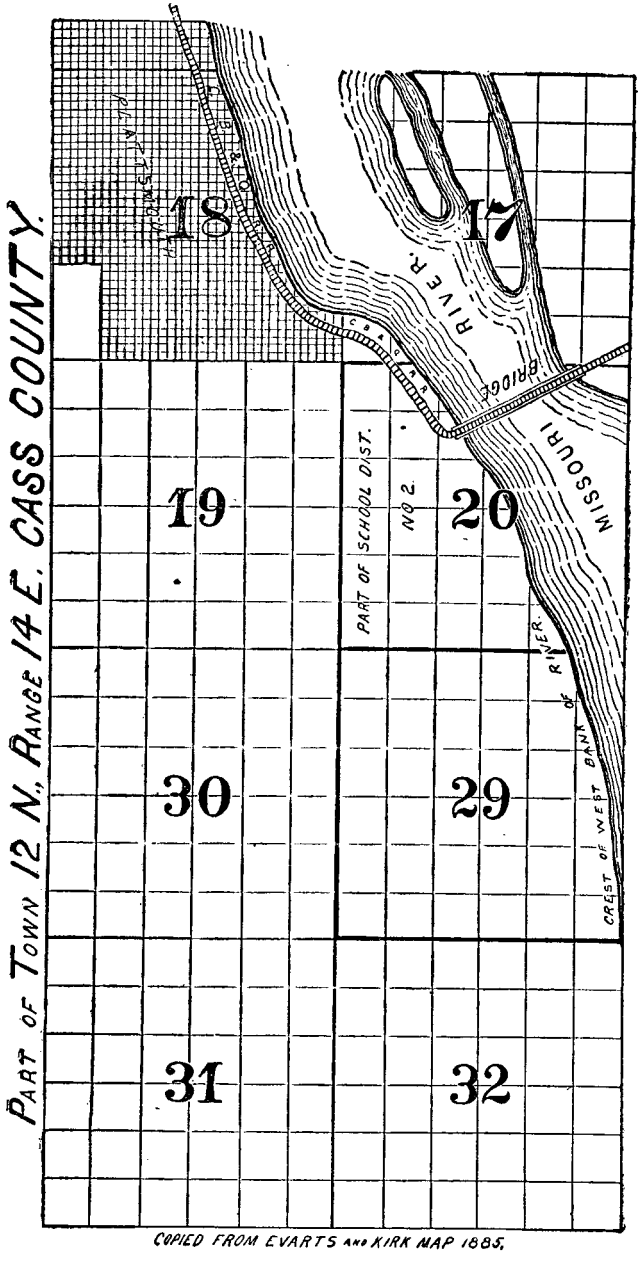
6. As already stated, the court found generally against the railroad company, and one of the issues made by the pleadings was that the railroad company had voluntarily listed the tax sought to be enjoined in the year 1895, and for prior years, and that by reason of its conduct in that respect it was estopped from maintaining this action. The undisputed evidence in the record is that the taxing officer of the railroad company in 1895 listed with the officers of school district No. 2 the west half of its railroad bridge; that he had so listed it for some years prior to that time. For the purpose of the argument under consideration, and for that purpose only, we assume that the district court based its decree upon a finding made by it that the railroad company had estopped itself to maintain this action by reason of its conduct in listing its property in 1895 and prior years. If the court did so find, was its conclusion correct? *State v. Baker*, 31 S. W. Rep. [Mo.], 924, is a case in point. In the year 1872, and prior to that time, Baker owned a piece of land in Mis-

sissippi county, Missouri. The legislature of Missouri in that year changed the boundary line between the counties of Mississippi and New Madrid. This change put Baker's land in New Madrid county. It seems that for some years subsequent to this time Baker listed his land as being in New Madrid county and paid the taxes thereon. Subsequently he resisted the payment of a tax levied by the authorities of New Madrid county, on the ground that the act of the legislature of 1872, changing the boundary line between Mississippi and New Madrid counties, was unconstitutional, and therefore his land was not, and never had been, in New Madrid county. It was urged that Baker had estopped himself to maintain the action because of his listing his land with the county authorities of New Madrid county and paying taxes thereon, and because he had represented to the county authorities of New Madrid county that his land was in that county by listing it for the very taxes he was then resisting; but the court said that there was no principle of estoppel in the case; that Baker's listing his land as in New Madrid county was the result of a mistake of fact upon his part. In *Town of Clinton v. Town of Haddam*, 50 Conn., 84, the authorities of the town of Haddam received a notice from the authorities of the town of Clinton that a pauper belonging to the former town was on expense in the latter town. The authorities of Haddam, believing in fact that the pauper belonged to their town, wrote the authorities of Clinton, requesting them to be economical as possible in the matter and promised to pay for the pauper's support. Four years afterwards, the pauper again needing aid from the town, the authorities of Haddam were notified of the fact and the supplies were furnished by the town of Clinton. During all this time the authorities of Haddam believed that the pauper belonged to their town and conceded this to the authorities of Clinton, who by reason of this fact took no steps to investigate the matter or to hold any other town responsible. The means of knowledge were equally open

to both towns. In a suit brought by the town of Clinton against the town of Haddam for the supplies last furnished the pauper the court held that the town of Haddam was not estopped from showing that the pauper was not legally chargeable to it. The court based its decision upon the ground that a party is not estopped by an admission made in ignorance of his rights when the admission was the result of an innocent mistake of a material fact. *Chicago N. W. R. Co. v. Auditor General*, 18 N. W. Rep. [Mich.], 586, is another authority in point here. The case is too long for review, and we content ourselves with quoting the syllabus: "Where a railway company makes out a report of earnings to present to the state for taxation, no error or want of fullness in the report can be made a ground of estoppel to prevent the company from disputing the propriety or legality of an assessment based upon such report, unless fraud or bad faith be alleged." See, also, as applicable to the point under consideration, *Parke County Coal Co. v. Campbell*, 39 N. E. Rep. [Ind.], 149; *Lee v. Templeton*, 73 Ind., 315. In the case at bar the evidence shows that the tax agent of the railroad company listed the west half of this bridge for taxation in said school district No. 2 because he erroneously believed that said half of the bridge was in the boundary limits of said school district. His mistake was a mistake of fact. It is neither pleaded nor proved by the defendants in error that any of them believed that the bridge was in fact within the limits of school district No. 2; nor that they believed the statement of the tax agent, if he made one, that it was within the limits of said district; nor that they changed their status in any respect by reason of the tax agent so listing the property. All that appears is that the tax agent so listed the property as being in school district No. 2; that he did this because of a mistake of fact as to the actual location of the bridge and that the mistake was innocently made; but it does not appear that the school district was in any manner prejudiced by such listing or representation of the rail-

road company's tax agent, and we conclude, therefore, that the conduct of the railroad company in listing its property as being in school district No. 2 in the year 1895, and prior years, does not estop it from maintaining this action; and if the court based its decree upon a finding of law made by it, that the company was estopped by reason of its conduct in the premises, the decree is contrary to law.

7. We come now to the consideration of the correctness of the finding of fact made by the district court that the west half of the railroad company's bridge is within the limits of said school district No. 2. We take judicial notice of the fact that the Missouri river is a navigable stream. The middle of its channel is the eastern boundary of the state at the point where the railroad company's bridge crosses the Missouri river from Iowa into Cass county. (Enabling Act, sec. 2; 13 United States Statutes at Large, p. 47, sec. 2.) The eastern boundary of Cass county, where it is crossed by said bridge, is the middle of the channel of the Missouri river. (Compiled Statutes, ch. 17, art. 1, sec. 10.) The evidence shows, without conflict, that school district No. 2 is in Cass county and composed among others, of section 20, in township 12 north, and range 14 east of the Sixth P. M.; that this section is fractional; that the road-bed is constructed over a part of the northwest quarter of the northwest quarter of said section to the bank, bluff, or high-water line of the river, and there joins the west end of the railroad bridge. The following plat will assist us in understanding the question at issue, viz., whether the west half of the railroad bridge in question is within the limits of said school district No. 2:


PART OF TOWN 12 N, RANGE 14 E. CASS COUNTY.
18
17
19
20
30
29
31
32
RIVER R.
BRIDGE
MISSOURI
PART OF SCHOOL DIST. NO 2
CREST OF WEST BANK OF RIVER.
COPIED FROM EVARTS AND KIRK MAP 1885.

The evidence, without contradiction, also shows that the United States surveyed and platted this section 20 and other sections of land next to the river in the same township; that this section 20 was surveyed and platted as a fractional section, as shown on the foregoing plat; that in making the survey the United States followed the meanderings of the river at the crest of the river bank, or at high-water line; that no land east of the crest of the bank or bluff or high-water line was by the survey or plat made by the United States included in said section 20, and that no part of the bridge of the railroad company is on any part of said section 20, as surveyed and platted by the United States; that the western bank of the river where the bridge crosses is a steep bluff some 80 feet high; and that about 120 feet of the west end of the bridge spans a space between low and high water mark. The contention of the defendants in error is that the eastern boundary of school district No. 2, where crossed by the bridge, coincides with the eastern boundary of the state and Cass county, viz., is the middle of the channel of the river,—in other words, that the eastern boundary of said section 20 is the middle of the channel of the river,—whereas the evidence shows that the United States made the eastern boundary of said section 20 the crest of the west bluff of the river. The statutes of this state, since February, 1869, have provided, in effect, that the superintendent of schools of each organized county should divide his county into school districts. (General Statutes, 1873, ch. 68, sec. 1.) The evidence further shows that the county superintendent of Cass county, in 1869, divided that county into school districts, and that school district No. 2 of this record was constituted of certain named sections of land, among others, said section 20. Suppose said school district No. 2 had been and was now composed of only said section 20, where would be its eastern boundary? A school district is the territory under the jurisdiction of a single school board. (Compiled Statutes, ch. 79, subdiv. 1, sec. 1.) Jurisdic-

tion, as used in this section of the statute and applied to the facts in litigation here, means the power and authority to levy taxes upon property within the limits of the school district for school purposes. Possibly the county superintendent of Cass county, in dividing his county into school districts, might have made the eastern boundary of the school district coincide with the eastern boundary of the county. But the eastern boundary of section 20, as surveyed and platted by the United States, is not the middle of the channel of the Missouri river, is not the low-water line of said river, but it was and is the crest of the west bluff or bank of the river,—in other words, the high-water line. From the evidence in the record before us we are constrained to the conclusion that the eastern boundary of said school district No. 2, at the point where touched by the railroad bridge, is the eastern boundary of said section 20 as surveyed and platted by the United States, and that this latter boundary line is the crest of the river bluff or high-water line, and that, therefore, no part of the west half of the railroad bridge is in said school district No. 2. In the absence of express legislative authority, the officers of a school district are without jurisdiction to lay a tax upon real estate not within the limits of their school district, and a tax so levied, no matter for what purpose, is absolutely void. We have not overlooked the suggestion of counsel for the defendants in error that this bridge is personal property; but we do not see how the determination of the question as to whether the bridge is real or personal estate is important here. The question involved in this case is not what is the character of this property, but where is it situate? If it be conceded that the bridge is personal property, its *situs* or situation is not within the limits of this school district, either actually or constructively.

Counsel for defendants in error, in support of their contention of the right of the school district to assess the west half of the bridge in controversy, cite us to *St. Louis*

Bridge Co. v. City of East St. Louis, 12 N. E. Rep. [Ill.], 723. In that case the right of the city of East St. Louis to tax, for municipal purposes, one-half of the bridge across the Mississippi river at that point was sustained. The bridge company resisted the taxes levied by the city of East St. Louis on the ground that the city did not furnish the bridge company fire and police protection and lights, etc.,—in other words, that it received no benefits from the taxes paid to the city,—and it therefore claimed to be exempt from municipal purposes; but the court based its decision upon the fact that the western boundary of the city of East St. Louis, as fixed by its charter, was the middle of the channel of the Mississippi river, and that, therefore, the eastern half of the bridge was within the limits of East St. Louis. *Henderson Bridge Co. v. City of Henderson*, 14 S. W. Rep. [Ky.], 85, is another case very much like the St. Louis bridge case. There it was held that the city of Henderson had a right to tax the bridge across the river at that point, not only to the middle of the channel of the Ohio river, but to tax all that part of it extending from Kentucky to the low-water line of the river on the Indiana side, and that decision, it seemed, was based upon the ground that by some charter or grant the corporate limits of the city of Henderson extended not only to the middle of the channel of the Ohio river, but extended to the low-water line of the river on the Indiana side. But we have not been able to find any case where any court has ever held, in the absence of an express statute authorizing it, that a municipality or school district had authority to levy a tax upon real estate outside of its limits, nor do we think any such a case can be found. We must not be understood from anything said in this opinion as deciding anything in reference to the riparian or littoral rights of the owner of said section 20, or of any other piece of land whose boundary is the Missouri river. We do not decide whether the owner of that part of section 20 lying next to the Missouri river has any title or may exercise any rights as riparian owner

over any part of the soil lying east of the high-water or bluff line of the Missouri river. That question is not presented by this record. The owner of lands bounded by a navigable stream, because of the fact that he is a shore proprietor, may have certain rights over the soil below the high-water line of such stream and in the waters thereof; but it does not necessarily follow because the proprietor is invested with these rights and privileges below high-water line that he owns the fee-simple title to the soil below that line. The fee-simple title to the soil is one thing, riparian rights over that soil is another and a very different thing. Decree reversed and cause remanded.

