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# REPORTS OF CASES

IN THE

# SUPREME COURT

OF

# NEBRASKA.

## JANUARY AND SEPTEMBER TERMS, 1897.

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## VOLUME LII.

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D. A. CAMPBELL,
OFFICIAL REPORTER.

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

# THE SUPREME COURT

OF

# NEBRASKA.

1897.

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CHIEF JUSTICE,

A. M. POST.

JUDGES,

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

COMMISSIONERS,

ROBERT RYAN,
JOHN M. RAGAN,
FRANK IRVINE.

---

## OFFICERS.

ATTORNEY GENERAL,

C. J. SMYTH.

CLERK AND REPORTER,

D. A. CAMPBELL.

DEPUTY CLERK,

W. B. ROSE.

# DISTRICT COURTS OF NEBRASKA.

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*First District—*
C. B. LETTON.....Fairbury.
J. S. STULL.....Auburn.

*Second District—*
B. S. RAMSEY.....Plattsmouth.

*Third District—*
A. J. CORNISH.....Lincoln.
CHARLES L. HALL.....Lincoln.
E. P. HOLMES.....Lincoln

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

*Fifth District—*
EDWARD BATES.....York.
S. H. SEDGWICK.....York.

*Sixth District—*
WM. MARSHALL.....Fremont.
J. J. SULLIVAN.....Columbus.

*Seventh District—*
W. G. HASTINGS.....Wilber.

*Eighth District—*
R. E. EVANS.....Dakota City.

*Ninth District—*
J. S. ROBINSON.....Madison.

*Tenth District—*
F. B. BEALL.....Alma.

*Eleventh District—*
A. A. KENDALL.....St. Paul.
J. R. THOMPSON.....Grand Island.

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

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

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

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

# PRACTICING ATTORNEYS.

ADMITTED SINCE THE PUBLICATION OF VOL. LI.

COPELAND, LUCIEN B.
FERNEAU, EDGAR.
GRAVES, GUY T.
GRUVER, L. E.
HALE, E. W.
HERRING, CARL E.
HUNKER, FRED D.
JACKSON, LOGAN F.
LOGAN, JOHN S.
MATTHEWS, W. L.
MERCER, J. R.
MILLER, JOHN A.
MULVANEY, WM.
NELSON, W. T.
RISSER, GEORGE H.
SLOAN, FRANK W.
SLOAN, ROBT. J.
TRUNKEY, D. F.
WESTERFIELD, ELLERY H.

# 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.)

# RULES OF SUPREME COURT.

FEBRUARY 17, 1898.

1. [SITTINGS OF THE COURT.]—The regular public sessions of this court will be held on the first and third Tuesdays of each month at 9 o'clock A. M., standard time, during each term.

2. SECTION 1. [SUBMISSION OF CAUSES.]—Causes will be taken up and heard in their order on the docket. Any cause may, however, be submitted upon the written stipulation of the parties thereto providing for such submission on printed briefs accompanied by or containing an agreed printed abstract of the record and evidence upon which the case is to be determined. Whenever a cause is reached and the brief of the party having the affirmative is not on file the judgment will be affirmed or the proceeding dismissed. When default has been made by the other party and there is due proof of service of summons in error and the briefs of the party holding the affirmative are on file with proof of service thereof within the time provided by rule 9, he may proceed *ex parte*. But if the briefs shall be served or filed out of time, although without leave of court, the irregularity shall be deemed waived if no objection be made on that ground at the time of service, if the delay be in that respect, or, if the delay be merely in filing, within thirty days thereafter, or if the adverse party serve and file briefs in answer. The hearing of no cause shall, however, be delayed by default of either party in serving or filing briefs. To avoid such result the case will be disposed of as if the delinquent party's brief had not been served; Provided, that the court may under special circumstances and on suitable terms otherwise order.

2. SEC. 2. [SAME.]—Criminal cases will stand advanced for hearing without motion. The court will, on motion, which motion shall be submitted without argument, advance for hearing cases which have once or more already been regularly upon the docket of the court and which were not on such former occasion dismissed on motion of the party seeking the advancement. A confession of error shall be deemed equivalent to a dismissal on motion of the party confessing error. The court will likewise advance cases within the original concurrent jurisdiction of this court, which have been prosecuted in the district court and brought to this court by appellate proceedings. The court may also in its discretion advance other cases if they involve questions of public interest; but this power will not be exercised except in cases of grave import and serious urgency.

2. SEC. 3. [SAME.]—At any time after the expiration of the time allowed for the service of briefs by the plaintiff in error or appellant, the defendant in error or appellee may move for an affirmance on the ground that the proceedings are without merit and taken for delay. In order to do so he shall cause the record to be printed, according to the form prescribed for the printing of briefs, and file with the clerk ten copies thereof, together with the professional certificate of his counsel to the effect that he is familiar with the record, that it presents no question of law which has not been settled by past adjudications of this court, and no question of fact demanding serious consideration and that he believes the proceedings are taken solely for delay. On the filing of such motion, printed records and certificate, the cause will be submitted without argument, and on the record and briefs of the plaintiff in error or appellant alone. If on examination the court be satisfied that the motion is well taken, the judgment will be affirmed. If on examination the record be found to present any question of law or fact as to the proper decision whereof the court entertains a doubt, the motion will be overruled, and the cause will be remanded to its proper place on the docket

for hearing in its regular order. A certificate of counsel willfully false will be deemed an act of professional misconduct and dealt with accordingly. This rule shall apply to causes now pending as well as to those hereafter docketed.

3. [ORDER OF HEARING.]—The court, in advance, shall, by order, designate what cases shall be submitted and when, having reference to the order of time in which such cases were originally docketed. Advanced cases and cases in which rehearings shall have been granted will be placed on the call for the sitting of court next following the expiration of the time for serving briefs as provided by the rules.

4. [CRIMINAL CASES—SECOND TRANSCRIPT UNNECESSARY.]—Whenever, in a criminal case, a writ of error shall be issued upon a certified transcript of a record, no further transcript shall be required or allowed to be taxed in the bill of costs, but the same transcript shall be returned with the writ, and shall be deemed sufficient, unless diminution or other objection thereto be suggested.

5. [TIME FOR ORAL ARGUMENT.]—In the oral argument of a cause the time allowed the parties on each side shall not exceed thirty minutes, unless for special reasons the court shall extend the time. Oral arguments on a motion will be limited to five minutes on a side.

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

of said notice shall be allowed and taxed as for the service of summons in proper cases.

7. [MOTIONS FOR REHEARING.]—A motion for rehearing may be filed as of course at any time within forty days from the filing of the opinion or rendition of the judgment of the court in the case. Such motion must specify distinctly the grounds upon which it is based, and must be accompanied by a separate printed brief.

8. [MANDATES.]—No mandate shall issue in any civil case during the time allowed for the filing of a motion for rehearing, or pending the consideration thereof, unless specially ordered by the court.

9. [BRIEFS.]—Within thirty days after the docketing of a cause in this court, and within the same time after a rehearing shall have been allowed, the party holding the affirmative shall furnish a printed brief of his points and citations in support thereof, to the opposite party or his attorneys of record, by whom in turn a like brief in reply shall be served within thirty days after service of the first required brief, or if none such shall have been served, then within thirty days after the expiration of the time allowed the party holding the affirmative the other party may serve such brief. Forthwith after service thereof on the adverse party, each party shall file with the clerk of this court ten printed copies of the brief which he has furnished the opposite party or his attorney of record, with proof of service thereof. Each brief shall by number designate the several pages of the record containing matter bearing upon the questions discussed in such brief. Every reference to an adjudicated case shall be by the title thereof, as well as by the volume and page where it may be found, and the particular edition of any textbook referred to must be given in connection with the cited page or section thereof.

10. [BRIEFS—HOW PRINTED.]—All briefs shall be printed on good book paper, small pica type, leaded lines; the printed page to be four inches wide and seven inches long, with a margin of two inches; but the type in which extracts are printed may be small pica solid or brevier

leaded. The heading of each brief shall show the title of the cause, the court from which the cause is brought, and the names of counsel for both parties.

11. [COSTS.]—When the parties or their attorneys shall furnish their printed briefs in conformity to the rules of this court, or briefs and printed abstracts under stipulation for submission as provided for in rule 2, it shall be the duty of the clerk to tax a printer's fee at the rate of one dollar for every five hundred words embraced in a single copy of the same, against the unsuccessful party not furnishing the same, to be collected and paid to the successful party as other costs. When unnecessary costs have been made by either party, the court will, upon application, order the same taxed to the party making them, without reference to the disposition of the case.

12. [SECURITY FOR COSTS.]—In each case brought to this court the plaintiff in error, appellant, or relator shall, before the entry of the same upon the docket, give security for costs by filing a bond in the sum of $50, with one or more sureties, conditioned for the payment of the costs of this court, which bond, in cases brought on error or appeal, must be approved by the clerk of the district court of the county from which such cause is brought, and in original causes by the clerk of this court. But this provision shall not apply in causes where a bond or undertaking has been filed in the court below, in accordance with the provisions of sections 588 and 677 of the Code of Civil Procedure, where such bond is conditioned to pay costs, but in such causes the transcript filed must show the giving of such bond or undertaking with the names of the sureties thereon; nor shall it apply in criminal cases where an affidavit of poverty is filed, as allowed by section 508, Criminal Code. Besides the security for costs above required to be given when a cause is docketed, the party docketing such cause shall deposit with the clerk $10 to cover clerk's costs that may be made by such party in the cause; and if the deposit shall at any time be exhausted by the party making the

same the clerk may from time to time require such party to deposit a further sum of $5. Upon the termination of a cause any sum remaining from such deposits not applicable to clerk's costs incurred by the party making the deposits shall be returned to him.

13. [CAPITAL CASES—SUSPENSION OF SENTENCE.]—In all criminal cases brought on error to this court, where it appears that the court below has passed sentence of death upon the plaintiff in error, it is ordered that the sentence and judgment be suspended until the further order of this court, and it shall be the duty of the clerk to indorse such suspension upon the transcript filed in said cause and immediately transmit a certified copy thereof to the officer charged with the execution of said sentence.

14. [TRIALS IN ORIGINAL CASES.]—Whenever an issue of fact is presented for trial in an original action or proceeding, a commission will be named composed of two resident electors of the state, of different political affiliations, who shall, under the direction of the court, select such number of persons having the qualifications of jurors in the district court as may be designated in the order for their appointment. A *venire* for the jurors so selected will be issued by the clerk, directed to the bailiffs of this court or any sheriff or sheriffs of the state, and shall be served in the manner prescribed for the service of summons. Said commissioners, before entering upon the duties of their office, shall take and subscribe to the oath prescribed by section 1 of chapter 10, Compiled Statutes.

15. [SAME.]—Each party shall be entitled to three peremptory challenges, and challenges for cause may be made by either party, the validity of which shall be determined by the court. If, from challenges or other cause, the panel shall not be full, the court may order the bailiff to fill the same from bystanders or neighboring citizens having the qualifications of electors.

16. [SAME.]—The jurors summoned or called as above provided, or such of them as are not set aside or chal-

lenged as will make up the number of twelve, shall constitute the jury for the trial of said issue of fact.

17. [SAME.]—Each juror shall be entitled to the same compensation and mileage as are provided by law for jurors in civil cases in the district court.

18. [SYLLABUS OF THE POINTS DECIDED.]—A syllabus of the points decided in each case shall be stated in writing by the judge or commissioner preparing the opinion, and such syllabus and opinion shall be examined and approved by the court before the same shall be reported.