REVERSED AND REMANDED.

WALTER C. BEDWELL V. CUSTER COUNTY.

FILED APRIL 21, 1897. No. 7235.

1. **County Treasurers:** COMPENSATION. Section 1, chapter 44, Session Laws of 1887, limited the compensation of county treasurers of counties of 25,000 inhabitants or less to $2,000 per annum for all services rendered by such treasurers by virtue of their office.

2. ———: EDUCATIONAL FUNDS. The statutes in force in 1888 and 1889 made it the duty of the county treasurers of such counties to collect and remit to the state treasurer moneys owing to the state arising from the leasing and sale of the educational lands of the state situate in such counties.

3. ———: ———: FEES. By chapter 80, Session Laws of 1887, allowing such county treasurers a fee of one per cent on educational land funds collected and remitted by them to the state treasurer, the legislature intended the state to reimburse such county for the services rendered by its treasurer in the collection and remittance of such fund.

4. ———: ———: ———. The fees paid by the state to such a county treasurer for collecting and remitting the educational land fund should by the latter be added to all other fees received by him as such treasurer, and if the aggregate exceeds the sum of $2,000 per annum the excess should be turned into the treasury of his county by him.

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

Sullivan & Gutterson, for plaintiff in error.

E. P. Campbell, *J. R. Dean*, and *John S. Kirkpatrick*, *contra.*

RAGAN, C.

During the years 1888 and 1889 Walter C. Bedwell was county treasurer of Custer county, a county having less than 25,000 inhabitants. During his term of office he collected $19,861 belonging to the educational land fund of the state. The money was derived from the sale and leasing of school lands belonging to the state, and for collecting and remitting this money to the state treasurer the state paid Bedwell, on a warrant duly drawn in his favor therefor, the sum of $198.61, or one per cent of the amount of the educational land fund collected. The amount so paid him by the state treasurer Bedwell claimed the right to retain in excess of his salary of $2,000 per year as county treasurer of Custer county. The county sued the treasurer for this money and recovered a judgment, which the treasurer brings here for review.

By section 1 of an act passed and approved April 4, 1887, and which went into force about three months thereafter (see Session Laws, 1887, p. 463, ch. 44), it was provided that every county treasurer in counties having a population of 25,000 inhabitants or less whose fees should in the aggregate exceed the sum of $2,000 should pay the excess into the treasury of their county. In other words, this act limited the compensation of county treasurers in counties of the class to which Custer belongs to $2,000. By an act which went into force April 4, 1887, (see Session Laws, 1887, p. 615, ch. 80), it was provided that county treasurers should be allowed as compensation for the collection of educational land funds one per

cent of all such funds collected by them, and the auditor of public accounts was authorized and directed by the act to issue his warrant therefor in the same manner as was provided for the payment of county treasurers' fees for the collection of state taxes. The contention of the plaintiff in error here is that by the provisions of the act last quoted the state was required to pay him a compensation for collecting educational land funds for the state, and that he is under no obligation to account for moneys so received as a part of the fees of his office as treasurer of Custer county. We think these two acts of the legislature of 1887 should be construed together and both should be read and considered in connection with the statute governing the sale and leasing of the educational lands of the state. By the latter statute it is made the duty of the county treasurer of each county, in which are situate educational lands belonging to the state, to receive the moneys owing to the state arising from the leasing and sale of such lands and to remit such money to the state treasurer. By the first act of 1887, quoted above, the salary or compensation of county treasurers of counties of 25,000 inhabitants or less is limited to $2,000, and this is to be in full for all services rendered by them by virtue of their office. The second act of 1887, quoted above, did not repeal or modify the first act, but by it the legislature intended that the state should reimburse the county for services performed by the latter's treasurer for the state in collecting and remitting the educational land funds. It was therefore the duty of the treasurer of Custer county to account for the compensation paid him by the state for collecting the educational land funds as part of the fees of his office as treasurer of Custer county, and if such compensation, added to the other fees of his office, exceeded $2,000 per year, he was required to pay the excess into the treasury of his county. The judgment of the district court is

AFFIRMED.

JOSEPH G. SLOAN V. CLARA VAN BUSKIRK.

FILED APRIL 21, 1897. No. 7216.

1. **Sale by Husband to Wife: CONSIDERATION.** The signing by a wife of a mortgage upon the homestead of herself and husband, the legal title to which is in him, to raise money with which to pay his debt, is such a valuable consideration, if otherwise sufficient, as will support a sale of personal property of the husband to the wife.

2. ———: ———. Evidence examined, and *held* to sustain the finding of the jury.

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

G. E. Becker and *W. W. Giffen*, for plaintiff in error.

Lindsay & Raper, contra.

RAGAN, C.

This is an action of replevin brought in the district court of Pawnee county by Clara Van Buskirk against Joseph G. Sloan, the sheriff of said county. Mrs. Van Buskirk had a verdict and judgment, and the sheriff brings the judgment here for review.

The first argument is that the verdict is not sustained by sufficient evidence. The record shows that on and prior to the 31st day of December, 1892, Mrs. Van Buskirk's husband owned a "Racket-Store" in the village of Burchard, Nebraska; that on said date Douglas & Son brought suit against Mr. Van Buskirk to recover a claim of about $96 and caused the store to be seized on attachment; that an agreement was then entered into between Van Buskirk and his wife to the effect that she would unite with him in mortgaging their homestead to raise the money with which to pay off the claim of Douglas & Son; and in consideration of this Van Buskirk agreed to and did sell and convey to her the "Racket-Store." The mortgage was made on the homestead and about $81

realized, and Mrs. Van Buskirk, in addition, furnished $22 in money, and the claim of Douglas & Son was paid and discharged and she took immediate possession of the "Racket-Store," without any knowledge or notice that her husband was indebted to any other person. In February, 1893, Butler Bros. caused this "Racket-Store" to be attached as the property of Mr. Van Buskirk, and his wife then brought this action. The court, under proper instructions, submitted the good faith of the transaction between Van Buskirk and his wife to the jury, and its finding that the sale of the goods by the husband to the wife was made in good faith and without fraudulent intention on the part of either of them to defraud the husband's creditors is abundantly sustained by the evidence. But counsel make the point that the consideration moving from Mrs. Van Buskirk to her husband for this store was not a valuable consideration. We think it was. The homestead mortgaged was the only real estate owned by either of the parties. It was a small house and lot in the village of Burchard and worth less than $2,000; the legal title was in the husband, but the record shows that the wife by washing and ironing had earned a part of the money which went to pay for this homestead; but if she had not contributed anything towards purchasing it, she had an interest in this of which she could not be deprived except by her voluntary act. In *Cox v. Einsphar*, 40 Neb., 411, it was held that the release by a wife of her dower interest in real estate, the title to which was in her husband, was a sufficient consideration to sustain a transfer of personal property from the husband to the wife. The property conveyed by the husband to the wife in this case was of the value of about $140, and we think, therefore, that the wife parted with or gave a valuable consideration for the goods purchased of her husband. The judgment of the district court is

AFFIRMED.

SOUTH PARK IMPROVEMENT COMPANY V. A. H. BAKER.

FILED APRIL 21, 1897. No. 7152.

1. **Review:** EVIDENCE. This court will not disturb a finding made by a district court on the ground that such finding is not supported by the evidence, solely because we may be of opinion that had we tried the issue we would have reached a contrary conclusion.
2. **Attachment:** MOTION TO DISCHARGE. One made defendant in an attachment proceeding may move to discharge such attachment from the whole or any part of the property attached notwithstanding the fact that he had disposed of his interest in such property prior to its seizure.
3. ———: ———: ISSUE. The issue of fact in a proceeding to discharge an attachment is not whether the attachment defendant owns the property, nor whether his grantee has an unimpeachable title or interest therein.

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

R. C. Glanville, for plaintiff in error.

W. H. Thompson, contra.

RAGAN, C.

This is a proceeding in error to review a judgment of the district court of Hall county discharging an order of attachment.

1. The first argument is that the district court erred in finding that the defendant in error, the defendant in the attachment suit, had not made a fraudulent disposition of his property. It is a waste of time to bring to this court for review, on the ground of non-support in the evidence, a judgment of a district court based upon a finding made upon conflicting evidence where such finding has sufficient evidence for its support. It has been so many times decided that this court will not disturb the finding made by a district court on conflicting evidence, if there is sufficient evidence to support the finding made, that to restate the rule and cite the cases would be a use-

less consumption of time, and it is a matter of surprise that we are so often called upon to review such judgments. In the case at bar the plaintiff alleges for attachment every ground provided by the statute except that the attachment defendant was a non-resident of the state and that he had fraudulently contracted the debt sued for. These allegations of the affidavit were put at issue and that issue tried by the district court upon conflicting evidence, and, after a patient hearing and consideration of this evidence, the deliberate judgment of that court was that the plaintiff in the attachment suit had failed to show that the attachment defendant had made a fraudulent disposition of his property. We have no right to disturb this finding, even if we were of opinion that had we been trying the issue we would have reached a different conclusion.

2. It is said by the plaintiff in error that the undisputed evidence shows that the attachment defendant had, prior to the issuing of the attachment, disposed of all his interest in the attached property, and therefore it is insisted that the attachment defendant had no standing in court to move or to be heard in support of a motion to discharge the attachment. We assume, for the purposes of this opinion, that the evidence shows, without dispute, that prior to the attaching of the property in question the defendant in the attachment had disposed of his entire interest in such property; but one made defendant in attachment, in which proceeding property has been seized, may move to discharge such attachment from the whole or any part of the property seized, notwithstanding the fact that he had disposed of his interest in the property prior to its seizure. (Code of Civil Procedure, sec. 235.) This point was thoroughly considered in *McCord v. Bowen*, 51 Neb., 247, decided at this term. All the cases in this court bearing on the subject were reviewed and a conclusion reached contrary to that made here by the plaintiff in error. Counsel for the plaintiff in error say that since the attachment defendant has con-

veyed his interest in the property they are unable to understand how any rights of his can be affected by the seizure of the property; that that is a matter which concerned only the vendee of the attachment defendant. Counsel overlook the fact that the issue of fact in a proceeding to discharge an attachment is not whether the attachment defendant owns the property. That fact is affirmed, it is true, by the plaintiff in attachment, and in the proceeding to discharge he is estopped from asserting the contrary. Nor is the issue of fact in such proceeding whether the vendee or pledgee of the attachment defendant has an unimpeachable title or interest in the attached property. Generally, the issue of fact tried on a proceeding to discharge an attachment is directed to the motives which inspired the conduct of the attachment defendant in dealing with his property or in contracting the obligation made the basis of the suit against him to which the attachment is auxiliary. Under our statute the issues in such a proceeding must be either whether the defendant therein was at the time the attachment was issued a non-resident of the state, whether he fraudulently contracted the debt sued on, or whether he had made a fraudulent disposition of his property. Even if he has at the time of the seizure of the property no interest whatever in it, he still has the legal right to resist the attachment for the purpose of preventing a judgment of fraud against him in disposing of the property or in contracting the debt; and if the issue tendered is whether at the time of the issuance of the attachment he is a non-resident, he has a right to litigate that issue, as it goes to the jurisdiction of the court. The judgment of the district court is right and is in all things

AFFIRMED.

ERIE W. FENTON V. AMERICAN JEWELRY COMPANY.

FILED APRIL 21, 1897. No. 7232.

Transcript for Appeal: TIME OF FILING: CONTRADICTION OF RECORD. The record of a district court showed that a transcript for the purpose of perfecting an appeal from a justice of the peace was filed within the statutory time. On a motion to dismiss, the court considered the filing mark and a certificate of the clerk to the same effect and also an affidavit of the appellee's attorney, containing a statement that he had searched the records after the time for filing the transcript and had not found it, and also hearsay evidence in the nature of statements which the deputy clerk had made to him with regard to the clerk's acts. *Held*, That this affidavit was insufficient to contradict the record, and that the appeal should not have been dismissed.

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

A. D. McCandless, for plaintiff in error.

E. N. Kauffman, contra.

IRVINE, C.

The American Jewelry Company sued Fenton before a justice of the peace and recovered judgment. Fenton filed an appeal bond which was duly approved within the statutory time. Later he filed his transcript in the district court, where the jewelry company moved to dismiss the appeal on the ground that "said action was not appealed and filed and docketed in the office of the district court within thirty days after the judgment was rendered in the justice court." This motion was sustained and the appeal dismissed. The judgment was rendered by the justice on the 2d day of November, 1893. The transcript of the record before us recites that the transcript from the justice court was filed in the office of the clerk of the district court on the 1st day of December, 1893, which was within the statutory period. There is in the record a bill of exceptions certified to embrace all the evidence given or offered on the hearing of the motion ex-

cept the filing mark of the clerk upon the transcript. This filing mark we also have before us in the record, and it bears date of December 1, 1893. The evidence embraced in the bill of exceptions consists of an affidavit of the attorney for the jewelry company and a certificate by the clerk of the court. The affidavit is to the effect that on the 4th of December the attorney went to the office of the clerk and asked the deputy clerk if the appeal had been filed and docketed; that the deputy examined the records and said no papers had been filed; that the attorney also examined the docket and nothing was at that time filed or docketed; that the same thing occurred December 9; that on December 12 the deputy clerk informed the attorney that the clerk had received the transcript in Wymore and had carried it in his pocket and failed to deliver it into the office "until a couple of days before." The clerk certified that he filed the transcript December 1, marked it filed that day in his own handwriting, and received from appellant's attorney the sum of $1.50 filing fee.

The record before us does not support the order of the district court. It is argued by the defendant in error that the clerk's certificate is not competent evidence of the facts therein stated. But if this be a case for the application of strict rules of evidence, the affidavit embraced only hearsay evidence, except in so far as it stated the result of affiant's search. The evidence before the court then would be its own record in support of the appeal on one side and the affidavit of the attorney that he had not found the transcript on file on the other. This would be clearly insufficient to disprove the record. We are inclined, however, to think that the case falls within the rule that a court takes notice of its own record including the signatures of its officers and the date of proceedings. (*State v. Postlewait*, 14 Ia., 446; *Alderson v. Bell*, 9 Cal., 315; *State v. Bowen*, 16 Kan., 475.) If so, the judge might have informed himself from any trustworthy source of the facts and his action would not be interfered

with. But the record discloses that he proceeded solely in the light of the evidence referred to, which, as we have seen, was insufficient.

REVERSED AND REMANDED.

FIRST NATIONAL BANK OF TOBIAS V. ELLIS A. BARNETT.

FILED APRIL 21, 1897. No. 7249.

1. **Usury:** ACTION AGAINST NATIONAL BANK FOR PENALTY: RENEWALS OF LOANS: EVIDENCE. In an action against a national bank to recover the penalty for taking usury, it appeared that the transactions between the plaintiff and the bank consisted of a large number of loans evidenced by notes, many of which had been from time to time renewed. *Held*, That evidence of the whole course of transactions was material in order to trace the different debts and the interest reserved on each, although some transactions were not pleaded as usurious.

2. ———: ———. While under the state law no action can be maintained to recover back payments of usury, and all remedy is lost by payment of the debt, the national banking act provides otherwise, and an action will lie against a national bank to recover the penalty, notwithstanding the borrower has paid both principal and interest.

3. ———: INSTRUCTIONS: EVIDENCE. Certain instructions examined, and *held* properly refused and evidence held sufficient to sustain the verdict.

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

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

Ong & Jensen and *E. S. Abbott, contra.*

IRVINE, C.

This was an action by Barnett against the First National Bank of Tobias to recover the penalty provided by the United States statutes for the receipt of usurious interest by a national bank. The petition in twenty-eight counts alleges as many payments of usurious interest, amounting in all to $349.95, and prays judgment for $699.90, double the amount of such payments. The an-

swer pleaded the statute of limitations as to six of the counts and generally denied all the allegations of the petition. There was a trial to a jury, followed by a verdict and judgment for $301.60. The defendant prosecutes error. The petition in error contains forty assignments, some of them presenting questions of law which have been determined since the briefs were filed. Some present questions of fact. These it would be unprofitable to review in detail.

It is now well settled that the state statutes relating to usury do not apply to the case of national banks so far as the penalty and the remedy are concerned, and that an action to recover usurious interest paid arises upon the payment, and the special period of limitations contained in the federal statutes begins to run from that time. These principles were clearly expressed in the court's instructions.

Some fourteen rulings on the evidence are complained of The only specific complaint made is that the evidence admitted was immaterial. The proof shows that the transactions between the parties consisted of a large number of loans made by the bank to the plaintiff and evidenced by notes, many of which were from time to time renewed. A complicated account was thus presented, and the rulings complained of relate to the admission of evidence of these transactions, some of which are not among the matters complained of in the petition, and many of which antedate the period of limitations. Recurring to the principle that the statute begins to run from the time of payment, it became necessary to go back to the inception of the debt and to follow it through its different stages in order to disclose the usury. While in this process some evidence was introduced which may have unduly influenced the jury, we think it was pertinent for the purpose indicated, and being material for that purpose was properly admitted as tending to prove the issues.

It is argued that there could be no recovery for usurious interest on notes which have been entirely paid. This

argument is supported by citations of cases arising under the state law, such as *Blain v. Wilson*, 32 Neb., 302. These decisions are based on the fact that the state law does not provide for the recovery of usurious interest already paid; but, as we have seen, the federal law governs this case and does so provide.

Complaint is made of the refusal to give certain instructions. So far as these instructions stated the law correctly they were covered by the court's charge. One of them is as follows: "The jury are instructed that if there still remains of the amounts of money borrowed of defendant a greater amount than has actually been charged plaintiff as usury is still unpaid then the plaintiff cannot recover." This instruction, as contained in the record, is unintelligible to us, and whatever principle of law it was intended to express, it could have no effect on the jury except to confuse it. It was, therefore, properly refused. Another instruction refused was that "National banks are not governed by the usury laws of a state and the only penalties incurred by them in taking excessive interest is that imposed by the national banking act." In so far as this instruction could convey to the jury the information that the remedy open to the plaintiff was only that provided by the banking act, it was covered by specific instructions given by the court stating the essentials to a recovery. It is not true, as a general proposition, that national banks are not governed by the usury laws of the state, because the federal law makes the state laws applicable so far as they regulate the rate of interest which may be lawfully charged. Another instruction refused was that "Payments made upon a note to a national bank and indorsed on the same will be applied first upon the principal until the same is fully paid." Had this instruction been given it would have been misleading. It was an attempt to state a rule announced in *Hall v. First Nat. Bank of Fairfield*, 30 Neb., 99; but as there stated it was as follows: "Where payments are made generally to a national bank on a promissory note which includes un-

lawful interest, they will be applied on the principal." The rule was there stated under a peculiar condition of facts, where sway was given to the presumptions of innocence and legality, and payments of doubtful character were therefore applied to reduce the principal instead of to the discharge of usurious interest. Generally speaking, the rule is directly contrary to that stated in the instruction, and payments will be applied to discharge the interest and the surplus to reduce the principal. This is the established rule of the federal courts, and is recognized in *Hall v. Bank, supra;* and to state as a matter of law that all payments must be applied to the reduction of the principal would nullify the usury law relating to national banks, in all cases at least where the debt as well as the usury has not been fully paid. Another group of instructions refused required as a condition for recovery that the interest should have been paid in cash. The court, in its charge, clearly stated to the jury that there could be no recovery except for payments which had actually been made. It is not essential to constitute payment that legal tender money should be delivered. The fact of payment depends upon the agreement and intent of the parties, and may be accomplished in *media* other than cash, if the parties so agree.

It is strongly urged, and with much force of argument, that the evidence does not sustain a verdict for so large an amount. The transactions were complicated, and the evidence of the plaintiff falls far short of being in all points conclusive; but we think that, under the rule in this state established, there was sufficient to sustain the verdict as rendered.

AFFIRMED.

S. K. DAVIS ET AL. V. NEBRASKA NATIONAL BANK OF OMAHA.

FILED APRIL 21, 1897. No. 7199.

Corporations: PROOF OF CORPORATE EXISTENCE. The plaintiff sued as a corporation. The defendants, in their answer, specifically denied the corporate existence of plaintiff. *Held,* That the answer in this respect stated a defense and cast upon the plaintiff the burden of proving its corporate existence.

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

G. M. Johnston and *J. E. Cobbey,* for plaintiffs in error.

E. R. Fogg, contra.

IRVINE, C.

The Nebraska National Bank of Omaha sued the plaintiffs in error on a promissory note alleged by the petition to have been made by the defendants below to the order of the Nebraska National Bank of Beatrice and by the latter bank indorsed and transferred to the plaintiff. The plaintiff recovered judgment for the amount of the note. The petition alleged that the plaintiff was a corporation organized under the laws of the United States. The answer specifically denied plaintiff's corporate existence. No evidence was introduced on the subject. The instructions of the court entirely ignored the issue, and the court refused a peremptory instruction to find for the defendants, as well as a special instruction submitting to the jury for determination the corporate existence of the plaintiff.

It will be observed that there existed no privity of contract between the defendants and the plaintiff bank whereby the defendants were estopped to deny the corporate capacity of the plaintiff, nor are any other grounds of estoppel pleaded. The defense interposed was, therefore, a valid defense in this action. It has been several

times held that a general denial does not present the issue, but that it must be raised by a specific denial in the nature of a plea in abatement (*National Life Ins. Co. v. Robinson*, 8 Neb., 452; *Dietrichs v. Lincoln & N. W. R. Co.*, 13 Neb., 43; *Herron v. Cole*, 25 Neb., 692; *Swift v. Crawford*, 34 Neb., 450); but a special denial of the character indicated is sufficient to present the defense (*Sunapee v. Eastman*, 32 N. H., 470; *Greenwood v. Lake Shore R. Co.*, 10 Gray [Mass.], 373), and such a plea casts the burden of proof of corporate existence upon the plaintiff. (See cases cited in 5 Ency. Pl. & Pr., 82.) At the common law there existed some controversy as to whether *nul tiel* corporation should be pleaded in abatement or whether it might be pleaded in bar. The Nebraska cases cited intimate that this court has considered it to be in the nature of a plea in abatement; but this is immaterial, because, under our Code, defenses of both characters may be presented in one answer. (*Hurlburt v. Palmer*, 39 Neb., 158; *Anheuser-Busch Brewing Ass'n v. Peterson*, 41 Neb., 897; *Herbert v. Wortendyke*, 49 Neb., 182.) It is probable, as suggested in the bank's brief, that this and other defenses were purely technical and devoid of merit. The plea was, however, one of which the defendants might legally avail themselves. The bank was notified by the special plea that it would be called upon to establish its corporate existence. It entirely failed to do so, and the judgment must for that reason be reversed.

REVERSED AND REMANDED.

MINNEAPOLIS THRESHING MACHINE COMPANY ET AL. V. ISAAC REGIER.

FILED APRIL 21, 1897. No. 7208.

1. **Review: JOINT ASSIGNMENTS OF ERROR.** Where two or more plaintiffs or defendants join in a motion for a new trial or in a petition in error, an assignment of error which is not good as to all who join must be overruled as to all.

2. **Malicious Prosecution**: INSUFFICIENCY OF COMPLAINT. The defendant in an action for malicious prosecution will not be permitted to urge the insufficiency of the complaint on which he caused the plaintiff's arrest as a defense to the action.

3. ———: DAMAGES: EVIDENCE: NEWSPAPER PUBLICATIONS. In an action for malicious prosecution the plaintiff, if successful, is entitled to recover damages for the injury to his reputation, and therefore he may prove newspaper publications containing plain accounts of the prosecution without comment thereon. *Filer v. Smith*, 96 Mich., 347, followed.