19. [RECORDS NOT TO BE REMOVED.]—The clerk of the court is answerable for all records and papers belonging to his office, and they shall not be taken from his custody unless by special order of the court, or a judge or commissioner thereof, but the parties may have copies when desired by paying the clerk therefor.

20. [MANDAMUS—NOTICE.]—In all cases of application to this court for a writ of *mandamus*, a reasonable notice must be given to respondent of the time when it will be made, accompanied by a copy of the affidavit on which it is based, unless for special reasons it is otherwise ordered.

21. [ADMISSION OF ATTORNEYS.]—Examinations of applicants for admission to the bar will be held on the second Tuesday of June and the third Tuesday of November each year.

22. [SAME.]—Each applicant for admission shall, at least four weeks before the day set for the beginning of examinations, file with the clerk of this court a written request for admission in his own handwriting, subscribed by himself, together with proofs of his qualifications, as prescribed by section two (2) of an act for the admission to practice of attorneys and counselors at law, etc., approved March 30, 1895.

23. [SAME.]—The proofs required under the foregoing subdivision shall be the applicant's affidavit as to his age, residence, and time and place of study, the certificate of his preceptor that the applicant has regularly and attentively studied law under such preceptor's personal direc-

tion and supervision for at least two (2) years, and the certificate or affidavit of at least two (2) citizens of good standing in the community where the applicant resides, or formerly resided, that they are well acquainted with him, that he is of good reputation in that community, and that they believe him to be of good moral character. If it be shown by the affidavit of the applicant that his preceptor is dead, or that for other satisfactory reasons his certificate cannot be obtained, there may be substituted therefor the certificate of any member in good standing of the bar of the county in which the applicant pursued his studies, and who may be personally cognizant of the facts.

24. [SAME.]—None of the facts required for qualifying an applicant for admission shall be conclusively established by the foregoing proof, but the applicant shall in his application give the names and addresses of at least three (3) persons other than those whose certificates he presents, of whom inquiry can be made in regard to the applicant's character and other qualifications.

25. [SAME.]—The applicant shall also, with his application, deposit with the clerk the sum of five ($5.00) dollars. The clerk shall enter all sums so received in a book or account kept for that purpose, showing date and name of applicant, and shall pay the same out on order of the Chief Justice, in payment of the expenses of such examination, and for no other purpose; that is to say, the cost of necessary printing and stationery; to the clerk for each oath and certificate of admission issued to an applicant, one dollar and fifty cents; to each member of the commission conducting the examination, his necessary traveling expenses, and for personal expenses while actually engaged in the performance of his duties, not exceeding five ($5.00) dollars per day.

26. [SAME.]—Any practicing attorney in the courts of record of another state or territory, having professional business in either the supreme or district courts of this state, may, on motion to such court, be admitted for the purpose of transacting such business, upon taking the

required oath, as provided by section three (3), chapter seven (7), of Compiled Statutes. Any such attorney desiring to be admitted to practice generally in the courts of this state must make his application as required by these rules and present proof by certificate that he is a licensed practitioner in a court of record of such other state or territory.

27. [SAME.]—The court will, on or before the opening of the September term in each year, appoint a commission composed of five (5) persons, learned in law, to conduct examinations for the ensuing year.

28. [SAME.]—The commission so appointed shall, prior to the examination, examine the proofs of qualifications filed in accordance with foregoing rules, and may make such further investigation as to the qualifications of any applicant as it shall deem expedient. On the day appointed it shall commence the examination of applicants. The method of conducting the examinations shall be left to the discretion of the commission, it being expected that the commission will, in the conduct of such examinations, and in the investigation of the qualifications of applicants, take care that no person shall be recommended for admission who has not in all particulars shown himself to be well qualified. Oral examinations shall be reported by the stenographer of this court.

29. [SAME.]—As soon as practicable after the conclusion of the examination, the commission shall make a written report to the court of its conclusions, and all persons who shall be recommended for admission by a majority of the commissioners shall thereupon be admitted to practice, on taking the oath prescribed by law.

30. [SAME.]—If an applicant shall be rejected, he shall not again be admitted to an examination for one year from the time of such rejection, and until he shall file a certificate that he has studied law for one year since his rejection.

31. [SAME.]—Graduates of the College of Law of the University of Nebraska shall make application and present proofs of qualifications in the same manner as other

applicants. If found otherwise qualified by the commission, they shall be admitted without examination.

32. [QUESTIONS NOT INVOLVED IN LITIGATION.]—Only questions involved in matters of actual litigation before the court will be entertained or judicially determined, and no opinion will be filed in answer to any merely hypothetical question.

See page lix for table of Nebraska cases overruled.

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

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

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# CASES

## ARGUED AND DETERMINED

IN THE

# SUPREME COURT OF NEBRASKA.

## JANUARY TERM, A. D. 1897.

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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.

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## STATE OF NEBRASKA V. MIDLAND STATE BANK AND JOSEPH W. THOMAS, RECEIVER, APPELLANTS, AND SCHOOL DISTRICT NO. 5, DOUGLAS COUNTY, APPELLEE.

FILED JUNE 15, 1897. No. 9053.

1. **School Districts: DEPOSIT BY TREASURER: BANKS.** It is not within the power of the treasurer of a school district by a general deposit of funds held by virtue of his office to create between such district and his banker the relation of debtor and creditor.

2. ———: ———: **INSOLVENCY OF BANK: TRUST FUNDS.** A banker by receiving on deposit from a school district treasurer funds known to be held by the latter in his official capacity becomes thereby a trustee for the beneficial owner with respect to such funds, and the same may, upon his insolvency, be recovered by the owner as a preferred claim against his estate.

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

*John L. Kennedy*, for appellants.

*Byron G. Burbank* and *McCoy & Olmsted, contra.*

POST, C. J.

This is an appeal by the receiver from an order of the district court for Douglas county preferring the claim of appellee, school district No. 5 of said county, against the Midland State Bank, recently impounded on motion of the state banking board. The facts essential to an understanding of the controversy are as follows: On the 12th day of February, 1896, John Bondesson, as treasurer of the appellee district, deposited in the bank above named the sum of $1,308.08, money of said district, and held by him as such, and that he subsequently made other deposits of funds entrusted to him as such treasurer amounting to $2,241.83. He also checked against his said account from time to time in payment of orders or warrants drawn by the district board, so that there was to his credit in said bank when it passed into the hands of the receiver the sum of $1,463.86. The original credit was given to Bondesson as treasurer and the pass-book in which the several credits were entered by the cashier shows an account between the bank and the school district. The inference is therefore irresistible that the bank was at all times advised of the fact that the money deposited belonged not to Bondesson, but to appellee.

The powers and duties of school district treasurers are defined by section 5, subdivision 4, of chapter 79, Compiled Statutes, entitled "Schools," in the following language: "It shall be the duty of the treasurer of each district to apply for and receive from the county treasurer all school moneys apportioned to the district, or collected for the same by said county treasurer, upon order of the director, countersigned by the moderator of each district, all moneys received by him." And in section 9 of subdivision 11 appears the following inhibition upon the pow-

ers of the treasurer: "School district treasurers are forbidden to lend or use any part of the school moneys which may be in their hands under penalty of fine and imprisonment under the provisions of the statute regarding embezzlement." No question is here raised of the right of a school district treasurer, or other officer charged with custody of public funds, to deposit the same in bank for safe-keeping, provided he so far retains the control over them that they may be by him reclaimed at any time. It is, however, contended that the treasurer was, in this instance, without authority to make a general deposit of the funds in his hands, in the sense that the relation of debtor and creditor would result therefrom as between the school district and the bank, and to that proposition attention will now be directed. It has been many times held that when, except as specially authorized by statute, a treasurer, or other custodian of public money, makes a general deposit thereof in his own name, a trust results in favor of the beneficial owner, and that upon the insolvency of the bank receiving such funds with notice of their character, its estate is chargeable with the full amount of the deposit to the prejudice of nonpreferred creditors. (See *Independent District of Boyer v. King*, 80 Ia., 497; *Bunton v. King*, 80 Ia., 506; *Myers v. Board of Education of Clay Center*, 51 Kan., 87.) The principle underlying the cases above cited has been often recognized in this state in the distribution of the assets of insolvent banks. (See *Anheuser-Busch Brewing Ass'n v. Morris*, 36 Neb., 31; *Griffith v. Chase*, 36 Neb., 328; *Capital Nat. Bank v. Coldwater Nat. Bank*, 49 Neb., 786.) True, the two classes of cases differ in one respect, viz., in the former the inhibition results from the statute and the policy of the law applicable to custodians of public money, while in the latter the circumstances attending the deposit are such as to amount to a fraud against the owner of the fund, although the wrong in each consists in a violation of a trust relation with respect to the subject of the controversy. We are, in support of the opposing view, referred

by counsel to the case *Allibone v. Ames*, 68 N. W. Rep. [S. Dak.], 165, and also *State v. Hill*, 47 Neb., 456. Those cases are not, however, in our judgment, authority for the proposition asserted. The point there decided is that the word "loan," as employed in the statutory inhibition upon the powers of the officers concerned, is used in its restricted sense and includes those transactions only in which the conventional relation of borrower and lender exists,—in brief, that a public officer, by depositing in bank money entrusted to his care in order to preserve the same, is not *ipso facto* guilty of conversion. In neither case was the question presented of the power of a treasurer by a deposit of money in his hands as such, to create the relation of debtor and creditor between the bank and the public body whose commission he holds. The judgment of the district court is right and will be

AFFIRMED.

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EUGENE A. HALL, SHERIFF, V. NATHAN HART.

FILED JUNE 15, 1897. No. 7363.

Fraudulent Conveyances: UNLAWFUL CONTRACTS: PUBLIC POLICY. An insolvent debtor, or one in failing circumstances who parts with money or property under a contract in violation of statute, or which is void as against public policy, will be held to stand in the same position as one making a voluntary conveyance in fraud of creditors.

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

*R. C. Noleman*, for plaintiff in error.

*William Mitchell, contra.*

POST, C. J.

The subject of the controversy in this action of replevin is a certain stock of liquors taken by the plaintiff in

error, as sheriff of Box Butte county, to satisfy an order of attachment against David B. Chase in a suit then pending, wherein David Wise & Co. were plaintiffs and the said Chase was defendant. Practically the only question at issue is whether one purchasing the stock and business of a licensed saloon-keeper, and by agreement continuing such business ostensibly in the name of, and by virtue of the license issued to, his vendor, will be heard to claim the property so purchased when taken to satisfy an execution or order of attachment against the latter for a debt existing at the date of such transfer. That question was by the district court, in the rejection of evidence offered and in directing a verdict for the plaintiff below, resolved in the negative, and is now, by means of the petition in error of the sheriff, defendant below, presented for determination by this court.