4. ———: ———: ———: EXPENSES. In an action *ex delicto* where expenses incurred by reason of the tort are recoverable, it is not essential that the plaintiff should have actually paid the money. It is sufficient if he has incurred a legal obligation to do so.

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

George B. France, for plaintiffs in error.

Gilbert Bros., *contra.*

IRVINE, C.

This was an action for malicious prosecution brought by Regier against the Minneapolis Threshing Machine Company and Newton F. Spear. The theory of the case was that Spear instituted the prosecution in the course of his employment as agent for the Threshing Machine Company. The plaintiff recovered judgment against both defendants for $250.

Some of the assignments of error and many of the arguments advanced in the briefs are in their nature applicable to the case of only one of the defendants. The defendants below joined in the motion for a new trial and they have proceeded in this court by a joint petition in error. In such case it is the established law that unless the assignment of error can be sustained as to all who join it must be overruled as to all. (*Gordon v. Little*, 41 Neb., 250; *Small v. Sandall*, 45 Neb., 306; *Harold v. Moline, Milburn & Stoddard Co.*, 45 Neb., 618; *McDonald v. Bowman*, 40 Neb., 269; *Scott v. Chope*, 33 Neb., 41.) We have, therefore, considered only those questions which affect the rights of both defendants.

The first and most serious assignment of error argued relates to the sufficiency of the petition to state a cause of action. In brief, the petition alleges that the defendant Spear filed an information before a justice of the peace whereon the defendants caused a warrant to be issued and the plaintiff to be arrested. The petition properly alleges malice, a want of probable cause, the discharge of the plaintiff, and termination of the prosecution. The complaint or information on which the warrant was based is set out at length. It is of the character required to procure the issuing of a search warrant and closes with a charge that the plaintiff committed the theft complained of. The defect to which attention is called is that the value of the stolen property was not alleged in the complaint; whence it is argued that no crime was charged, that the complaint did not justify the issuing of a warrant, and that defendants cannot, therefore, be held liable in an action for malicious prosecution. We are aware of but two cases in this court which throw any light upon the question so presented. In *Painter v. Ives*, 4 Neb., 122, it was held that an action for malicious prosecution could not be maintained where the court before which the prosecution was instituted had no jurisdiction of the offense charged; but it was added, that this fact appearing, the allegation of the plaintiff's arrest made the petition sufficient as one for false imprisonment. The present case might perhaps be resolved on the same ground, but the petition was manifestly drawn on the theory that the action was for malicious prosecution, and the case was tried throughout on that theory; and pursuing the rule that this court will here confine the parties to the theory adopted by both in the district court, we prefer not in this case to apply the rule of *Painter v. Ives*. *Malone v. Huston*, 17 Neb., 107, was a case where the defendant's contention was that the complaint by him made had not charged a criminal offense. The court was not there required to consider what would be the effect of a complaint substantially defective, hold-

ing as it did that an offense had been charged. It was, however, held that a mere informality, although one which might be available to the accused in the criminal proceeding, was not sufficient to defeat an action for malicious prosecution.

In other jurisdictions the question has frequently arisen and the authorities are not entirely harmonious. In some states it has been held that a total want of jurisdiction in the court before which the prosecution was instituted will not defeat the civil action. (*Stone v. Stevens*, 12 Conn., 219; *Morris v. Scott*, 21 Wend. [N. Y.], 281; *Hays v. Younglove*, 7 B. Mon. [Ky.], 545.) On the other hand, there are cases supporting the doctrine of *Painter v. Ives*, to the effect that such a want of jurisdiction is fatal. (*Bixby v. Brundige*, 2 Gray [Mass.], 129; *Marshal v. Betner*, 17 Ala., 832.) In connection with the latter case, *Ewing v. Sanford*, 19 Ala., 605, is interesting as marking a distinction evidently in the mind of the court between a want of jurisdiction to try the offense charged and a failure to properly charge an offense of which the court had jurisdiction. *Newman v. Davis*, 58 Ia., 447, was a case where it was held that the plaintiff was not liable because the complaint had not charged a criminal offense. In *Shaul v. Brown*, 28 Ia., 37, the same court had held that a prosecution would found an action of this character whether the statement of facts in the criminal case was sufficient or insufficient. A comparison of the two cases leads us to believe that the court in them distinguished between a complaint attempting to charge a crime, but failing in some particulars to do so, and one charging facts not tending to establish any crime whatever, holding an action would lie in the former case and not in the latter. To illustrate: In the earlier case the attempt was made to charge larceny, the property described being a dog, and the objection made was that no such property could be had in a dog as to constitute its theft larceny. In the later case the attempt was made to charge a slander, which it is inferable was not a criminal offense.

In *Krause v. Spiegel*, 29 Pac. Rep. [Cal.], 707, it was held that the action would not lie because the charge before the magistrate furnished no ground for issuing a warrant. Here, again, the charge was slander, but it does not appear whether the decision of the court was based on the question of the criminality of such an offense in California or upon the failure to charge it specifically in the complaint. Conceding, however, that the Iowa and California cases entirely support the defendant's contention, they are opposed to the vast weight of authority. We believe it is the general doctrine that the defendant in an action for malicious prosecution will not be permitted to allege the insufficiency of the complaint on which he caused plaintiff's arrest to shield himself from the consequences of his act. (*Chambers v. Robinson*, 2 Strange [Eng.], 691; *Wicks v. Fentham*, 4 T. R. [Eng.], 247; *Pippet v. Hearn*, 5 B. & Ald. [Eng.], 634; *Parli v. Reed*, 30 Kan., 534; *Bell v. Keepers*, 37 Kan., 64; *Schattgen v. Holnback*, 36 N. E. Rep. [Ill.], 969; *Potter v. Gjertsen*, 37 Minn., 386; *Lueck v. Heisler*, 87 Wis., 644; *Stocking v. Howard*, 73 Mo., 25; *Stancliff v. Palmeter*, 18 Ind., 321; *Dennis v. Ryan*, 65 N. Y., 385.) Reason and justice undoubtedly are in accordance with this rule, and such confusion as exists in the authorities arises, we think, from two sources: The first, the necessity of distinguishing under the common-law practice between trespass and case. This difficulty no longer confronts us. The second, a failure to distinguish between cases where the prosecution was instituted in good faith and failed merely because of the defect in the proceedings, and cases of malicious prosecution where the defendant attempts to use such defect as a shield in the civil action; in other words, a failure to distinguish between the fact of the prosecution and the existence of probable cause therefor.

In the briefs complaint is made of a number of rulings on the introduction of evidence. Only two of these are specifically assigned in the petition in error, and these alone are properly presented for review. There was in-

troduced in evidence a copy of the Omaha *Bee* containing a news paragraph, without comment, stating the fact of plaintiff's arrest and the nature of the charge. The objection made to this was that it was incompetent, immaterial, and that no foundation had been laid for its introduction. We think it was, in its general nature, competent and material. Malicious prosecution is frequently classified with slander and libel as an injury to the reputation, and it has been so recognized by this court. (*Painter v. Ives, supra.*) Whether or not this classification is technically accurate, there is no doubt that the injury to one's reputation arising from an unfounded criminal prosecution is an element of damages. A plain, uncolored statement of such proceedings in a newspaper is a privileged publication and not in itself a tort. Such a publication is a natural and probable consequence and a direct consequence of the institution of the prosecution, and the fact that the prosecution resulted in such a publication may properly be shown to aid the jury in estimating the damages. (*Filer v. Smith*, 96 Mich., 347.) The foundation laid for the introduction of the paper was that after it had been identified, the following examination took place:

Q. Do you know whether the Omaha *Bee* is circulated at Henderson?

A. Yes.

Q. Much?

A. Yes.

Q. Do you know whether it is circulated in York county generally?

A. Yes.

No objection was interposed to any of these questions. No fact is better understood by practitioners than the difficulty of inducing a witness to distinguish between a statement as to his knowledge with reference to a fact and a statement of the fact as known to him. The monosyllabic question, "Much," with the witness's answer, "Yes," shows clearly that the witness in answering these questions referred to the fact of the *Bee's* circulation, and

not merely to the witness's knowledge as to whether or not it had a circulation in the places mentioned. Any circulation would render the fact of publication material. The extent of that circulation went to the probative force of the evidence.

There was introduced in evidence a written contract whereby a stranger to the action transferred the property alleged to have been stolen to the plaintiff. It was objected that the execution of this contract was not proved, but counsel in this respect has evidently overlooked the evidence, which is direct as to the genuineness of the signature. It is also contended that the contract was immaterial. The circumstances are too complex for statement here. It is sufficient to say that this contract, in connection with the other evidence, tended to show a *bona fide* claim of ownership in the plaintiff.

Many objections are urged to the instructions. These objections present no very important question of law and will not be noticed in detail. Some instructions, taken alone, would be incomplete and even inaccurate. But the charge, taken as a whole, was applicable to the evidence, and fairly stated the law of the case in such a way as to supply defects and cure inaccuracies in particular instructions and without any conflict of statement.

It is urged that the verdict was excessive. General damages are recoverable in such a case, and while it does not appear that the plaintiff was actually incarcerated, he was placed under arrest and subjected to the ignominy of a criminal prosecution. Two hundred and fifty dollars is certainly not in any case too much to compensate one for such an injury. It is probable that the verdict includes $25 as attorneys' fees incurred in procuring plaintiff's discharge. It does not appear that this was actually paid, but it is well settled that where such expenses are recoverable at all the legal liability is sufficient whereon to base a recovery, although payment has not yet been made.

It is suggested that the evidence is insufficient. We

think there was sufficient evidence to justify the jury in finding that the plaintiff held the property under a *bona fide* claim of ownership; that this was known to Spear; that Spear had general authority to act for the threshing company in the premises, and that the prosecution was instituted for the purpose of obtaining possession of the property or of compelling plaintiff to pay another man's debt, and not for the purpose of bringing an offender to justice.

AFFIRMED.

BLANCHE FULLERTON V. C. J. DILWORTH ET AL.

FILED APRIL 21, 1897. No. 7161.

Contribution Between Sureties: PLEADING. A sued B and others, alleging that B and the other defendants had with C and others named executed as sureties a bond for the faithful performance of the duties of a county treasurer; that the treasurer had embezzled a certain sum of money which C and others, not parties to the suit, had paid to the county in discharge of their obligations; that thereafter the county had assigned its rights to A in trust for C and the other paying sureties. The petition prayed contribution from the defendants. It did not allege that the assignment by the county to the plaintiff was in pursuance of any agreement with the paying sureties by which A was constituted their trustee. *Held*, That it stated no cause of action in favor of A.

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

A. H. Bowen, for plaintiff in error.

Smith & McCreary, Batty & Dungan, M. A. Hartigan, F. P. Olmstead, and *Tibbets, Morey & Ferris, contra.*

IRVINE, C.

The plaintiff was plaintiff in the district court. Several of the defendants filed demurrers to the petition. These demurrers were sustained and the plaintiff electing to stand on the petition, a judgment of dismissal was en-

tered. The petition is very long, but its substance can be stated without undue prolixity. It alleges that on the 8th day of January, 1890, the defendants, together with Mark Levy and certain other persons named, as sureties for one Charles H. Paul, executed a certain bond to the county of Adams conditioned for the faithful performance by Paul of his duties as treasurer of said county, which bond was duly filed and approved; that Paul qualified and entered upon his duties as treasurer; that during his term of office he embezzled public moneys coming into his hands in the sum of $21,770.25; that in January, 1892, said Levy and others named, the co-sureties of the defendants, made a full and complete settlement of said defalcation and embezzlement with the board of supervisors of said county, "and then and there paid into the treasury of said county the full sum of $21,770.25, being the amount so embezzled by said Paul, the principal on said bond; that on the 14th day of January, 1893, said county of Adams, by its board of supervisors in regular session, duly assigned all their right, title, and interest in and to the said obligation bond aforesaid to this plaintiff in trust for the said Mark Levy" and other sureties named. The petition then alleges the insolvency of Paul and certain of the sureties and prays for an accounting and for contribution by the solvent defendants. The demurrers are not all alike, but one ground in each is that the petition does not state a cause of action. We think that clearly it does not in favor of the plaintiff. The petition does not allege that plaintiff was one of the sureties. Without regard to the legal question which would arise on such an allegation, it does not allege that plaintiff paid the county and took an assignment of its cause of action in consideration of such payment. On the other hand, it affirmatively avers that certain of the sureties made the payment in discharge of the obligation, and then avers that the following year the county assigned its claim to the plaintiff as trustee for those sureties. If the averment of payment and discharge is true, the county had

afterwards nothing to assign. The sureties who paid the obligation had a right of action for contribution in themselves as against the other sureties immediately upon the payment. No assignment by the county was required to vest in them that cause of action. It is not alleged that the assignment was taken from the county to the plaintiff in pursuance of any agreement between the plaintiff and the paying sureties by which plaintiff was constituted their trustee. The arrangement as pleaded was simply between the county and plaintiff. The county had no rights to transfer.