We are unable to agree with the learned district judge in holding that the evidence offered is irrelevant to the issues presented. The sale and keeping for sale in this state, by any person, of intoxicating liquors without having first procured a license therefor, is a misdemeanor, for which a severe penalty is prescribed by statute. (Compiled Statutes, ch. 50, entitled "Liquors.") If, as the evidence offered tends to prove, the defendant in error, by agreement with Chase, continued the business of the saloon in the name of the latter, and, by implication, claimed protection under the license issued to him, he will not now be permitted to assert his own turpitude by proof that the contract through which he claims is in violation of the penal statutes and a fraud upon the school fund of the state. Such a proposition is alike shocking to our sense of justice and opposed to the plainest principles of public policy and sound morals. It should, in justice to the district court, be observed that its conclusion results, not from any different views respecting the validity of the agreement involved, but from the apparent previous execution thereof by the contracting parties. The rule is, however, well settled that when

an insolvent debtor, or one in failing circumstances, parts with his money or property pursuant to an agreement of the character here involved, he will be held to stand in precisely the same position as if such payment or agreement had been voluntarily made for the purpose of defrauding his creditors. (*Clark v. Gibson*, 12 N. H., 386; *Weeks v. Hill*, 38 N. H., 199; *Jose v. Hewett*, 50 Me., 248; *Laing v. McCall*, 50 Vt., 657; Greenhood, Public Policy, 68 Wait, Fraudulent Conveyances, sec. 214; Bump, Fraudulent Conveyances, sec. 202.) It is clear, both upon reason and authority, that the agreement through which defendant in error is required to trace his title is void as to creditors of Chase, his vendor, and that the property in controversy was liable to execution for debts then owing by the latter. It follows that the district court erred in the rejection of the evidence offered, for which the judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

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## CHARLES W. WILSON V. EDWARD L. PARRISH ET AL.

FILED JUNE 15, 1897. No. 7398.

1. **Unlawful Contracts: ENFORCEMENT: PUBLIC POLICY.** Courts will refuse to enforce contracts in contravention of statute or good morals, not on account of their solicitude for the contracting parties, but from motives of self-respect.
2. **Intoxicating Liquors: UNLAWFUL SALE.** An action cannot, in this state, be maintained for the price of intoxicating liquors sold in violation of statute.

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

*Clark & Allen*, for plaintiff in error.

*Wooley & Gibson, contra.*

POST, C. J.

This action was brought by the plaintiffs below, Root & Parrish, in the district court for Lancaster county to recover from the defendant therein, Charles W. Wilson, the sum of $3,400 on account of the alleged fraud and misrepresentation of the latter in the exchange of certain lands in Greeley county for a stock of drugs and store fixtures. Wilson, according to the allegations of the petition below, through his agent, one Zink, for the purpose of defrauding the plaintiffs therein, falsely represented the Greeley county land, to-wit, the west half of section 29, township 20, range 10 west, to be good farm land, well worth $12 per acre, of which eighty-one acres was then under cultivation; that, believing and relying upon such statements, the plaintiffs entered into a written undertaking whereby Wilson, in exchange for the stock of drugs and fixtures aforesaid, agreed to convey said land to the plaintiff, discharged from a mortgage lien thereon amounting to $1,700; that pursuant to said agreement, and relying altogether upon such representations, they accepted a conveyance of the Greeley county land and delivered possession of said stock and furniture to Wilson, who has sold and removed the same from Lancaster county. It is further specifically alleged that said statements were by Wilson known to be false and fraudulent, and that the land above described was not worth $12 per acre, but that it was, on the contrary, nearly, if not quite, worthless, and could not have been sold for exceeding $1 per acre. An answer was filed, in which, after denial of each and every allegation of fraud, it was alleged as follows: "For further and additional defense, the defendant alleges that said mentioned stock of drugs consisted almost entirely of intoxicating liquors, and that the value of all other goods in said stock, save and except intoxicating liquors, did not amount to the sum of $100. Defendant alleges that said intoxicating liquors consisted of malt, spirituous, and vinous liquors,

and that the same was sold and exchanged to this defendant by the plaintiffs in the city of Lincoln, Lancaster county, Nebraska, without having taken out a license for such sale or transfer as required by chapter 50, Compiled Statutes, entitled 'Liquors,' and such sale by the plaintiffs to the defendant was in violation of law." It appeared from the cross-examination of the plaintiffs' witnesses that said stock consisted in part of intoxicating liquors, and the defendant offered to prove by the clerk of the excise board of the city of Lincoln that no license or druggist's permit was issued to the plaintiffs for the year in question, which, upon objection of the latter, was excluded by the court, and which presents the only question requiring notice at this time.

Section 24 of chapter 50, Compiled Statutes, provides that the county board (or excise board of cities of the first class) may, under the restrictions of section 1 of said chapter, "grant permits to druggists to sell liquors for medicinal, mechanical, and chemical purposes, upon a compliance with all the provisions hereinbefore contained, and subject to all the requirements and penalties contained in this act, except that no license fee shall be required except the cost of issuing said permit." The first inquiry suggested by this statement is whether, assuming, as claimed, that the transaction involved is within the statutory prohibition, and therefore void, such fact is available as a defense to this action. It is, according to our understanding of the record, unnecessary to determine whether the cause of action pleaded is, in substance, *ex contractu*, or one sounding in tort, since the reliance of the plaintiffs is, in either case, upon the alleged illegal agreement. The courts will, as has been often said, refuse their aid in the enforcement of agreements in contravention of statute or good morals, not by reason of their solicitude for the parties, but from motives of self-respect. (*Wilde v. Wilde*, 37 Neb., 891.) "It is," as said by Ryan, C. J., in *Wight v. Rindskopf*, 43 Wis., 344, "the judicial duty always to turn a suitor upon such a contract out of court,

whenever and however the character of the contract is made to appear." The defense alleged in this case was that substantially all of the consideration for the Greeley county land was intoxicating liquors, sold and disposed of by the plaintiffs in violation of law, and the evidence rejected was admissible in support of that defense. Section 11 of the liquor law prohibits, under a severe penalty, the sale or giving away, upon any pretext whatever, of intoxicating liquors without having first obtained a license as in said act provided; and the prohibitory features of the statute are applicable to druggists. (*Warrick v. Rounds*, 17 Neb., 411.) The agreement, being one contrary to the policy and declared purpose of the law regulating the manufacture and sale of intoxicating liquors, is illegal, and its illegality is a sufficient defense to an action for its enforcement. (*Gillen v. Riley*, 27 Neb., 158; *Tredway v. Riley*, 32 Neb., 495; *De Witt v. Lander*, 72 Wis., 120.) It follows that the district court erred in excluding the evidence offered, for which the judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

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## HENRY MCKEE ET AL. V. NICHOLAS WILD.

FILED JUNE 15, 1897. No. 7318.

1. **Sales: WARRANTY: ACTION FOR BREACH: PLEADING: ESTOPPEL.** In an action for breach of warranty respecting the quality of corn sold and delivered under a contract evidenced by the following letter: "We are pleased to confirm purchase from you to-day of 2,500 bushels, or five cars [of corn], 3 or better, at 28 cts. per bushel, f. o. b. Stockham, twenty days' shipment, to be shipped within —— days, Toledo weights and grades. Bill same to Wm. Louder, East St. Louis, O. & St. Louis Railroad at Council Bluffs, Ia., care Wabash Railroad at East St. Louis, and make draft with bill of lading attached on us here," *held*, (1) that the plaintiffs by declaring upon a breach of warranty elected to treat the purchase as completed upon the delivery of the corn called for free on board at Stockham;

(2) that they cannot contradict the allegations of their petition by asserting that the contract is executory merely and that the title of the corn did not pass upon the delivery thereof on the cars at Stockham.

2. ———: ———: DELIVERY: EVIDENCE. The provision, "Toledo weights and grades," as employed in said contract, does not of necessity imply the delivery at Toledo at defendant's risk. But for the purpose of an action by the purchaser for a breach of warranty respecting the quality of the corn sold is satisfied by proof of the delivery free on board at Stockham of corn which would grade No. 3 or better, according to the Toledo standard, the question of weight and quality being one of fact for the consideration of the jury.

3. Custom and Usage: CONSTRUCTION OF CONTRACT. Custom or usage in trade or business may be shown for the purpose of interpreting a contract or controlling its execution, although not for the purpose of changing its intrinsic character, provided it be known to the party sought to be charged, or is so well settled and so uniformly acted upon as to warrant the presumption that it was known to both contracting parties and that they contracted with reference to it. (*Milwaukee & Wyoming Investment Co. v. Johnston*, 35 Neb., 554.)

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

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

*Hainer & Smith, contra.*

POST, C. J.

The plaintiffs in error, who were also plaintiffs below, alleged as their cause of action against the defendant in the district court for Hamilton county, "that on May 3, 1892, they bought of said defendant five car-loads, or 2,500 bushels, of corn, free on board at Stockham, Nebraska, to grade what is known as 'No. 3 or better,' at twenty-eight cents per bushel, to be billed at Stockham to order of William Louden, care Omaha & St. Louis Railway Company at Council Bluffs, Iowa, and care Wabash Railway Company at East St. Louis, to be shipped to Toledo, Ohio, said corn to be graded and weighed at Toledo, and the weights and grades returned from Toledo

were to be the number of bushels and grade the plaintiffs were to pay the defendant for, at twenty-eight cents per bushel, the defendant guarantying to plaintiffs that said corn should grade No. 3 or better." It is further alleged that the defendant, pursuant to said contract, on and previous to May 24, 1892, shipped five cars of corn, aggregating 2,499 bushels, against which he drew upon plaintiffs three drafts, with bills of lading attached, amounting to $670, which were in due time honored and paid, but that the corn so shipped did not, when received at Toledo, grade No. 3 or better and was, according to custom, sold upon its arrival there at prices ranging from four cents to thirty-seven cents below the ruling price of No. 3 corn, to plaintiffs' damage in the sum of $468.19, for which sum they prayed judgment. The defendant answered admitting the sale and shipment of the corn substantially as alleged, except that he denied having warranted the corn sold to grade No. 3 at Toledo. He alleged, also, that the corn sold was good merchantable corn and would, when shipped, have graded No. 3 or better under the rules prevailing at Toledo, but that the plaintiffs' agents engaged in the forwarding and transporting the same from Stockham were guilty of negligence and unreasonable delay, in consequence of which it was from two to six months en route and was suffered to become damp and heated, and that if it failed to grade No. 3 or better at Toledo, such fact was due to the negligence of plaintiffs' own agents and without fault or negligence of the defendant. The reply was in effect a general denial. The contract proved is evidenced by the following communication in writing:

"*Mr. N. Wild, Stockham, Neb.:* We are pleased to confirm purchase from you today of 2,500 bushels, or five cars, 3 or better, at 28 cents per bushel, f. o. b. Stockham, twenty days' shipment, to be shipped within —— days, Toledo weights and grades. Bill same to order Wm. Louden, East St. Louis, care O. & St. Louis Railroad at Council Bluffs, Ia., care Wabash Railroad at East St.

Louis, and make draft with bill of lading attached on us here. McKEE & WARNER."

By reference to the petition it will be observed that the plaintiffs declared upon a warranty, or guaranty, respecting the quality of grain purchased. The title must accordingly be held to have passed upon the delivery of the corn free on board at Stockham, since in order to recover for a breach of warranty the title must have vested in the plaintiffs. That the corn when delivered was such as would have graded No. 3 at Toledo cannot, upon the evidence adduced, be denied. The primary question is, therefore, whether, as claimed by plaintiffs, the words "Toledo weights and grades" employed in the contract, import an assurance against actionable negligence by common carriers in the transportation of the corn; in other words, to which of the parties hereto are the railroad companies, upon this record, answerable for the negligence resulting in the loss sustained? That question is, in view of plaintiffs' own interpretation of the contract, freed from any difficulty which would otherwise attend it. The title having vested in plaintiffs upon the delivery of the corn at Stockham, the conditions of the warranty were satisfied, provided said corn was in quality such as would have graded No. 3 or better according to the Toledo standard, the question of quality and weight being one of fact to be determined by the jury. In this connection may be cited the recent case of *Lord v. Edwards*, 148 Mass., 476, the syllabus of which reads as follows: "Warranty is of quality at port of shipment, and not port of destination, under a contract evidenced by the following letter from the sellers to the buyers: 'We have made sale to you of 1,200 tons extra M. sugars, about No. 9 D. S. in color, at 10.10 per ton, f. o. b., and we understand it is your intention to load same on the Republic on her arrival at M. It is further understood that the sugar is sold on a basis of 88 degrees pol'r with 3d. per cwt. per degree downwards, and fractions of degree in proportion. The sugars to be thoroughly sam-

pled and tested on arrival.'" And the court, by Morton, C. J., referring to the closing sentence of the contract above quoted, say: "Both parties agree, and it is clear, that upon the delivery of the sugar on board the ship, and the payment for it, the property in it passed to the plaintiffs. It is equally clear that the defendants did not assume any risks of damage to the goods by the perils of the sea. It was a sale of certain goods of a specified quality at Manila, and not at New York. The nature and scope of the transaction being that of a completed sale of goods, which were to be exposed to the perils of the sea, and other risks of a long sea voyage, and which were taken entirely out of the custody or oversight of the sellers, it is not to be presumed that they assumed any risks of its future condition, unless there be an express and clear stipulation to that effect. The plaintiffs contend that such a stipulation is implied in the words 'the sugars to be thoroughly sampled and tested on arrival.' This is certainly not an express stipulation that the sugar, upon arrival in New York, shall be of a specified quality. It cannot be claimed under this clause that, if the goods were damaged by a peril of the sea, the defendants would be responsible. It does not import a warranty against damage by perils of the sea, and we cannot see that it necessarily or reasonably imports a warranty against damage from wet weather or from sweating, or other causes of deterioration operating during a long voyage. The clause in question seems to be an independent clause, inserted probably because it was thought important or desirable that the parties should know the condition of the sugar upon its arrival. Such knowledge might be important in case of any controversy as to the condition of the sugar when shipped. But whatever the reasons for its insertion, we cannot reasonably construe it as importing a stipulation which is contrary to the spirit and scope of the contract, which contemplated a completed sale and delivery at Manila." The reasoning there employed impresses us as altogether sound and we adopt without hesitation the conclusion to which it leads.

In the brief of counsel for plaintiffs is found an exhaustive discussion of the subject of executory contracts exemplified by the citation of numerous cases holding tests prescribed by contract essential in order to divest the seller of his title. But, as above intimated, that question is eliminated from the present controversy by plaintiff's own interpretation of the contract. Having declared upon an executed agreement and sought in this action to recover for a breach of warranty as to the quality of property purchased, he is estopped to assert that the agreement is executory merely, or to deny that the title passed upon the delivery of the corn. (*Foley v. Holtry*, 43 Neb., 133.)

Exception was also taken to the exclusion of evidence offered to prove that grain purchased free on board in this state is, by recognized custom of dealers, forwarded at the shipper's risk, and that the title thereto does not pass until inspected and weighed at the point to which it is consigned. The evidence offered was inadmissible: (1.) Because it embraced the mere opinion of the witnesses. (2.) Its tendency was to vary the terms of the written contract as interpreted by the plaintiffs, and was a departure from the cause of action alleged in the petition. (3.) When a custom is relied upon to prove a meaning other than the ordinary significance of words used in a contract it should be pleaded. (*Lindley v. First Nat. Bank of Waterloo*, 76 Ia., 629.) (4.) It did not appear therefrom that the custom relied upon was known to the defendant, or that it was so well established and so uniformily acted upon as to warrant the presumption that it was known to both contracting parties and that they contracted with reference to it. (*Milwaukee & Wyoming Investment Co. v. Johnston*, 35 Neb., 554.) We discover no error in the record, and the judgment must be

AFFIRMED.

MARY COSTELLO, BY EDWARD COSTELLO, GUARDIAN, V. W. J. KOTTAS ET AL.

FILED JUNE 15, 1897. No. 7293.

1. **Unauthenticated Bill of Exceptions.** A bill of exceptions must, in order to become a part of the record in this court, be authenticated by the certificate of the clerk of the district court.
2. **Instructions: REPETITIONS.** It is not error to refuse instructions requested when given in substantially the same language by the court on its own motion.
3. **———: EXCEPTIONS: REVIEW.** Error cannot in this court be predicated upon the giving or refusing of instructions to which no exception was taken in the trial court.

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

*Richard Cunningham*, for plaintiff in error.

*John Barsby, contra.*

POST, C. J.

The plaintiff in error, an infant, by her next friend, Edward Costello, sued the defendants in error, Vaclar Kottas, Joseph Ondrak, Frank Rohla, and Frank Kabel, in the district court of Fillmore county upon the bond of Kottas & Ondrak, as licensed saloon-keepers, the cause of action alleged being the sale by the defendants last named of intoxicating liquors to Daniel Costello, plaintiff's father, to her damage, etc. The defendants, by their joint answer, admitted that Kottas & Ondrak were engaged in business as licensed saloon-keepers as charged, and denied each and every other allegation of the petition. There was a trial below, resulting in a verdict and judgment for the defendants, from which the plaintiff prosecutes error.

The several assignments which relate to the sufficiency of the evidence and alleged errors in the admission and

rejection of evidence must be ignored, since the documen which accompanies the transcript, entitled a "bill of ex ceptions," is not authenticated by the certificate of th clerk of the district court. The other assignments of th motion for a new trial relate to the giving and refusing o instructions as follows:

"4. The court erred in refusing to give the instruction asked by the plaintiff.

"5. The court erred in refusing to give the instruction asked by the defendants.

"6. The court erred in giving the eighth instruction."

We observe, by a reference to the transcript, that the plaintiff requested four separate instructions which had, in substance, been given by the court on its own motion. It follows that there is no error in the refusing plaintiff's requests. Respecting the instructions to which reference is made in assignments numbered 5 and 6, it may be observed that the record discloses no exception thereto; hence they will not be examined in this proceeding. There is no error in the record and the judgment will be

AFFIRMED.

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## BURLINGTON & MISSOURI RIVER RAILROAD COMPANY IN NEBRASKA V. MICHAEL KITTRIDGE.

FILED JUNE 15, 1897. No. 7375.

1. Carriers: CONTRACT OF SHIPMENT: DAMAGES: EVIDENCE. Evidence examined, and *held* to warrant the finding that the contract of shipment sued on was executed by authority of the defendant, a railroad company.

2. New Trial: NEWLY-DISCOVERED EVIDENCE. It is not error to refuse a new trial upon the motion of the defendant, a railroad company, alleging newly-discovered evidence material to the issues, where the facts disclosed by affidavits accompanying such motion are within the knowledge of the defendant's servants who testified in its behalf on the trial.

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

*A. W. Agee, J. W. Deweese,* and *J. R. Hanna,* for plaintiff in error.

*T. J. Doyle, contra.*

POST, C. J.

This was an action by the defendant in error, Michael Kittridge, against the plaintiff in error, the Burlington & Missouri River Railroad Company, in the district court for Greeley county, in which the plaintiff therein recovered judgment, and the defendant prosecutes error.

It is, by the petition, alleged that the defendant therein, hereafter called the "railroad company," is engaged in the operation of a line of road between Byron and Greeley, in this state; that as a common carrier for hire it received from the plaintiff, and undertook to safely transport from the first named station to Greeley, a car containing certain household goods, farm machinery, eight horses, and fifty-four hogs; that the defendant did not safely transport said car as by its contract it had undertaken to do, but that it was, on the contrary, guilty of negligence, particularly alleged, whereby twenty-eight of the hogs above mentioned were killed, to the plaintiff's damage in the sum of $506.40. The railroad company answered denying that it is, or was at the time in question, engaged in the operation of a line of road between Byron and Greeley; and alleging that whatever shipment of goods and chattels was made by the plaintiff was over and by way of a line of road owned and operated by the Chicago, Burlington & Quincy Railroad Company. There was also a denial of the alleged negligent acts, accompanied by the charge that the plaintiff's loss, if any, was occasioned by his own negligence and misconduct, without any fault whatever of the last named company. The

bill of lading introduced in evidence, so far as material to the questions at issue, reads as follows:

"This contract, made and entered into this 21st day of Mch., 1893, between M. Kittridge, of Byron, Neb., of the first part, and the Burlington & Missouri Railroad in Nebraska, of the second part, witnesseth, that for and in consideration of $38 per car, subject to minimum weights as shown in published tariffs, the said railroad company agrees to transport one car loaded with em'gr't & stk from Byron, Neb., to Greeley, Neb. * * * Witness the name of the railroad company, by the agent, and the hand of the first party, the day and year above written.

"THE BURLINGTON & MISSOURI RIVER RAILROAD.

"By J. E. HINES, *Agent.*

"M. KITTRIDGE, *Shipper.*"

The first contention at this time is that there was no competent proof of the authority of Hines, the station agent, to execute the contract of shipment in behalf of the defendant company, and that the trial court accordingly erred in receiving that instrument in evidence. That contention is, we think, without merit. True, the Burlington & Missouri River Railroad Company is, as shown by witnesses for the defendant, a division only of the system of roads owned and operated by the Chicago, Burlington & Quincy Railroad Company. It is, however, conceded that Byron & Greeley are stations on the line of the first named company, and that the property above described was transported over said line. The blank form used in the execution of the contract above set out was one furnished the station agent for that purpose by the managing officers of the Chicago, Burlington & Quincy Railroad Company, and a duplicate of said contract was, upon the execution thereof, forwarded by the agent at Byron to the auditor of the last named company at Omaha. It appears also that a "bad order report" was a few days thereafter forwarded to said agent, showing the condition of the car mentioned when received at Greeley. The evidence furnishes a sufficient foundation

for the introduction of the contract, and is, moreover, quite sufficient to warrant the finding that said contract was executed by authority of the defendant company.

It is next argued that the proof fails to support the allegation of negligence on the part of the railroad company; also that the hogs in question were killed by the falling of a deck negligently constructed by the plaintiff in the loading of the car. The deck here referred to was about twenty-seven inches from the bottom of the car, and supported the farm machinery and household goods, which, on the collapsing of said deck, fell upon the hogs, with the result stated. The charge of negligence in the loading of the car was denied by the plaintiff, who testified, in effect, that the injury sued for was caused by the negligent and unnecessary jolting and shaking of said car by the servants of the railroad company engaged in switching and coupling the same, and without fault or negligence on his part. The evidence bearing upon that issue is fairly indicated by the foregoing statement, and does not call for comment in this connection. It is sufficient that it may, when tested by the rules applicable to proceedings for review by petition in error, be said to support the finding adverse to the railroad company.

Exception was taken to the giving of certain instructions and to the refusal of others. By those given the jury were, in effect, advised that the plaintiff was required to prove affirmatively the acts of negligence alleged; also that he was required to exercise reasonable care in loading the car, and that he could not recover provided his negligence in that particular caused or contributed to the loss for which he claims, which propositions included the substance of those refused, so far as applicable to the issues presented. There was, accordingly, no error in the giving and refusing of instructions prejudicial to the rights of the defendant company.

Finally, it is argued that a new trial should have been allowed upon the defendant's motion on account of newly-discovered evidence material to the issues; but, unfortu-

nately for that contention, the facts disclosed by the affidavits accompanying the motion were of necessity within the knowledge of defendant's servants who were called as witnesses, and should, in the exercise of reasonable diligence, have been discovered before the trial. There is in the record no error of which the defendant company can complain, and the judgment is accordingly

AFFIRMED.