AFFIRMED.

RAGAN, C., not sitting.

BLANCHE FULLERTON V. JAMES C. KAY ET AL.

FILED APRIL 21, 1897. No. 7162.

Contribution Between Sureties: PLEADING.

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

A. H. Bowen, for plaintiff in error.

Smith & McCreary, Batty & Dungan, M. A. Hartigan, F. P. Olmstead, and *Tibbets, Morey & Ferris, contra.*

PER CURIAM.

This case is in all material respects precisely similar to that of *Fullerton v. Dilworth*, 51 Neb., 409, just decided, and for the same reason the judgment is

AFFIRMED.

RAGAN, C., not sitting.

GOTFRIED HARD V. HANNAH HARD.

FILED MAY 5, 1897. No. 7275.

1. **Divorce:** DECREE PROCURED BY FRAUD: PETITION TO VACATE. Petition examined, and *held* to state a cause of action for the vacation of a decree of divorce on account of fraud practiced by the successful party.
2. **Costs:** SECURITY: REVIEW. The refusal of the district court to require a non-resident plaintiff to give security for costs affords no grounds for reversal, on petition in error to this court, where, on a final trial or hearing, the costs of the action are rightly taxed to the defendant.

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

E. W. Thomas, for plaintiff in error.

A. R. Keim, contra.

POST, C. J.

The defendant in error, Hannah Hard, exhibited to the district court for Richardson county her petition in which she alleged that she was married to the defendant therein, Gotfried Hard, in the year 1862, and that the parties named lived and cohabited together until the year 1885, at which time a separation took place in consequence of the defendant's cruel and inhuman treatment; that in the year last mentioned the defendant commenced an action in said court in which he prayed for a decree of divorce from the plaintiff and which, on the 19th day of March, 1886, resulted in a decree in accordance with the prayer of his petition; that there was no personal service of process upon the plaintiff, as defendant in said action, nor was she in any manner personally notified of such proceeding; that the only pretense of service therein was the publication of a notice, which for reasons specifically stated, was wholly insufficient to confer jurisdiction

upon the court. It is further charged that the testimony given in support of the cause of action therein alleged was false and perjured, and that the defendant was thereby guilty of a fraud and imposition upon the court, etc. The prayer was that the aforesaid decree might be adjudged null and void and for a decree of divorce in the plaintiff's favor on account of a cause of action therein alleged. The defendant filed a motion for security for costs, accompanied by a showing that the plaintiff was a non-resident of the state, and a general demurrer to the petition, which were in turn overruled, and to which rulings exceptions were in due form noted. The cause subsequently coming on for hearing upon its merits, there was a finding for the plaintiff substantially in accordance with the allegations of her petition, a final order setting aside the former decree and continuing the cause for hearing upon the plaintiff's petition for divorce, and for the payment of alimony *pendente lite*, from which the defendant Gotfried Hard prosecutes error to this court.

The first assignment of the petition in error which calls for notice is that the petition below fails to state a cause of action, since, as claimed, the allegation of fraud is in general terms only without the statement of any facts whatever. We do not, however, so construe the petition. It appears therefrom that the matters alleged in the defendant's action for a divorce were wholly false; that the evidence adduced to sustain the allegations of the petition, viz., the willful desertion by the plaintiff as the defendant therein, was false and perjured; that the plaintiff was not, as charged, guilty of desertion, but had been driven from her home by means of the inhuman treatment, specifically alleged, of the defendant. Such a pleading is sufficient when assailed by a general demurrer. The proceeding was not, as counsel assume, one for the opening of the decree under the provisions of the Code, but was, tested by the allegations of the petition, an original action. (*Smithson v. Smithson*, 37 Neb., 535.)

It is claimed that the defendant was not permitted to

introduce his evidence in the district court; but in the absence of a bill of exceptions showing that competent evidence was offered and rejected, that criticism is obviously without merit.

Lastly, it is argued that the district court erred in refusing to require the plaintiff to give security for costs. It is, we think, clear that the plaintiff was a non-resident of this state, and that the motion of the defendant should have been sustained. But inasmuch as the latter is by the final decree required to pay all costs of the case, the ruling assigned is error without prejudice. (*Walker v. Russell*, 73 Ia., 340.)

DECREE AFFIRMED.

BERNARD FOWLER ET AL. V. CHARLES T. BROWN ET AL.

FILED MAY 5, 1897. No. 7229.

1. Appearance: DISCLAIMER. A formal disclaimer, by one made a party defendant to a proceeding *in rem*, of any interest in the subject of the action is not a special appearance for the purpose of challenging the jurisdiction of the court over his person; but is, in substance, a defense requiring the judgment of the court, and amounts to a general appearance.

2. Disclaimer: COSTS. Section 618 of the Code, viz., "Where defendants disclaim having any title or interest in land or other property the subject-matter of the action, they shall recover costs, unless for special reasons the court decides otherwise," is declaratory merely of the rule in equity, since the discretion reserved to the court implies a determination from an inspection of the pleadings of defendant's right to be dismissed from the action.

3. Practice: NOTICE OF CROSS-BILL: ACTION IN REM. The service of a formal summons is not essential, in order to give the district court jurisdiction over a defendant in an action *in rem*, for the purpose of a cross-petition filed by a co-defendant after answer day. (*Patten v. Lane*, 45 Neb., 333.)

4. Equity: JURISDICTION. When a court of equity has acquired jurisdiction over a cause for any purpose, it may retain it for all purposes and proceed to a determination of all issues made by the pleadings.

5. Summons: SERVICE BY PUBLICATION. Service by publication, or in such manner as may be authorized by statute, is sufficient in proceedings substantially *in rem*, but where the purpose of the action is to determine the personal rights of the parties, and to enforce a mere personal obligation against the defendant, personal service within this state is essential to the jurisdiction of the court. (*Anheuser-Busch Brewing Ass'n v. Peterson*, 41 Neb., 897.)

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

Hall & McCulloch, for plaintiffs in error.

Harl & McCabe, James McNeny, and *John H. Ames, contra.*

POST, C. J.

The action out of which this proceeding arose was brought by Stephen Douglas Bayer in the district court for Lancaster county, to foreclose a mortgage executed by George K. Brown and wife in favor of J. R. and L. C. Richards, to secure certain notes of the said George K. Brown and his brother, Charles T. Brown, payable to the order of the mortgagees named. Among the several parties named as defendants to that action were the said George K. and Charles T. Brown, Benjamin B. Dow, and the plaintiffs in error, Bernard Fowler and the Fowler Elevator Company. Personal service was had upon the Browns and certain other defendants, but return "not found" was made as to the plaintiffs in error and Dow. The last named defendant, however, on the 24th day of February, 1893, and previous to the day named therefor in the summons, filed his answer admitting the existence of the Bayer mortgage and its lien in the order claimed, but denying knowledge of the ownership thereof or the amount due thereon, and asking that the plaintiff be put upon his proof in that regard. Accompanying his answer was a cross-petition for the foreclosure of a mortgage executed by the said George K. Brown and wife upon the premises described in petition to his co-defendant Charles T. Brown, to secure notes payable to the

latter in the aggregate sum of $15,000. Said notes and mortgage were, according to the allegations of the answering defendant, sold and transferred before maturity, for value, to the plaintiffs in error, Bernard Fowler and the Fowler Elevator Company, from whom they were by said defendant purchased in the usual course of business, before maturity. The prayer of the cross-petition was for an accounting of the amount due on said notes and mortgage, for a decree of foreclosure, and personal judgment for any deficiency remaining after exhausting the proceeds of the mortgaged property. On the 1st day of April, 1893, the plaintiffs in error voluntarily appeared in said cause and filed a disclaimer in the following words:

"Come now the said Fowler Elevator Company and Bernard Fowler, defendants herein, and disclaim any and all right, title, claim, or demand in this action, or to the premises described in the petition filed in this action. Wherefore these defendants pray to be dismissed out of court at the cost of the plaintiff.

"FOWLER ELEVATOR COMPANY,
"Per C. H. FOWLER, *Treasurer.*
"BERNARD FOWLER."

On May 25, 1893, George K. Brown, Charles T. Brown, and David W. Brown asked leave to answer within ten days, which request was by the court denied, whereupon the two former filed an answer instanter containing a general denial of the allegations of Dow's cross-petition. On October 3, 1893, David W. Brown and the firm of Charles T. Brown & Brothers asked to be made parties defendant, on the ground that they were necessary parties to the controversy, by reason of an interest therein adverse to Dow and the Fowlers, which motion was on October 13 sustained by the court. On October 16 the several defendants, to-wit, George K. Brown, Charles T. Brown, David W. Brown, and the firm of Charles T. Brown & Bros., joined in an answer admitting the execution of the notes and mortgage described in Dow's cross-

petition, but denying the latter's ownership thereof, and alleging that said securities were the property of the Fowlers, the real parties in interest, and for whose benefit the said cross-petition was prosecuted. It was further alleged, also by way of a cross-petition, that the lots described in the said mortgage were, at the date of the execution of that instrument, owned by the firm of Charles T. Brown & Bros., which was composed of the said George K., Charles T., and David W. Brown, and that the notes executed by the said George K. Brown to his co-defendant Charles T. Brown were, at the time of the transfer thereof by the latter to the Fowlers, the property of said firm; that the Fowlers and the firm of Charles T. Brown & Bros. had, previous to the transaction last mentioned, been engaged together in the buying and selling of grain, and that the notes described in the cross-petition, together with other securities, property of the Browns, had during the course of such business been turned over to the Fowlers and by the latter converted to their own use. It was charged, also, that there was a large sum due Charles T. Brown & Bros. on account of such transaction, including the deals in grain and conversion of said securities. The prayer was for an accounting and judgment against the Fowlers and Dow for the amount found due said firm by reason of the several transactions alleged, and for a decree requiring the surrender by said parties, for cancellation, of the notes above mentioned, with other securities therein particularly described. On October 19 both Bernard Fowler and the Fowler Elevator Company were served with notice in writing of the filing of the last mentioned cross-petition, and that they were by order of court required to answer within ten days thereafter. Service of said notice, as shown by the return, duly verified, was made upon both of said parties by copy in the city of Chicago, and also by leaving a copy thereof at the office and last place of business of the Fowler Elevator Company, in Douglas county, in this state, there being no president, chairman

of board of directors of said corporation, or other managing officer or agent thereof found within said county. The district court, upon a final hearing of said cause, at the January, 1894, term, found in favor of the Browns as to each of the allegations of their cross-petition, and entered a decree substantially as prayed by them, to which, as appears from the record, "the defendants, Bernard Fowler and the Fowler Elevator Company, except and pray an appeal, which is hereby allowed and forty days given defendants from the rising of court to prepare their bill of exceptions, and the supersedeas bond herein is fixed in the sum of thirty thousand dollars ($30,000)." The Fowlers, on a subsequent day of the same term, filed separate motions for the vacation of said decree, alleging as a reason therefor that it was as to them without jurisdiction and void, which having been denied, an exception was taken and the cause removed into this court for review. Separate petitions in error have been filed herein by Bernard Fowler and the Fowler Elevator Company, but which are identical in substance and may, for convenience, be considered together.