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MARTHA SKINKLE, APPELLANT, V. JASPER HUFFMAN ET AL., APPELLEES.

FILED JUNE 15, 1897. No. 7341.

1. **Subrogation.** The right of subrogation does not exist in favor of the holder of a second mortgage to the prejudice of the paramount lien.

2. ———: MORTGAGES: PAYMENT BY JUNIOR MORTGAGEE. A second mortgagee, who, for the protection of his own security, pays an installment due on the first mortgage, will, to the extent of such advancement, as against the mortgagor, be subrogated to the rights of the holder of the first mortgage, and may, upon payment by the mortgagor of the balance due on the prior mortgage, enforce by action his lien for the amount so advanced.

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

*F. C. Power*, for appellant.

*G. W. Bemis, contra.*

POST, C. J.

This was an action by the appellant, Martha Skinkle, in the district court for York county upon an interest coupon of a prior mortgage paid by her in order to protect her own security. Appellant, on the 23d day of February, 1891, in an action then pending in said court in which Melintus H. Kealiher and wife were defendants,

secured the entry of a decree foreclosing her second mortgage. The first mortgage for $2,000 executed by Kealiher and wife to the Connecticut Mutual Life Insurance Company (hereafter called the insurance company) not having matured, said company was not made a party to that action. Subsequent to the decree in appellant's favor, coupon No. 4 of the first mortgage matured, and the amount thereof, to-wit, $120, was paid by her, for her own protection, and said coupon, duly canceled, was by the holder delivered to her. The mortgaged property was thereafter sold by the Kealihers to the appellee Damerin, who, as part consideration therefor, assumed and paid the amount of appellant's decree, also the principal and interest of the first mortgage which had in the meantime matured. This action was thereupon brought by appellant, in which Damerin and the Kealihers were made defendants, and in which she alleged as her cause of action the payment of the coupon as hereinbefore stated, and that the said Damerin purchased with full notice of the fact that said coupon had not been paid by the Kealihers, and that the appellant had been compelled to pay and satisfy the same in order to protect her security. The prayer was for an accounting of the amount due on said coupon, a decree adjudging the same to be a first lien upon the mortgaged premises, and for general relief. The defendants above named answered denying the material allegations of the petition, in addition to which Damerin alleged the payment to the Kealihers in full for the mortgaged property without notice of appellant's equities in the premises. The district court, upon a final hearing of the cause, found specially that the Farmers & Merchants Bank of York, which acted as Damerin's agent in the purchase of the mortgaged premises, had notice at the time of said transaction that said coupon was then held by the appellant, and that she claimed a lien for the amount thereof upon said property; also that appellant had previously left said coupon with said bank for collection and the same was for said pur-

pose held by the bank before and at the time of payment of the purchase price of the land to the Kealihers. Judgment was awarded in the appellant's favor against the Kealihers for the amount of the coupon and interest. There was also a decree in favor of Damerin, dismissing appellant's petition, and from which this appeal is prosecuted.

The real question is, as will be observed from the foregoing statement, whether appellant, upon the facts as found, is entitled to be subrogated to the rights of the insurance company with respect to the coupon paid by her. The right of subrogation exists, as a rule, in favor of a creditor who has paid the amount of a mortgage or other incumbrance in order to protect his own subordinate lien. (*Bohn Sash & Door Co. v. Case*, 42 Neb., 281; *South Omaha Nat. Bank v. Wright*, 45 Neb., 23; *Seieroe v. Hohman*, 50 Neb., 601.) Appellees, while conceding the proposition above stated, argue that it can have no application to the facts of this case, since, as they contend, payment of the entire debt is essential to the right of equitable subrogation, whether in favor of a surety, or the holder of a subordinate lien. Subrogation, it is settled, both upon reason and authority, will not, except in case of estoppel, be allowed to the prejudice of other rights. This principle was recognized in the leading case of *Kyner v. Kyner*, 6 Watts [Pa.], 221, holding that substitution of one creditor for another will be denied so long as the debt, or any part thereof, remains unsatisfied, because, as held therein, until the creditor shall be wholly satisfied, there ought, and can be, no interference with his rights or his securities which might, even by a bare possibility, prejudice or embarrass him in any way in the collection of the residue of his claim. (See, also, *Forrest Oil Co.'s Appeals*, 118 Pa. St., 138; *Graff's Estate*, 139 Pa. St., 69; *Coson v. Laney*, 82 Tex., 317; *Swigert v. Bank*, 17 B. Mon. [Ky.], 268; *Carter v. Neal*, 24 Ga., 346; *Receivers v. Wortendyke*, 27 N. J. Eq., 658; *Rice v. Morris*, 82 Ind., 204.) But the doctrine of the cases cited has, in every

instance, been invoked for the protection of the creditor, and never, so far as we are advised, to defeat contract obligations in the interest of the debtor alone. Thus understood, the exception requiring payment in full of the debt as a condition precedent to the right of subrogation, is as firmly established as the rule itself. Cases are, however, not wanting directly in point, and in which subrogation has been allowed between parties occupying towards each other the relation of cosureties and the like upon the payment of a part only of the debt. (See *Comins v. Pottle*, 35 N. J. Eq., 94; *Gede v. Matson*, 25 Beav. [Eng.], 310; *Kelly v. Kelly*, 54 Mich., 30; Sheldon, Subrogation, sec. 128.) We conclude, from an examination of the subject in the light of authority, that appellant is entitled to be subrogated to the right of the insurance company with respect to the coupon in question. The decree in favor of the defendant Damerin is accordingly reversed and the cause remanded, with directions to enter decree in accordance with the prayer of the petition.

REVERSED.

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TRYPHENA KIRKHAM V. FRANCIS N. GIBSON ET AL.

FILED JUNE 15, 1897. No. 7383.

Judgments: VACATION: PETITION. A petition presented to the district court under the provisions of sections 602 and 603 of the Code of Civil Procedure to obtain the vacation or modification of its judgment or decree, must contain statements which disclose that there exist some one or more of the reasons assigned in section 602 for the granting of such relief, or the facts averred must be sufficient to warrant the court within the exercise of its general jurisdiction to set aside the decree.

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

*D. T. Hayden* and *John P. Maule*, for plaintiff in error.

*E. H. Wooley, contra.*

HARRISON, J.

The plaintiff in error filed a petition in the district court of Lancaster county, the object and purpose of which was to secure to be vacated a decree of that court rendered during a term thereof which had been closed prior to the filing of the petition, and by which the title to certain real estate, which of record was in plaintiff in error, was affected; also to be allowed to appear and make a defense in the action in which the decree had been entered. To the petition a general demurrer was interposed for the defendants in error, which, on hearing, was sustained, and the plaintiff electing to stand on the petition and plead no further, the cause was dismissed.

The petition in this action was filed under the provisions of sections 602 and 603 of the Code of Civil Procedure, and a careful reading of the petition convinces us that there were no allegations which entitled the plaintiff to the relief sought. From the facts stated it does not appear that there was any irregularity in obtaining the judgment which was asked to be vacated, nor that the party seeking its vacation was prevented from defending in the suit in which it was rendered by any unavoidable casualty or misfortune, nor that there was any fraud or wrong practiced by the successful party in obtaining the decree, nor are any of the other reasons or causes assigned in the law as sufficient to warrant the court in vacating its judgment disclosed; hence the court ruled properly when it sustained the demurrer. The petition did not state a cause of action, nor sufficient grounds for relief. (*Ganzer v. Schiffbauer*, 40 Neb., 633; *Scott v. Wright*, 50 Neb., 849.) The judgment of the district court will be

AFFIRMED.

# TATE OF NEBRASKA, EX REL. WOODRUFF-DUNLAP PRINTING COMPANY, V. JOHN F. CORNELL ET AL.

FILED JUNE 15, 1897. No. 9216.

**State Printing**: CONTRACTS. That part of section 2, chapter 68, Compiled Statutes, in which is stated, "The printing and binding of reports of state officers, authorized by law to be printed, and all other reports and documents ordered by the legislature, except such as enter into and form a part of the journals, shall be let in another contract," *held* to require that the designated work be done under a single contract; and the state printing board cannot sever the contract for such work and award portions of it to one bidder and other portions to other bidders.

———: ———: BIDDERS. There is a necessary implication in the law in regard to state printing that the contracts be awarded to the lowest competent bidders.

———: ———: ———. Where the statute provides that there be an advertisement for proposals or competitive bids for the doing of public work and the awarding of the contracts pursuant to such bids, the object being to secure the work to be performed as economically as may be, and the statute contains a statement that if the first party to whom the contract is awarded fails to perfect the contract, the work may be let to the next lowest bidder, it requires, though not expressed directly, that the contract be awarded and let to the lowest bidder, unless the statute vests, or by reason of the nature of the work there rests, a discretion in the officer or board authorized to let the contract.

———: ———: REJECTION OF BIDS. A provision in the statute or a reservation in the advertisement of the right of the officer or board in the consideration of bids, to reject any or all of them, does not confer a power to be exercised arbitrarily or without cause in the rejection of a bid or bids.

———: ———: ———. Where the law requires that specifically designated items of work shall be let as a whole or in a single contract, the fact that an officer or board, charged with the duty of awarding such contract to the lowest bidder therefor, attempts to sever the contract and to let portions of it to several parties respectively, does not work a rejection of any or all the bids, as such action is wholly unauthorized.

**Res Judicata**: PLEADING. If to a petition or pleading in an action a general demurrer is interposed, and the pleading is determined defective for the want of a material allegation, and a judgment follows, and in a second suit the material averment which the pleading in the first suit lacked, is supplied, constituting the plead-

ing sufficient as a statement of a cause of action, the judgment i the first case is not a bar to the second suit, though both were in stituted to obtain the enforcement of the same right.

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

*J. H. Broady,* for plaintiff in error.

*C. J. Smyth, Attorney General,* and *Ed P. Smith, Deput Attorney General, contra.*

HARRISON, J.

The relator herein filed in the district court of Lancas ter county an application for a writ of *mandamus* to issu against John F. Cornell, the auditor of public accounts John B. Meserve, state treasurer, and William F. Porter secretary of state, who by law constitute the state print ing board, to compel such board to award and cause to b let to the relator a contract to do certain of the publi printing. An alternative writ was issued, in which ap peared certain formal statements, to which we need de vote no space or attention; also, that prior to December 1896, and up to January 7, 1897, Eugene Moore was au ditor of public accounts, Joseph S. Bartley was state treasurer, and Joel A. Piper secretary of state, and collec tively the state printing board, and as such board adver tised for proposals or bids for doing public printing, sep arating the work to be done, arranging one portion of it under what was designated in the advertisement "Class One," and the other as "Class Three;" that in the adver tisement the board assumed to reserve the right to award contracts for the work to be done under Class Three in or on as many separate contracts as it should deem best; that the relator made its proposal or bid for the perform ance of the work included under Class Three, and accom panied its bid with good and sufficient bond conditioned as required by law, and in the sum of $5,000; that the bids offered were duly considered by the printing board, and

it was determined that the relator's bid was the lowest and best bid for the work included in Class Three and the relator a responsible bidder. The printing for the doing of which proposals had been asked, arranged and classed as three, was of reports of state officers, and it was further pleaded that for the printing of six of said reports the bid of relator was the lowest; that for six of them the bid of Jacob North & Co. was the lowest, and for printing of four of them the bid of the State Journal Company was the lowest, but in the aggregate, or for printing the whole number, the proposal of relator was the lowest; and further:

"The said printing board, at the time provided by law, in the manner provided by law, considered the relator's bid as aforesaid. At the time they so considered it the relator tendered to the said board its bond to the state in the sum of not less than twice the amount of the contract price of the contract for the work so bid for, which he claims should be awarded to him, and with more than two good and sufficient sureties approved by said board, conditioned for the faithful performance of said contract, which bond was according to law in all respects and was received and kept and is still retained by said board, and no objection has ever been made to the form or the sufficiency of the sureties of the said bond. The relator thereupon demanded of the said board the awarding of a contract and the execution thereof in writing in due form for the printing of all the said sixteen reports, but the said board refused, solely on the ground that they contended that the relator was only entitled to such contract for the said six reports on which its bid was the lowest, and that Jacob North & Co. were entitled to another contract for the printing of the said six reports on which its bid was the lowest, and that the State Journal Company was entitled to the contract for the printing of the said four reports on which its bid was the lowest. The said board neither made nor have any other objection to the relator's demand than as aforesaid. They only objected

to the demand because they desired that there should be three contracts for the work covered by said bid, viz., one to relator, one to Jacob North & Co., and one to the State Journal Company. The said board still insists upon said objections, and still refuses to award the contract for the whole of said work to the relator, until the said Moore, Piper, and Bartley were succeeded in office as the said printing board on the 7th day of January, 1897, when the said Cornell succeeded the said Moore as auditor of public accounts, and the defendant Meserve succeeded the said Bartley as treasurer, and the defendant Porter succeeded the said Piper as secretary of state, and thereby the defendants became and constituted the state printing board of Nebraska, as the successors to the said Moore, Bartley, and Piper, and that they have remained such state printing board ever since, and are such now. Immediately after the defendants became the state printing board the relator saw a majority of them, of whom he demanded the awarding of a contract according to its bid above given, and the execution of a written contract accordingly. The majority of the members of the new board conceded its right to a contract according to law, according to its request, and for a time satisfied him that the contract would be awarded to him and executed accordingly. Thereupon the relator delivered to the defendant Porter, as the custodian of the records of the said board, its bond, duly executed according to law, with good surety, for the faithful performance of the said contract according to its bid, hereinbefore more particularly mentioned, and the board accepted it without objection and has retained it ever since. Thereupon the relator concluded that the contract would be awarded to him and proceeded to get ready to do the work, and, pursuant to talks with members of the board, did actually commence upon the work thereof, and on good faith that the contract would in the regular order of business be executed. The relator was informed by the printing board that they would get the attorney general to draw the contract in writing, and

notify the relator when it was ready for execution. In which assurance the relator acted until about the last of January, 1897, when the defendants, as the state printing board, met and decided that they had no jurisdiction to act in the matter, because of what the board had done during the incumbency of their predecessors, and solely upon that ground, that they had no jurisdiction to act, conceding the responsibility of the relator and that he was a good and lawful bidder, declined to take any action in the matter, thereby leaving the relator without any remedy except in the courts, and therefore refused to enter into contract with relator for said work, as relator then and there demanded according to its bid; but, on the other hand, the said printing board considered that they are bound by the action of the former board to divide up the said work into three contracts, according to the plan of the former action of the board, which they propose to do and will do if not controlled by the action of the courts. With no former knowledge on that subject, it was then ascertained that the said board of printing, before the defendants were installed in office, had entered upon the minutes of their record that they awarded three different contracts for the said work, part to relator, part to Jacob North & Co., and part to the State Journal Company, according to their theory and contention as hereinbefore stated. But the said printing board has all the time since then, and up to the present time, declined and refused to make written contracts, and the said board has entered into no writings with any one, although the said bids all contemplated writings, and such written contracts are necessary to consummate the awarding thereof. There is no consummated contract yet with any one for any part of the work covered by the bids hereinbefore described."

To the writ the board filed an answer, in which it admitted the formal allegations of the writ and the allegations in regard to the advertisement for bids, the bidding, and that relator's bid was accompanied by its bond in the

sum of $5,000; also that the bids of the State Journal Company, Jacob North & Co., and the relator were as stated in the writ, and were all determined by the printing board to be unobjectionable in form and substance, and that an award was made to each of a portion of the printing included in Class Three, as more fully shown by a copy of the record of proceedings in this regard of the printing board, of date December 8, 1896, which copy was as an exhibit attached to and made a part of the answer. It was also admitted that the respondents had declined as a board to take any action in the matter, and refused to order a contract to be entered into with relator for the printing of all of said reports. There was a denial that the bid of relator was determined by the board to be the lowest and best for the work included in Class Three; also a denial of the conversations and transactions alleged to have occurred between the printing board and the relator prior to January 7, 1897. It was affirmatively alleged in the answer that the board was ready and willing to enter into a contract with relator for the printing of the six reports for which its bid was and had been declared the lowest and best. The further allegations in the answer were as follows:

"Further answering said relator's petition, these respondents show to the court that on the —— day of December, 1896, an action was commenced in the supreme court of the state of Nebraska entitled 'The State of Nebraska, ex rel. The Woodruff-Dunlap Printing Co., v. Joseph S. Bartley, State Treasurer, Eugene Moore, Auditor of Public Accounts, and Joel A. Piper, Secretary of State, Constituting a State Printing Board,' in which action relator sought to procure a writ of *mandamus* from said court to compel the said respondents therein to enter into a contract with the said relator therein the same as is now prayed for by said relator in the petition now filed in this court. They allege that said action was pending and undetermined when the respondents therein named went out of office on the 7th day of January, 1897; that

thereafter the relator filed an amended and supplemental petition, and by leave of court joined and made the respondents herein parties to said action, and in the said amended and supplemental petition the said relator set up the matters and things in substance the same as are pleaded in its petition filed in this court, and asked that these respondents be required to enter into a contract with the relator the same as is prayed by the relator in this court; the said amended and supplemental petition being filed by the said relator in the supreme court of Nebraska on the 2d day of February, 1897. They allege that afterwards, to-wit, on the 8th day of February, 1897, these respondents filed in the supreme court of the state of Nebraska their demurrer to the petition of the relator; that afterwards said cause came on to be heard upon the issues joined in said pleadings and was submitted to the supreme court of the state of Nebraska; that afterwards, on the 4th day of March, 1897, the said supreme court of the state of Nebraska, after being fully advised in the premises, found the issues so joined in said cause in favor of these respondents, and entered a judgment in said court dismissing said proceedings, and ordered that these respondents go hence without day and recover of the relator their costs therein expended. The respondents attach hereto, and mark 'Exhibit B,' a true and certified copy of the amended and supplemental petition filed by the relator in said court, except that the same does not contain 'Exhibit A,' referred to in the petition, but which exhibit is in truth and in fact the same as 'Exhibit A' attached to the relator's petition filed in this court; a true and certified copy of the demurrer filed in the supreme court by these respondents, and the final order of the court entered in said cause on the 4th day of March, 1897.

"10. These respondents allege that the said supreme court of the state of Nebraska had full jurisdiction of the subject-matter of the said action and of the person of the relator and of these respondents, and that the judgment so entered in said court on said 4th day of March, 1897,

has never been reversed, vacated, or modified, but is now in full force and affect.

"Wherefore these respondents say that by reason of the premises herein set forth, the relator's rights in the premises have been fully adjudicated and determined by the supreme court of the state of Nebraska, and this court is wholly without jurisdiction to hear and determine the matters complained of in the relator's petition filed herein."

Of the issues presented there was a trial resulting in a denial of the application for the writ and a judgment of dismissal of the action. The relator has removed the case to this court by proceedings in error.

There are but two main questions raised and discussed by counsel, one that the determination of the awarding of the contract was committed to the board and a matter resting within its discretion, hence not controllable by *mandamus;* and a second, that of a former adjudication in an original action in this court. The provisions of statute in relation to the state printing board and its duties, etc., will be found in chapter 68, Compiled Statutes, and chapter 61, Session Laws, 1883, of which section 1 states what officers shall constitute the state printing board, and that it "shall have general supervision over the matter of state printing, in the manner provided by this act." Section 2 is as follows: "The printing of all bills for the legislature, with such matters as may be ordered by either house thereof, to be printed in bill form, shall be let in one contract. The printing and binding of the senate and house journals shall be let in another contract. The printing and binding of reports of state officers authorized by law to be printed, and all other reports and documents ordered by the legislature, except such as enter into and form a part of the journals, shall be let in another contract. The printing and binding of the laws, joint resolutions, and memorials enacted by the legislature shall be let in another contract. And the printing and binding of all blanks, blank books, and cir-

culars required to be furnished by the officers of the executive department of the state shall be let in another contract." In section 3 the times at which the contracts for public printing shall be let are prescribed. Section 4 provides for advertisements for proposals and, *inter alia*, that the advertisement "shall also state that the board reserves the right to reject any and all bids." Section 7 is in the following language: "The proposal or bid for any of the contracts aforesaid shall not be considered unless the same shall be accompanied by a bond in the sum of five thousand dollars ($5,000), with two or more sureties, that in case the party proposing for any such contract shall be awarded the same such party will, within five days after the award to him of such contract, enter into bonds for the faithful performance thereof;" and section 8: "It shall be the duty of the secretary of state to give immediate notice to the successful bidder that his proposal has been accepted, and each successful bidder shall in five days thereafter enter into bonds to the state in the sum of not less than twice the amount of the contract price for each and every contract so awarded to him, with at least two good and sufficient sureties, to be approved by said board, conditioned for the faithful performance, pursuant to this act, of that contract for which he has been adjudged the successful bidder; and if he fail to give bond within the time allowed, then the contract shall be given to the next lowest bidder who will give bond as aforesaid, or the board may in their discretion advertise anew and relet the contract in the manner hereinbefore provided." In section 10 it is prescribed that the attorney general shall draw all contracts; that any contract shall be signed by the members of the board, and the party to whom it has been awarded. It also provides for the institution of action on the bond filed with the bid if any successful bidder shall fail to file bond for performance of his contract.

There is little or no substantial conflict in regard to the facts. It appears that for the printing of items in Class

Three the bid of relator, if the bids were considered as a whole or in the aggregate, was the lowest of all proposals for such work, there being quite a number, while on some individual items it was not the best. There is and was no contention in respect to the responsibility of the relator nor as to the sufficiency of the preliminary bond furnished in form or substance. The board, it is disclosed by a record which was kept of the proceedings when in session for the purpose of letting the contract, severed the items which appeared in the advertisement as Class Three and, if it could legally do so, awarded contracts for the work in distinct stated portions, one to each of three different bidders. If the board possessed the power or right to so do, then this application could not and cannot control it. It will be remembered that in section 1 the board was given general supervision of the state printing but "in the manner provided by this act." The language employed in section 2 is clear and unambiguous and can scarcely be said to admit of a construction other than is explicitly imported by the words employed. Its first provision is "The printing of all bills for the legislature, with such matters as may be ordered by either house thereof to be printed in bill form, shall be let in one contract." To say that this means the contract may be severed and not one, but two or more contracts may be awarded, for illustration, to one party or firm for the printing of senate files and to another for the printing for the house of representatives, would be a substitution for the words used, of language of an import in direct opposition to the plain meaning of that actually used by the lawmaker. Each following clause in reference to the letting of a contract, for in each a specifically stated distinct class of printing, inclusive of the third, prescribes as to each that it shall be let in "another contract." The signification of another is "one more," and thus in each instance it is made as plain as language can state it that each class is to be let in a single contract. There can be no other conclusion without ignoring the direct terms of the sec

tion; hence we must conclude that the board could not sever the contract for the printing of the reports of state officers, or that included in Class Three. Whether it was wise to so enact or whether better results would have been obtained had the provision been different is not for us to say. It was a question for the consideration of the legislators, and what they embodied in the law as the result of such consideration may not be set aside directly or by construction where none is needed.