Counsel are in practical accord upon the proposition that the decisive question in this record is the jurisdiction of the district court, and not the regularity of its proceedings anterior to the final decree. The first inquiry suggested by an examination of that subject relates to the effect upon the rights of the parties hereto of the disclaimer above mentioned. Plaintiffs in error, as they contend, did not, by reason of such disclaimer, waive process and thereby submit themselves to the jurisdiction of the court so as to authorize the awarding of judgment against them personally on the cause of action subsequently alleged in defendant in error's cross-petition. We understand their argument, so far as it relates to this branch of the case, to rest upon the assumption that their relation to the suit below as parties defendant ended with their disclaimer; but the force of that reasoning is weakened, if not destroyed, by the implied admission

that the disclaimer was such an appearance as gave them a standing in court, and entitled them to judgment upon the pleadings then on file. Granting, as claimed, that they were entitled to be dismissed from the suit below at the cost of the plaintiff or their co-defendants, the fact remains that the court declined to grant their prayer in that behalf, and the jurisdiction over them, for whatever purpose, acquired by means of their appearance continued throughout the controversy. The case of *Little v. Giles*, 27 Neb., 179, cited by plaintiffs in error, is not in conflict with the views here expressed. The doctrine of that case is the familiar one that a disclaimer, whether by a plaintiff or defendant, operates as an estoppel with respect to the right thereby renounced, and is not authority for the proposition that any judgment subsequently entered against the disclaiming party is void for want of jurisdiction.

On the part of defendants in error it is contended that the filing of the disclaimer amounted to a general appearance, by which plaintiffs in error submitted themselves to the jurisdiction of the court as effectually for all purposes, as if, instead of such disclaimer, they had answered admitting the allegations of the petition and cross-petition. To that propositon we quite agree, since a disclaimer by a defendant of any interest in the subject of the action is not a special appearance for the purpose of challenging the jurisdiction of the court over his person. It is in equity held to be a mode of defense requiring action by the court in order to determine whether the person disclaiming is a necessary or proper party defendant. (*Isham v. Miller*, 44 N. J. Eq., 61; *Prescott v. Hutchinson*, 13 Mass., 441; Smith, Chancery Practice, 275; Maddock, Chancery Practice, 336*; Story, Equity Pleading [10th ed.], sec. 838; 6 Ency. Pl. & Pr., 721.)

In this connection our attention is directed to section 618 of the Code, as follows: "When defendants disclaim having any title or interest in land or other property, the subject-matter of the action, they shall recover their costs

unless for special reasons the court decides otherwise." That provision, instead of abrogating the rule in equity, is plainly declaratory thereof, as appears from the discretion reserved to the court, a discretion which plainly implies a determination of the defendant's right from an inspection of the pleadings. It has been settled by numerous decisions in this state that an appearance is special, provided the sole purpose thereof be to inquire into the jurisdiction of the court, and that the invoking of the power of the court for any other purpose is a general appearance which will give jurisdiction over the person of the defendant. (*South Omaha Nat. Bank v. Farmers & Merchants Nat. Bank*, 45 Neb., 29, and cases cited.) But a special appearance in this instance could not have been within the contemplation of the plaintiffs in error, since there was no service upon them and no process to which their objection could have been directed. The disclaimer was in the nature of a plea to the merits, as clearly so as a plea of payment, since its purpose was to secure a decree, or final order, adjudging plaintiffs in error not liable to further orders in that suit. It is, however, contended that, conceding the jurisdiction of the court for the purpose of the causes of action alleged by Bayer, the plaintiff below, and the cross-petitioner Dow, it was without authority to render the personal judgment here complained of on the cause of action alleged by defendants in error subsequent to the filing of the disclaimer. In support of that contention two propositions are asserted, viz.: (1.) A cross-petition filed by one defendant against another after answer day will be regarded as an original action, for the purpose of which the court must acquire jurisdiction of the party sought to be charged by means of a voluntary appearance or summons regularly issued and served. (2.) Personal service of process in this state is essential in every case to the jurisdiction of the court over the defendant where the purpose of the action is to enforce a mere personal obligation. Counsel, in support of the proposition first above stated, cite *Arnold v. Badger*

Lumber Co., 36 Neb., 841, in which it was said: "After answer day, if a defendant files a pleading in the nature of a cross-petition against his co-defendants who have no appearance, such co-defendants can only be thereby affected by their appearance, * * * or after service of a notice upon them in the nature of a summons as to such pleading." But we did not there hold a formal summons to be essential in such case to the jurisdiction over a defendant for the purpose of a cross-petition by a co-defendant. That case was, it will be observed, a direct attack upon the decree and involved not the jurisdiction of the court, but the regularity of its proceedings. And in *Patten v. Lane*, 45 Neb., 333, it was held that notice of a cross-petition, under our system, is a proceeding in a cause designed to assist in the prosecution thereof, and accordingly interlocutory rather than jurisdictional in character. It was also held by analogy from the Code of Civil Procedure (sec. 574, *seq.*) that notice not under the seal of the court is a process "in the nature of a summons" in the sense in which the expression just quoted was used in the first mentioned case.

We may with profit in this connection again refer to some of the facts which appear by direct allegations or plain implication from the pleadings. At the time plaintiffs in error entered their voluntary appearance and thus submitted themselves to the jurisdiction of the court, Dow's cross-petition was on file, praying the foreclosure of a mortgage upon the property described in the petition, of which defendants in error, as members of the firm of Charles T. Brown & Bros., claimed to be the equitable owners, that said mortgage had, as claimed by the latter, been previously paid and satisfied in full through transactions by means of which plaintiff in error became largely indebted to them; but that notwithstanding such fact, plaintiffs in error, as the real parties to said cross-petition, were, through fraud and collusion with Dow, seeking to enforce said mortgage in his name. It further appears that when defendants in error, by leave first obtained,

filed their answer and cross-petition, praying, among other things, for an accounting of the transactions alleged as a defense to said mortgage, and of which, as we have seen, plaintiffs in error were in due form notified, the latter were still in court, no action having been taken upon their demand to be dismissed as parties defendant. The subject of defendant in error's cross-petition is undoubtedly one of equitable cognizance; and that the district court, by reason of the facts stated, acquired jurisdiction over defendants in error for the purpose of such cause of action, is a proposition equally clear. Such, indeed, is the doctrine implied from the several decisions of this court, beginning *Hapgood v. Ellis*, 11 Neb., 131, and which are cited in *Patten v. Lane*, *supra*.

To the second contention of plaintiffs in error, viz., that personal service within this state is essential to the jurisdicton in every action, to enforce the mere personal obligation of the defendant, it may be answered that the rule asserted can, upon the facts disclosed, have no application to the case at bar. The purpose of the cross-petition was not alone to recover the amount due from plaintiffs in error by reason of the cause of action therein stated, but also to secure an accounting of the transactions resulting, as claimed, in the satisfaction of the mortgage, which, so far as concerns the parties to this proceeding, was the primary subject of controversy. Jurisdiction for such purpose having been acquired by the district court, the cause was properly retained for a determination therein of all issues made by the pleadings. *Swift v. Dewey*, 20 Neb., 107; *Buchanan v. Griggs*, 20 Neb., 165; *Disher v. Disher*, 45 Neb., 100; *Hurlburt v. Palmer*, 39 Neb., 158, and *Anheuser-Busch Brewing Ass'n v. Peterson*, 41 Neb., 897, cited by plaintiffs in error, are not in point, since those cases were actions at law for the recovery of damage, and in neither was there involved any subject of equitable jurisdiction. The sound rule is believed to be that stated in the syllabus of the last mentioned case, viz., "Service by publication, or in such other manner as may

be authorized by statute, is sufficient in proceedings substantially *in rem*, but when the purpose of the action is to determine the personal rights of the parties, and to enforce a personal obligation against the defendant, personal service within this state is essential in order to confer jurisdiction upon the court."

We are satisfied from a consideration of the whole record that the judgment of the district court is right and should be

AFFIRMED.

LEWIS SPELTS ET AL. V. GIDEON R. SUTHERLAND.

FILED MAY 5, 1897. No. 7268.

Judgment for Plaintiff in Action for Services: EVIDENCE: REVIEW. Evidence examined, and *held* sufficient to sustain the judgment of the district court.

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

Bartlett, Baldrige & De Bord, for plaintiffs in error.

Sutton & Lambert and *Theo. F. Elliott, contra.*

POST, C. J.

The defendant in error, in the district court for Douglas county, recovered judgment against plaintiffs in error in the sum of $246.51 and costs, being the amount of a balance claimed by him on account of services as a yard man in the Union Stock Yards at South Omaha for the period of one year and four months at the agreed rate of $60 per month. Plaintiffs in error by their answer admitted that defendant in error entered their service, in the capacity alleged, some time in the month of August, 1890, under an agreement whereby his compensation for the fractional part of said month was fixed at the rate of $55 per month; that he continued in their service during the

months of September, October, and November at the aforesaid rate; that for the month of December his compensation was by agreement fixed at $40, and that during the month last named they entered into a special contract with the defendant in error whereby he agreed to work for them during the year 1891 and to receive therefor $45 per month as full compensation for his services. They also allege payment in full at the stipulated rate. The reply was a general denial.

The brief of plaintiffs in error presents in several forms the single proposition that the verdict and judgment are unsupported by the evidence. As tending to sustain their contention with respect to that issue, we are referred to the significant fact that credit was each month entered by plaintiffs in error upon their books at the rate alleged in their answer and payments made to defendant in error monthly of the amount thus credited and no more. The latter, however, while admitting the receipt by him of payments as above stated, testified that such payments were made and received pursuant to a mutual agreement whereby plaintiffs in error were authorized to, and in fact did, retain each month a specified portion of his wages, and that the balance claimed by him is the total of the amounts so retained. We agree with the trial judge that there was a substantial conflict of the evidence upon this, the only controverted issue of the case, and that the verdict of the jury should not be disturbed.

JUDGMENT AFFIRMED.

AUGUST MEYER ET AL. V. JEROME SHAMP ET AL.

FILED MAY 5, 1897. No. 7245.

1. **Action Upon Promise for Benefit of Third Person.** "Where one makes a promise to another for the benefit of a third person, such third person can maintain an action upon the promise, though the

consideration does not move directly from him." (*Shamp v. Meyer*, 20 Neb., 223.*)

2. **Law of the Case.** "A judgment or ruling of this court in a case or point distinctly and finally made will be held to be the law of the case in which made throughout its course of litigation without regard to the number of times it may be brought before the court, or the intrinsic merits of such judgment or ruling." (*Meyer v. Shamp*, 26 Neb., 729.)

3. **Verdict:** COMPROMISE: REVIEW. Where it is clear that a verdict of a jury is based on a compromise of the differences of opinion of its individual members, and in disregard of the evidence, it is not error to set it aside.

4. **Instructions:** ASSIGNMENTS OF ERROR. An assignment in a motion for a new trial, that "the court erred in giving on its own motion each of the instructions numbered 1, 2, 3," etc., is sufficiently specific, and the same is true of a similarly worded assignment in the motion, in reference to the refusal to give several instructions requested by the complaining party. (*Kirchman v. Kratky*, 51 Neb., 191.)

5. ———: REPETITIONS. The refusal to give an instruction prepared and requested is not erroneous where the same subject-matter was fully embraced in an instruction given.

6. **Contracts:** CONSTRUCTION: EXTRINSIC EVIDENCE. As the general rule, the construction of a contract is a question of law, and it is the duty of the court to determine and announce its meaning. This is invariably true where the contract is to be construed with strict reference to its terms. If the construction must be in part from proof of facts extrinsic to the terms of contract, it may become a matter for the jury.

7. ———: ———: TRIAL. *Held*, That the contract involved in the controversy in the case at bar was one which it was the province of the court to construe; hence there was no error in an instruction in which the trial court announced the meaning of such contract.

8. **Trial:** EVIDENCE: ADMISSION OF NOTES AND CHECKS. Errors were alleged of the admission in evidence of certain notes and checks without a sufficient foundation having been laid for their introduction. *Held*, That the matters on the proof of which such instruments might have had a hearing were in this action all independent facts capable of proof by the oral testimony of any one having actual personal knowledge of them, and the latter evidence which was introduced was primary and not secondary; and inasmuch as these matters were fully shown by oral testimony, and were also proven in the cross-examination of some of the witnesses, if there were any errors in the admission of the notes and checks, they were without prejudice.

*See, also, *Barnett v. Pratt*, 37 Neb., 349.

9. Review. *Held*, That there was sufficient evidence to sustain the verdict.

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

Sawyer, Snell & Frost, for plaintiffs in error.

Cornish & Lamb, contra.

HARRISON, J.