Another question which presents itself is, does the law require the board to award the contract to the lowest bidder? It does not in express terms. If it does not by implication, it does not at all. The section 8 furnishes us some strong indications on this subject. It states that if the bidder to whom the contract is awarded fails to furnish the prescribed bond and perfect his contract, it shall be let to the next lowest bidder. It does not seem sensible, in view of this further provision to which we have just alluded, that it was in the contemplation of the legislature that the contract should or would in the first instance be awarded to other than the lowest bidder. The law provides that there shall be an advertisement and a competitive bidding. The main object and purpose of the last can be none other than to secure to the state the printing to be done as economically as possible. To say that it was the intention to let the contract to any other than the lowest bidder would be a construction which would in effect destroy one of the most beneficial and express purposes of the law; hence we must conclude that the awarding of the contract is to be to the lowest responsible bidder. In regard to the character of the work to be performed, its quality, or any details, they were not committed by the law to the discretion or judgment of the board in such manner that the settlement of any of them was connected with the awarding of the contracts in such a manner or degree as to make such settlement become of any moment in, or to enter into the determination of the board, of to whom the contract should be

awarded; hence there is in the awarding of the contracts under this law no discretion to be exercised as to any of the particulars to which we have alluded, which would preclude the issuance of a writ of *mandamus*, which will not, as a rule, be issued to control discretion. The board, by the first section of the law, had committed to it the general supervision of the state printing, which, however, was to be exercised in the manner provided in the act. We will say further in this connection that each bidder was required to place on file with his bid what may be designated as a preliminary bond in the sum of $5,000, to insure that he was a competent and responsible bidder and could and would perfect a contract if the successful bidder. The question of the responsibility of the bidder was not left for the general judgment and discretion of the board.

In regard to the effect of the provision that the board may reject any and all bids, we will content ourselves with a quotation from the opinion of this court in the case of *State v. Saline County*, 19 Neb., 253: "The board is also given authority to reject any and all bids. This is simply the reservation of a right to protect the interests of the county, as where there is a combination to prevent competition, or other cause, by reason of which the county would be defrauded. But in such case the board is not absolved from the duty of letting the contract to the lowest bidder." It may be added that a board may not arbitrarily or without cause reject bids. The issuance of an order to the board to award this contract to the lowest bidder would not interfere with or control the board in the determination of any matter committed by the act to its judgment and discretion. We are cited in the brief filed for respondents to the cases of the *State v. Lincoln County*, 35 Neb., 346, *State v. Dixon County*, 24 Neb., 106, and the *State v. Kendall*, 15 Neb., 262. The first two cited were applications for writs to issue ordering county boards to award contracts for certain county printing to the lowest bidders. The law did not require the boards

to advertise for bids, but in each instance it had been voluntarily done by the board. It was held that as the law did not require a letting of the contracts to the lowest bidders, but left it wholly within the discretion of the boards to determine, that notwithstanding the advertisements had been made and bids submitted, the discretion of the board in the matter of awarding the contracts could not be controlled by *mandamus*. In the case of *State v. Kendall, supra*, there were matters involved which would be connected with the contract for building to be let, which must be shown by the bidder to the board, and the board to decide whether the showing made was sufficient,—something committed to the judgment or discretion of the board to be settled prior to the letting of the contract, and until a favorable determination of which, as to him and his showing, no bidder could be awarded the contract. For decisions of this court on the subject of control of boards by *mandamus* in letting contracts and when to lowest bidder see *State v. York County*, 13 Neb., 57; *State v. Saline County*, 19 Neb., 253; *People v. Commissioners of Buffalo County*, 4 Neb., 150; *Merrick County v. Batty*, 10 Neb., 176; *State v. Farney*, 36 Neb., 546. See, also, *Boren v. Commissioners of Darke County*, 21 O. St., 311. The action of the board in attempting a severance of the contract and to let portions to different parties did not work and was not a rejection of all bids. It was no more than an attempt to award the contract in a manner not allowed by the law.

Prior to the change in January, 1897, individually, in state officers who are by law constituted the state printing board, the relator instituted an original action in this court, the object and purpose of which was to obtain the issuance of a writ of *mandamus* to compel the board to award it the contract for printing which it sought in the present action by the issuance of a similar writ out of the district court of Lancaster county to compel the board to award to it. To the pleading for relator in the original action in this court a demurrer was interposed for the

respondents therein. The cause was argued and submitted and an opinion filed March 3, 1897. It was then held: "The statute providing that no bid for state printing shall be considered unless accompanied by a bond conditioned to give bond for the performance of the contract should it be awarded, a bidder, though otherwise entitled to the contract, cannot have the aid of a writ of *mandamus* to compel the awarding of the contract to him when he does not show that his bid was accompanied by the bond so required." From which it will be gathered that the petition was determined insufficient because it did not contain a statement that the preliminary bond was filed with the board. Unless this bond was filed the bid of relator need not have been considered, and the petition without an allegation of the fact of such filing was fatally defective and open to an attack by demurrer. After the opinion was filed counsel for relator asked leave to amend the pleading and to supply the further allegation of the filing of the preliminary bond. This was denied him, but such denial did not necessarily involve a consideration or determination of the question of the sufficiency of the pleading if amended in the particular designated. A motion for a rehearing or for a modification of the judgment in this court to show that it was without prejudice to a new action, was presented and overruled. The judgment of this court in the original action was interposed as a bar to the action in the present case in the district court. In the pleadings of relator in the district court, the fact that the preliminary bond was filed was fully stated, and the question is presented whether, when a pleading is attacked by a general demurrer, or on the ground that there is not a cause of action stated therein, and the demurrer is sustained and the cause dismissed, it will bar a future action for the same cause and relief in which the pleading filed contains a further allegation which renders the pleading sufficient. It seems, both on reason and authority, that the answer must be that it will not. The former adjudication determined no

more than that the pleading, as presented, was insufficient; that the facts therein stated did not constitute a cause of action, not that the party presenting the pleading had not a cause of action. In the opinion in the case of *Gould v. Evansville & C. R. Co.*, 91 U. S., 526, appears the following statement directly in point: "From these suggestions and authorities two propositions may be deduced, each of which has more or less application to certain views of the case before the court: (1.) That a judgment rendered upon demurrer to the declaration or to a material pleading setting forth the facts, is equally conclusive of the matters confessed by the demurrer as a verdict finding the same facts would be, since the matters in controversy are established in the former case, as well as in the latter, by matter of record; and the rule is, that the facts thus established can never after be contested between the same parties or those in privity with them. (2.) That if judgment is rendered for the defendant on demurrer to the declaration, or to a material pleading in chief, the plaintiff can never after maintain against the same defendant, or his privies, any similar or concurrent action for the same cause upon the same grounds as were disclosed in the first declaration; for the reason that the judgment upon such a demurrer determines the merits of the cause and a final judgment deciding the right must put an end to the dispute else the litigation would be endless. Support to those propositions is found everywhere; but it is equally well settled that if the plaintiff fails on demurrer in his first action from the omission of an essential allegation in his declaration which is fully supplied in the second suit, the judgment in the first suit is no bar to the second, although the respective actions were instituted to enforce the same right; for the reason that the merits of the cause, as disclosed in the second declaration, were not heard and decided in the first action." (See, also, 2 Black, Judgments, secs. 707-9; 1 Freeman, Judgments, sec. 267, wherein there is the following statement: "A judgment on demurrer to the plaintiff's complaint is

conclusive of everything necessarily determined by it. If the court decides that plaintiff has not stated facts sufficient to constitute a cause of action, or that his complaint is otherwise liable to any objection urged against it, such decision does not extend to any issue not before the court on the hearing of the demurrer. It leaves the plaintiff at liberty to present his complaint in another action so corrected in form or substance as to be no longer vulnerable to the attack made in the former suit.") (See, also, cases cited in note 2; see, also, 21 Am. & Eng. Ency. of Law, 269, and cases cited in note; *Moore v. Dunn*, 41 O. St., 62; *Stowell v. Chamberlain*, 60 N. Y., 272; *Pepper v. Donnelly*, 8 S. W. Rep. [Ky.], 441.) In this action, commenced in the district court, there was a material averment in the pleading for relator, which was not alleged in its pleading in the former original action in this court, and which rendered the pleading in the district court sufficient as a statement of a cause of action. The adjudication in this court on the issues raised by the general demurrer, not being on the same state of facts, was not a bar to the second action. It follows, from the conclusions herein stated, that the judgment of the district court was erroneous and that the writ should have been allowed. The judgment must be reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

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## CITY OF OMAHA V. MATILDA WILLIAMS.

FILED JUNE 15, 1897. No. 7358.

**Municipal Corporations: GRADE OF STREET: DAMAGES.** A party who purchases a lot which abuts on a street, the grade of which has been established, must improve the lot conformably to the established grade and not with reference to the natural grade, and if he does the latter, cannot recover for damages to the improvements caused by the street being worked to the established grade.

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

*W. J. Connell* and *E. J. Cornish*, for plaintiff in error.

*Winfield S. Strawn, contra.*

HARRISON, J.

The grade line of Decatur street in the city of Omaha, it appears from the record in this case, was established March 5, 1885. On September 18 of the same year the defendant in error, by purchase, became the owner of a lot which fronted on said street, and within a few months thereafter had built houses and placed various other improvements on the lot. During the latter part of the year 1892 the prescribed statutory steps were taken to have the actual work or grading of the street done, and as a result during the summer season of 1893 the street was graded, and from an assessment of the damages to her property defendant in error took an appeal to the district court, wherein she was awarded a judgment, of which the city seeks the reversal in these present error proceedings. The judgment rendered included damages to the improvements on the lot.

It is agreed by counsel that there shall be but one question considered in the examination of this case, viz.: In assessing the defendant in error's damages, was she entitled to recover for improvements or injuries to improvements constructed or placed on the lot after the grade was established, but prior to the time the actual work of grading was done? It is settled that under the provisions of our constitution "The private property of no person shall be taken or damaged for public use without just compensation therefor;" that "A city is liable under the constitution of this state to a lot owner for such damages as he may sustain by filling in the street in front of his lot above the level of the same, when the buildings were erected on the lot before the grade was established."

(*Harmon v. Omaha*, 17 Neb., 548; *Hammond v. City of Harvard*, 31 Neb., 635; *City of Harvard v. Cronch*, 47 Neb., 133; and cases cited to same proposition.) In the Nebraska cases which we have just cited the question arose in regard to damages to property of which the improvements had been made prior to the time any grade had been established. In the present case the property was acquired by purchase and the improvements were made after the establishment of the grade, but prior to the time the actual work of grading was ordered by the city. The provisions of the city charter in force at the times of the occurrences out of which has sprung this action were as follows:

"The mayor and council of any city governed by this act shall have power, by ordinance, to establish the grade of any street, avenue, or alley in the city, and when the grade of any street, avenue, or alley shall have been heretofore established, or when the grade of any street, avenue, or alley shall be established and approved as herein provided, the grade of no street or part of a street shall be changed unless the consent in writing is first obtained of the owners of lots or lands abutting upon the street or part of street where such change of grade is to be made, who represent a majority of the feet front thereon, and not then until the damages to property owners which may be caused by such change of grade shall have been assessed and determined by three disinterested freeholders, who shall be appointed by the mayor and council for that purpose, who shall make such appraisement, taking into consideration the benefits, if any, to such property, and file their report with the city clerk; and the amount of damages so assessed shall be tendered to such property owners, or their agents, as soon as the funds for that purpose are obtained from the asssessments of such damages upon property benefited by reason of such change of grade, or otherwise realized; Provided, That no street, avenue, or alley shall be worked to such change of grade until the damages so assessed shall be tendered to such property owners or their agents.