In this action, instituted in the district court of Lancaster county, it was alleged for cause of action, in the original petition filed, that certain parties, Jerome Shamp, the defendant in error herein, T. B. Dawson, and J. A. Wallingford, constituted a firm or partnership under the name and style of Dawson, Shamp & Co., engaged on and for some time prior to November 9, 1880, in the business of buying and selling agricultural implements, machinery, etc., at Lincoln, and had become and were indebted to persons and firms in the amounts and as specifically set forth in the itemized statement in the petition, which we need not copy or refer to more definitely here; that on the date just stated the interest of defendant in error in the business of said partnership was by him sold to one John Giesler, who then became a member of a firm which adopted the name Dawson, Wallingford & Co.; that said last mentioned firm and John Giesler, as a part consideration of the sale and transfer of the interest of defendant in error in the business, agreed and assumed to pay certain liabilities of the former firm, including the ones specifically stated in the petition, and to save the defendant in error harmless therefrom; that on or about December 24, 1880, J. A. Wallingford, for a valuable consideration, sold and conveyed all his interest in the business and partnership property to T. B. Dawson, John Giesler, and one E. C. Nahrung, and as a part of the consideration for such sale and transfer the three parties just named agreed to pay all the indebtedness and liabilities, of any kind or nature whatsoever, of the firm of Dawson,

Wallingford & Co. The firm name was changed to Dawson, Nahrung & Co. The next change that occurred, one August Meyer purchased a one-fourth interest in the business, and subsequently to this, Dawson sold his part of the business to the other members and withdrew from the firm, a part of the consideration of each of the sales being the assumption, by the party or parties purchasing, of the debts and liabilities of the firm. The firm, after the last change to which we have just alluded, was known as Geisler, Nahrung & Meyer. In March, 1882, Giesler quit the business and firm, and when he did so, sold and transferred his rights in the business and property to the other two of the partners, a part of the consideration for such transfer being the assumption of the payment of all the debts and obligations of the old firm by the new partnership of Nahrung & Meyer. In October, 1882, the firm of Nahrung & Meyer was dissolved. August Meyer received and retained certain of the credits and effects of the partnership, and assumed and agreed to pay all liabilities of the firm. Each alleged assumption of and agreement to pay debts and obligations stated in the petition was also pleaded to have included the specifically enumerated liabilities of the original firm of Dawson, Shamp & Co., and to have in each instance been coupled with the further agreement to release and relieve the party to whom the promise was made from such liabilities. It was further pleaded that none of the parties or firms, promisors, had ever fulfilled their agreements, and the liabilities had remained unpaid and the defendant in error had been forced to pay them, and the sums so paid had never been repaid to defendant in error by the plaintiff in error, or any of the said parties or firms. To this petition there was interposed a demurrer, which on hearing was sustained and the action was dismissed. In error proceedings to this court the judgment of the district court was reversed and the cause remanded, the main question at that time being whether the alleged promise made by Meyer to pay these liabilities was one

on which a cause of action in favor of defendant in error arose or could be based; and it was held: "Where one makes a promise to another for the benefit of a third person, such third person can maintain an action upon that promise, though the consideration does not move directly from him." (*Shamp v. Meyer*, 20 Neb., 223.) The case was returned to the district court, where, as the result of a trial, the defendant in error was awarded a judgment, and the cause was again presented to this court by error proceedings on behalf of the party who was defeated in the trial court, and, on hearing, the judgment was reversed and the case remanded. It was announced in the decision, reported in 26 Neb., 729, *Meyer v. Shamp*, in regard to the questions which had been adjudicated at the former hearing and which were at the second presentation again urged, that "A judgment or ruling of this court in a case or point distinctly and finally made will be held to be the law of the case in which made throughout its course of litigation, without regard to the number of times it may be brought before the court, or to the intrinsic merits of such judgment or ruling," but the judgment was reversed for the reasons that the evidence disclosed that the defendant in error had not been alone in the payment of the claims on the payment of which he based his rights of action, but had been assisted by J. A. Wallingford, and Wallingford had assigned the interest thus acquired to defendant in error; and there was no statement in the petition under which a recovery was asserted or could be sustained in favor of defendant in error as assignee of claims accruing to Wallingford by virtue of his making the payments shown by the evidence. When the case again reached the district court an amended petition was filed for the defendant in error, in which the payments or assistance therein by Wallingford was stated, also the subsequent assignment by him of all rights thus obtained to the defendant in error. The items of the defendant in error's claim, as set forth in the amended petition, were as fol-

lows: "To the La Belle Wagon Works, as guarantors upon the note of one Peter Davy, in the sum of about $95.76. To R. Elwood Manufacturing Company, of Sycamore, Ill., in about the sum of $157. To Herst, Dunn & Co., of Peoria, Ill., in the sum of $37. To the La Belle Wagon Works, as guarantors upon the note of one Henry Overstake and others, in about the sum of $287.50. To Seiberling, Miller & Co., in about the sum of $66, as guarantors upon the note of one Atkinson and Westfall. To Seiberling, Miller & Co., as guarantors upon the note of one Magnus Larson, in about the sum of $80. To R. Elwood Manufacturing Company, in about the sum of $35, as guarantors upon the note of one L. W. Ward. To the La Belle Wagon Works, in a further sum of $257. To the Pekin Plow Company, in the sum of $19. To Seiberling, Miller & Co., in the further sum of $58.57. To C. W. and W. W. Marsh, in the sum of $115.60. To R. Elwood Manufacturing Company, as guarantors on the note of Fred Witte, in the sum of $30, and interest from May 1, 1880." To the amended petition there was an answer filed, in which were pleaded three defenses: A general denial, a plea of the bar of the statute of limitations, and a settlement. Issues were joined and a trial had. The jury to which the case was submitted, it appears, returned a verdict which was not in proper form. It is shown by some affidavits filed with the motion for a new trial that this verdict was for the plaintiff (defendant in error) in the sum of one dollar, and that defendant (plaintiff in error) pay all costs in the case. The jury was instructed in regard to the form of verdict, retired to its room, and came into court with a verdict in which the defendant in error was awarded the sum of $1. Motion for a new trial was made for defendant in error, which was sustained. In a subsequent trial the defendant in error was given a verdict of $1,000, from which the trial judge required a remittitur of the sum of $350 of the amount of the verdict, and, on compliance with this requirement, overruled the plaintiff in error's motion for a

new trial and rendered judgment for the defendant in error.

It is argued that the trial court erred in sustaining the motion of defendant in error for a new trial and in setting aside the verdict for $1. One of the grounds of that motion for a new trial was as follows: "There is error in the assessment of the amount of recovery in this: the action is brought to recover on several items of indebtedness, none in a less sum than $18 and interest; the verdict is for the plaintiff in the sum of one dollar; on no hypothesis from the testimony can such verdict be justified." It is further said in this connection that the trial judge, in sustaining the motion for a new trial, was largely influenced by what is stated in section 2606 of 2 Thompson on Trials, as follows: "Where the verdict which the jury returns cannot be justified upon any hypothesis presented by the evidence, it ought obviously to be set aside. Thus, if a suit were brought upon a promissory note, which purported to be given for $100, and the only defense was that the defendant did not execute the note, and the jury should return a verdict for $50 only, it would not be allowed to stand; for it would neither conform to the plaintiff's evidence nor to that of the defendant. It would be a verdict without evidence to support it, and it is not to be tolerated that the jury should thus assume, in disregard of the law and evidence, to arbitrate the differences of parties, or to decide according to some supposed natural equity, which in reality is merely their own whim."

The motion for a new trial, to which counsel refer here, contained several other grounds on which it was, apparently, claimed that it should be granted; but if it be conceded that it was on the one point, as claimed by counsel, and which we have hereinbefore stated, after a careful examination of the evidence adduced at the trial, we must conclude that the court did not err. Under the issue presented by the general denial the finding, if for defendant in error, must necessarily have been for a

greater sum than $1. There is no conceivable condition which the evidence could have assumed and a verdict be rendered on this issue, other than by a compromise or disregard of the amount shown to be due, and be for such sum as was this one. If the defense of the bar of the statute of limitations had been determined proved as to all the items of the claim, then the verdict should have been for the plaintiff in error; but if adjudged applicable to any number of the items, or as to all but one, the verdict could not in any event, under this defense, be for $1 and be warranted and sustained by the evidence. If we turn to the defense of settlement, the contention of plaintiff in error was that a full settlement had been made; hence a finding in his favor on this branch of the case would necessarily have produced a verdict of no cause of action. If the jury believed the theory of defendant in error relative to this issue and the evidence which tended to support it, they would necessarily have thrown out certain of the items of claim; but there was no fact or set of facts disclosed from which the jury could possibly make a finding on this issue of a balance of $1 due the defendant in error. There was no item of the claim which was for $1, or on which payments had been made which reduced the amount due to such a sum. If a finding was made for defendant in error, the amount to be awarded him could but be a matter of computation. It was not a suit for unliquidated damages, to be assessed in a lump or round sum. It was clear that the jury must have arrived at the verdict rendered by a compromise, or by disregarding the evidence and substituting for what was thereby shown its own idea or estimate of what would be about justice and right between the parties litigant. From all of which we are led to conclude that the trial court was not in error in setting aside the verdict for defendant in error in the sum of $1 and awarding a new trial of the cause.

Of the assignment of errors are some with reference to instructions. These, it is asserted by counsel for defend-

ant in error, must prove ineffective, for the reason that in the motion for a new trial the errors alleged in respect to instructions given or refused were not separately assigned. This was probably true of such assignments in the original motion, but in the amended motion for a new trial it was stated, "The court erred in giving on its own motion each of the instructions by it numbered 1, 2, 3;" also, "The court erred in refusing to give each of the instructions asked by defendant and by defendant numbered 1, 2, 3, 4." It has been decided by this court that the use of the word "each," as in the foregoing assignments, renders them sufficiently specific. (*Aultman v. Martin*, 49 Neb., 103.)

It is urged that the trial court erred in its refusal to give an instruction requested, numbered 7, and giving in its stead one prepared on its own motion and numbered 8, the main criticism being that the one given was too general in its statements to be sufficiently clear and intelligible to the jury with reference to the information which it was its office to convey, and that this defect would have been cured by the one requested, which it is claimed was more specific and definite in its statements and clearer in its import. From an examination and comparison of the two instructions we are satisfied that the one given was sufficiently definite in its terms to fully and clearly convey the ideas intended; and while the one refused was in some respects more specific, or a more extended statement of the same subject-matter, its giving would probably not have effected the intended purpose any better than the one which was given.

It is also urged that it was error to give the instruction numbered 12, given by the court of its own motion; that in it the court gave a construction to a verbal contract which was an invasion of the province of the jury. It has been said: "Simple contracts are all those which are not contracts by specialty. It is not accurate in point of language to distinguish between verbal contracts and written contracts; for whether the words are written or

spoken, the contracts are equally verbal, or expressed in words. Nor is it accurate in point of law to distinguish between written and parol contracts. For whether they be written or only spoken, they are, in law, if not sealed, equally and only parol contracts. For some purposes, and especially by the requirements of the statute of frauds, the evidence of the contract must be in writing; and when it is in writing, some peculiar rules of law apply to it. But it is a mistake to rest upon this a legal distinction between written and oral contracts; and from this mistake some confusion has arisen." (1 Parsons, Contracts, 7.) But whether when the contract of the parties has been reduced to writing, it may be called a written contract, and where it rests entirely in verbal statements of the parties, it is proper to call it a verbal or parol contract, we need not now determine. The one with which we have to deal was not committed to writing. As a general rule, the construction of a contract is for the court. It is the duty of the court to determine and announce the meaning of contracts. It is a question of law. (2 Parsons, Contracts, 491, 492; 3 Am. & Eng. Ency. of Law, 867.) It has been announced by this court that it is for courts to construe contracts, where they are to be construed, with strict reference to their terms; but if the construction must be in part from proof of facts extrinsic to the terms of the contracts, the construction may become a question for the jury. (*Coquillard v. Hovey*, 23 Neb., 622.)

The evidence in the case at bar was not conflicting in regard to what were the terms of any contract which might be determined to have been made. There was evidence of what parties had understood the contract to mean. It would have been wrong to allow the jury to consider evidence of what different parties understood to be the import of the contract and construe it by the light of such evidence; nor do we think it was necessary here, to resort to acts of parties which probably may sometime be of use and be used in determining the meaning of contracts. The contract shown herein was sufficiently ex-

plicit to furnish in and of itself a true index of the intentions of the parties thereto; hence its construction was a work for the court, and there was no error in the instruction, the subject of complaint now under consideration.

There is some argument on one point in the original question in the case, viz., whether an action will lie in favor of Shamp against Meyer, on the promise of Meyer, such as it was pleaded and shown to be. This was, we think, fully determined in the former hearings of the case in this court, including the point now presented, and must be held to have been settled and the law of the case. (*Shamp v. Meyer, supra; Meyer v. Shamp, supra.*)

Of the evidence introduced at the trial were several of the original notes referred to in the petition of the defendant in error with either the guaranty or indorsement of Dawson, Shamp & Co., as it appeared on the instruments; also some checks, the mediums by which it was testified payments of certain of these old debts had been effected by Shamp; also two judgments, which it was stated in evidence had been obtained on notes of the indebtedness, of the payment of which respectively, the firm of Dawson, Shamp & Co. was a guarantor, the judgments being against such firm in the capacity to which we have alluded. No proof was made of the signatures to the notes which were introduced, or of the signatures to the guaranties or indorsements thereon, or of the signatures to the checks claimed to have been given in payment by Shamp of these liabilities of the firm as guarantor. Counsel for plaintiff in error interposed an objection to the introduction of any and all of the evidence to which we have just referred, whenever offered, and its admission is assigned for error. It is also argued in this connection that the evidence was inadmissible and was incompetent, and being so, there was no valid proof of the indebtedness, of the guaranty, or of payment; hence no sufficient evidence to sustain the verdict. The rules asserted by counsel in argument in relation to the non-admissibility of parol evidence

of the contents of written instruments,—that it will only be allowed in specified and well defined instances, exceptions to such general rules, and under well defined precedent conditions to be fulfilled by the party seeking to introduce the evidence,—are doubtless correct; also what is urged in regard to the necessity of proving the execution of the notes and the guaranties of the same may be correct, but we do not think it applicable here. This is not an action between the original parties to either the notes or guaranties; neither is it an action on the notes or guaranties. The gravamen of this suit is the promise of plaintiff in error to pay the indebtedness of the firm. What that indebtedness was, that it existed, that notes evidencing it had been executed in each individual instance where it had been done, the execution by the firm of any notes, or of the guaranties, that plaintiff in error had failed to pay, and defendant in error had paid, were all independent facts, which in this case were capable of proof by the parol testimony of any person who had actual personal knowledge of them; and such evidence would be primary and not secondary. There was ample evidence of each and every one of the above facts, aside from the documentary or written evidence to which objections were made. Moreover, on cross-examinations of witnesses who were sworn on behalf of the defendant in error, these facts were sufficiently proven to support the verdict. From the foregoing conclusions it results that if there were any errors in the admission of the matters of evidence which it is asserted were objectionable, they were not prejudicial, and the assignment of errors in regard to them, and also that the evidence as to these designated points was insufficient, must be overruled.

This completes the examination of the assignments of error presented here, and it follows from the conclusions herein that the judgment of the district court will be

AFFIRMED.

FRANK B. HIBBARD V. JOHN T. WILSON.

FILED MAY 5, 1897. No. 7260.

1. **Review:** CONFLICTING EVIDENCE. Findings of a jury on conflicting evidence will not be disturbed if there is sufficient favorable evidence to sustain them.

2. **Instructions:** EVIDENCE. The refusal of an instruction whereby it is sought to direct the jury that certain evidence which has been introduced incidentally or collaterally is directly applicable to the issues in the cause, when in fact it is not pertinent or direct in its bearing on any issue, and its giving would probably mislead the jury, is not an error.

3. **Quantum Meruit:** MEASURE OF DAMAGES. In a suit upon a *quantum meruit* for services performed the reasonable value of the services furnishes the measure of recovery.

4. ———: ———: EVIDENCE. Under a *quantum meruit* count for services rendered under a contract, the contract is admissible to prove the value of the services. The stated rates of compensation, if any, are competent evidence tending to show the reasonable value.

5. ———: ———: ———. In the case at bar, an action on a *quantum meruit*, the only competent evidence of the reasonable value of services performed was the contract price. The plaintiff in the action offered other proof of the value of the services, which, on objection of defendant, was excluded. *Held*, That the contract price was the proper measure of damages.

6. ———: ———: ———. The evidence examined, and *held* sufficient to sustain the verdict.

ERROR from the district court of Stanton county. Tried below before BLAIR, J. *Affirmed.*

V. O. Strickler, for plaintiff in error.

E. E. Thomas and *Thomas & Nolan, contra.*

HARRISON, J.

The plaintiff herein declared, in a petition filed in the district court of Stanton county, that on or about May 1, 1892, he entered into a verbal agreement with the defendant by which the plaintiff became bound to drill and

complete a two and one-half inch tubular well on the farm of defendant, from which could be obtained a plentiful supply of water, to furnish all necessary material, perform all labor, and pay all expenses, of any nature whatsoever, incurred in and about the drilling and completion of the well; that the agreement did not specify the depth to which the well should be drilled, further than it was to be to the depth at which a sufficient supply of water was found. If plaintiff stopped the work of his own motion before the water was found, he was to receive no compensation for what he had theretofore done. That the defendant, on his part, agreed to pay $1 per lineal foot for every foot of the well necessarily drilled and completed in compliance with the contract, and to pay the same rate if he ordered the work on the well discontinued prior to its termination by the full accomplishment of the purpose of the work. That the plaintiff commenced the work on May 26, 1892, and proceeded therewith until August 12, 1892, at which time the well was completed to a depth of 480 feet, but water had not been obtained. Plaintiff then ordered defendant to quit work, refused to allow him to proceed further therewith, and forbade him to come on the farm for the purpose of continuing the work, and refused to pay plaintiff for the work which had been performed, and also refused to submit the matters of difference between the parties to arbitrators. It was also pleaded that defendant made certain misrepresentations to plaintiff, by which the latter was induced to enter into the contract as made. It was further stated that the plaintiff elected "to rescind the contract * * * and to sue for the reasonable value of his services;" or, in short, the plaintiff asked a recovery as upon a *quantum meruit*, the value of the work performed being alleged as $840. In the answer it was admitted that plaintiff was engaged to drill a well of the kind described in the petition; that plaintiff was to furnish all material, perform all labor, and bear the entire expense incurred in the making of the well; was to fur-

nish a sufficient quantity of water, and if he abandoned the contract before so doing, to receive no pay for what had been done; that defendant was to pay for the work $1 per lineal foot of the depth to which the well should extend. It was also stated that the amount to be paid was not in any event to exceed the total sum of $350, and if necessary to extend the well beyond the depth of 350 feet to obtain the required supply of water, the compensation for the entire work was to be $350 and no more. It was admitted that the work was commenced May 1, 1892, as alleged in the petition, and asserted that plaintiff abandoned it at some date during the month of August of the same year. There was a denial that defendant had ordered or compelled the plaintiff to cease labor on the well. There were some further statements of the answer in regard to trouble and expense occasioned to defendant by the plaintiff's abandonment of the work; also a long recital of some transactions between the parties to the suit, as parts of which a chattel mortgage on the machine and some of the tools which were used in drilling the well was executed and delivered by plaintiff to defendant, and its foreclosure, at or about the time that plaintiff stopped work on the well. A reply was filed and a trial of the issues resulted in a verdict and judgment for the plaintiff. The defendant asks a review in this court of the proceedings had in the trial court.

The plaintiff did not offer any proof of the allegations of false representations; hence that feature of the case may be dismissed without further notice. It was admitted, or undisputed, that the contract was made; that plaintiff commenced and prosecuted the proposed labor. The evidence was conflicting as to whether it was abandoned by him, or its further progress was prevented by defendant, but we must conclude from the verdict of the jury that it was one of its findings of fact that the defendant, by his actions and orders in the premises, caused the cessation of the work on the well. In regard to how much had been done, or how many feet had been drilled,

there was also a conflict in the evidence; but here it is also clear, from the verdict rendered, that the jury settled the question in favor of plaintiff to the effect that he had drilled to the depth of 480 feet, in which he had also inserted the required iron tube or pipe to a depth of 383 feet and 8 inches. The findings in the two particulars to which we have just alluded each had sufficient evidence in its support, and as the evidence was conflicting, in accordance with the established rule of this court, neither will be disturbed.

It is one of the assignments that the trial court erred in not giving in the charge to the jury the second instruction requested for defendant. This instruction was as follows: "You are instructed that if you find from the evidence that the defendant held a mortgage on the plaintiff's well-boring machinery, and that the debt, which was secured by said mortgage, was due, that the defendant had the right to demand payment from the plaintiff according to the tenor of said notes; and if payment was not made, that the defendant had the right to foreclose his mortgage and that such foreclosure would not amount to a discharge of the plaintiff by the defendant." The matters of the mortgage and the defendant assuming possession of such of the machinery, etc., as was being used by plaintiff in the work on the well, simultaneously with the direction to plaintiff to quit the work, were of the evidence, but collaterally or incidentally, and not as pertinent or bearing either directly or indirectly on the important element or question of the issues, viz., whether the plaintiff abandoned the work or was compelled to quit by defendant. It was not claimed, nor did the evidence in relation to the mortgage and its enforcement by defendant even remotely hint at a conclusion, that the defendant's assertion of his rights thereunder effected the discharge of the plaintiff from further work on the well. The jury could not be misled by this evidence to the indulgence of any such erroneous supposition. The instruction quoted was not applicable to the issues and its refusal was not prejudicial; hence not erroneous.

It is assigned as error that the trial court gave paragraphs 1 and 2 of the charge to the jury. It is also urged that the evidence was insufficient to sustain the verdict. The complaint in regard to the instructions is that they announced the wrong measure of damages in that the jury were informed that the plaintiff, if allowed to recover, should have $1 per foot for each foot of the depth of the well completed, in which the iron pipe had been placed, and seventy-five cents per foot for each foot drilled in which the pipe had not been placed at the time plaintiff quit work. The only proof of the reasonable value of the work which had been performed was of the amount of $1 per foot, which had been agreed upon in the contract between the parties, as to the completed portion of the well, and the same amount less the cost per foot of the iron tube, which was proven to be twenty-five cents, for the portion of the well drilled but not equipped with the pipe. This, it is urged, was not admissible to show the reasonable value of the plaintiff's services; hence the instructions stated an improper measure of damages; and further, there was no evidence on the subject of damages to support the verdict. It is undoubtdly true that where a party seeks to recover upon a *quantum meruit* for services rendered, the stipulations of the contract under which the work was performed, as to compensation, do not govern in fixing the amount to which the suitor will be entitled to recover, but such stated rates are competent evidence tending to show the value. (2 Sutherland, Damages, 522.) "Under a *quantum meruit* count for services rendered under a special contract, the contract is admissible in evidence to prove the value of the services." (*Thomson-Houston Electric Co. v. Berg*, 30 S. W. Rep. [Tex.], 454; *Adams v. Burbank*, 37 Pac. Rep. [Cal.], 640; *Jenney Electric Co. v. Branham*, 41 N. E. Rep. [Ind.], 448.) The case of *Williams v. Sherman*, 7 Wend. [N. Y.], 109, was an action on *quantum meruit* for work and labor performed under an agreement by which the compensation was fixed. The only evidence introduced as to the reasonable value of the

labor was the contract to pay a specified sum, and it was held to govern the question of damages. In the case at bar the only evidence introduced by either party of the value of the work performed was the rate per foot specified by the contract of the parties. The defendant did not object to this as evidence, or offer or suggest any other. The plaintiff offered proof of the reasonable value of the services, other than the contract price, but, on objection of defendant, this was held not admissible. The sum per foot to be paid, as stated in the contract, was, as we have determined, competent evidence of the reasonable value, and, being the only evidence on the subject, presented the proper measure of damages. In regard to the portion of the well on which the work of drilling had been done but the pipe had not been inserted, the court received evidence of the cost of the pipe per foot, and deducted this from the contract price per foot of a foot of the well with the tube inserted, and adopted the remainder as the measure of damages, or the proper amount as shown by the evidence to be assessed in favor of plaintiff for each foot of the partially completed portion of the well. We can discover nothing unfair in this, all the evidence considered, and certainly nothing, under all the facts and circumstances in evidence, prejudicial to the defendant.

Our attention has not been challenged to any errors in the proceedings of the trial prejudicial to the rights of the complaining party. The judgment of the district court must be

AFFIRMED.