"Before any street, avenue, or alley shall be ordered graded, the damages, if any, by reason of such grading to property along that portion of the street proposed to be graded, including approaches thereto, shall first be ascertained and determined by three disinterested freeholders, who shall be appointed by the mayor and council for that purpose, who shall make such appraisement, taking into consideration the benefits, if any, to such property, and who shall exclude any damages resulting from any change or changes of the original or first established grade; and the amount of damages so assessed, unless an appeal is taken, shall be due and payable to such property owners, or their agents, in sixty days after the completion and acceptance of such work of grading." (Compiled Statutes, 1895, ch. 12*a*, secs. 116, 117.)

These, it will be gathered by the reading, provided and provide for the establishment of grades of streets, changes of grades, assessments of damages in certain cases, etc. When a lot is purchased, as was this, which abuts upon a street the grade of which has been established and made of record, though the street has not been ordered worked or brought to the grade, it does not seem unjust or unfair, but right, all interests considered, that the purchaser should take notice of the established grade, and in afterwards placing improvements on the lot, to do so conformably to such grade. It becomes a fixed fact when the grade is established that when the street is ordered graded the property owner will be entitled to such damages to the premises, deducting special benefits, as may be occasioned by the grading; but this cannot be said to include damages for or to improvements made after the establishment of the grade, by one who bought the lot after the grade was fixed, and with knowledge of it. To hold that this last might be, would seem to be allowing the party to build or improve for prospective damages. The purchase is a voluntary one, and made with a knowledge, or at least notice, of existent conditions in regard to the property and its surroundings, including that of the

grade of the street, and the calculations can be made and the price paid be according to the conditions affecting the property and its value. In such a case it is not inequitable or unjust, and there is no hardship or inconvenience in requiring the party buying the premises to take notice of the fixed grade of adjoining streets. "One who buys property on a street after a grade has been established should improve with reference to the established grade, and not with reference to the natural grade; and where in such a case a purchaser improves with reference to the natural grade, and the city afterward cut down the street three feet to the established grade, it was held no recovery could be had." (Lewis, Eminent Domain, sec. 223, p. 299; *City of Denver v. Vernia*, 8 Colo., 399.) It follows that the judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

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JENS C. MENG, APPELLANT, V. CHARLES F. COFFEE ET AL., APPELLEES.

FILED JUNE 15, 1897. No. 7323.

**Review**: TEMPORARY INJUNCTION: DISSOLUTION: FINAL ORDER. An order dissolving a temporary injunction, and which does not determine or make some final disposition of the case in which the injunction was issued, is not final, and is not alone, or until after a final judgment in the action, reviewable on error or appeal to this court.

APPEAL from the district court of Sioux county. Heard below before BARTOW, J. *Appeal dismissed.*

*Chambers Kellar* and *H. T. Conley*, for appellant.

*D. B. Jenckes, contra.*

HARRISON, J.

The appellant herein commenced this action in the district court of Sioux county to secure an injunction by which the appellees would be restrained from appropriating and using the waters of Hat creek for irrigation, and thereby, it was alleged, depriving him of his rights in and to the use and enjoyment of such waters. A temporary injunction was granted, answers were filed, issues joined, and the case was heard. The trial judge filed "Special findings of law and facts," and made the following order: "The order of the court is that as to the defendants Coffee, Brewster, Wilcox, and Steele this injunction is hereby dissolved." The plaintiffs in the district court have appealed. No other or further order or decree appears in the record presented here than the one we have hereinbefore quoted. It did no more than dissolve the temporary injunction, and was not a final order from which an appeal will lie. The record does not disclose that there has been a dismissal or final disposition of the case. There is nothing in this record to negative a conclusion that the case is still pending in the trial court. In the opinion in the case of *School District v. Brown*, 10 Neb., 440, an action to obtain an injunction, an order very similar to the one in the case at bar was made, and of it LAKE, J., speaking for the court, said: "To show that the order in question is not * * * final, we need but quote it entire. It is in these words: 'It is therefore considered and adjudged that the injunction heretofore granted in this action be, and the same is hereby, dissolved.' This is the whole of it, and for aught that is shown the action is pending and still undetermined in the district court. The relief sought by the final judgment, as before stated, is an order of injunction, and, until the dismissal of the action, it is not beyond the power of that court to grant it, nor is there any question for this court to decide." See, also, to the same effect, *Scofield v. State Nat. Bank of Lincoln*, 8 Neb., 16; *Bartram v. Sherman*, 46 Neb., 713;

*Browne v. Edwards & McCullough Lumber Co.*, 44 Neb., 361.) This appeal must be dismissed, because the order made was not a final one and not appealable, and there has been, so far as we are informed by the record, no final disposition of the case in the district court.

APPEAL DISMISSED.

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BENJAMIN F. TROXELL V. LEONORA Z. JOHNSON.

FILED JUNE 15, 1897. No. 7372.

1. **Real Estate: POSSESSION.** The holder of the legal title to land of which there is no actual occupancy is deemed to be in possession thereof. (*Yorgensen v. Yorgensen*, 6 Neb., 383.)
2. **Covenant of Warranty: ACTION: EVIDENCE.** To sustain an action on a covenant of warranty, or for quiet enjoyment in favor of a covenantee, it must appear that there has been an eviction or surrender by reason of a paramount title. (*Real v. Hollister*, 20 Neb., 112; *Cheney v. Straube*, 35 Neb., 521.)

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

*Warren Switzler*, for plaintiff in error.

*L. D. Holmes, contra.*

HARRISON, J.

In this action, instituted in the district court of Douglas county by the defendant in error, she sought a recovery of certain sums which she alleged became her due from plaintiff in error by reason of a breach of a covenant of warranty contained in a deed of conveyance of real estate executed and delivered by him to her, pursuant to and in completion of her purchase of said realty from him. She was successful in the district court and was awarded a judgment, and he seeks in this court a review of the proceedings in the court below.

In the petition filed for defendant in error it was pleaded that on a certain date she purchased from plaintiff in error a certain described lot in Troxell's subdivision of a lot in an addition to the city of Omaha, and that he delivered to her a warranty deed therefor in which was contained the following: "And we hereby covenant with the said Leonora Z. Johnson that we hold said premises by good and perfect title; that we have good right and lawful authority to sell and convey the same; that they are free and clear from all liens and incumbrances whatsoever. And we covenant to warrant and defend the said premises against the lawful claims of all persons whomsoever. It is understood that a certain mortgage now of record, from Benjamin F. Troxell to John L. Redick, is still a lien on said lot, but to be paid by said Troxell when due. And the said Emma Troxell hereby relinquishes her right of dower in and to the above described premises." That at the time of the execution and delivery of the deed the plaintiff in error did not have the title to the said property and was not in actual possession thereof, but the same was vacant and unoccupied; that prior to December 29, 1875, one Frances H. Englebert was the owner in fee-simple of a certain lot in an addition to Omaha; that said Frances H. Englebert was married, her husband's name being J. Lee Englebert, and they had one child, a son, named Francis Leon Englebert, born October 11, 1868; that Frances H. Englebert died on December 29, 1875, and the surviving husband and son, the last named being at that time a minor, conveyed the property to George E. Pritchett, by whom it was conveyed to another party. There were further recitals of conveyances of the premises, including its being deeded to the defendant in error, and the further statements we will quote from the petition, as follows:

"Plaintiff alleges the fact to be that the only title or interest the said Troxell had in said property he pretended to convey by his said deed above described, was the pretended title obtained by the said conveyances from said Francis Leon Englebert.

"Plaintiff further alleges that at the time of making said conveyances on the 4th day of August, 1885, and the 21st day of June, 1886, the said Francis Leon Englebert was a minor under the age of twenty-one years; that said J. Lee Englebert departed this life the 22d day of September, 1888, and that the only interest he had in said property at any time was that of a life estate, which said estate expired on the 22d day of September, 1888.

"Plaintiff further avers that said Francis Leon Englebert attained his majority on the 11th day of October, 1889, and shortly thereafter disaffirmed his said conveyances to said George E. Pritchett, and on the 14th day of November, 1889, commenced his suit in the district court of Douglas county, Nebraska, against said Benjamin F. Troxell and Emma J. Troxell, his wife, George E. Pritchett, and this plaintiff, together with others, in which suit the said Francis Leon Englebert disaffirmed the said deed and asked that the said conveyances to said George E. Pritchett be set aside and the said title canceled and declared null and void, and that the said Francis Leon Englebert's title be affirmed and quieted in him, for the reason that the said Francis Leon Englebert was a minor at the time of making said conveyances.

"Plaintiff further avers that all of said parties were duly served with process of this court; that said defendants George E. Pritchett and Benjamin F. Troxell appeared in said cause and answered said petition; that the said cause proceeded to a hearing and on the 1st day of August, 1891, the court held that the said conveyances to the said George E. Pritchett were null and void and of no force and effect and ordered that the same be canceled and that all deeds, mortgages, conveyances, plattings, and dedications made by parties subsequent to said deeds made by said Francis Leon Englebert to the said George E. Pritchett be vacated and set aside; that a decree of the court was entered on the 1st day of August, 1891, and is found in journal 7 at page 566; that said decree remains in full force and effect and binding upon

all the parties to said suit, among whom are included the defendant in this case, whereby plaintiff has been deprived of all right and title in and to said premises, and the title which the defendant pretended to convey to the said plaintiff is void and of no force and effect, and the plaintiff alleges that the whole title to said property was in Francis Leon Englebert at the time of commencing this suit."

It is argued that the evidence was insufficient to sustain the finding made by the trial court and consequent judgment rendered. This is based on the proposition that it was necessary for the defendant in error to show that she had been evicted by, or surrendered the premises to, the holder of the paramount title; that neither was shown, and hence the proof was insufficient. It appears from the record that the defendant in error had improved and was in the occupancy of the said premises as a home for herself and family, and it was neither pleaded or proved that there had been an eviction in favor of the holder of the paramount title, or a surrender in any manner to the holder of such title. There were pleadings and a decree in the case of Francis Leon Englebert against Benjamin F. Troxell, Leonora Z. Johnson, and others introduced in evidence. The action was one instituted by the plaintiff named to have the conveyances to Pritchett of the lot in the addition to Omaha of which the property referred to in the case at bar was a part, and the subsequent conveyances of all descriptions or kinds, vacated. In the decree in the case of Englebert against Troxell and others there were statements of the findings therein in relation to the conveyances to Mr. Pritchett, from which as evidenced it might be inferred that the court had considered the deeds as transfers, not voidable, but void and of no force from their inception. A careful analysis of the whole decree, however, convinces us that it was predicated upon the finding that the grantor in the deeds, the plaintiff in the suit for their annulment, was at the time of their execution and delivery a minor, and might, as he

did at his majority, disaffirm them and demand that they be set aside, which was the relief that the decree accorded him. Since the trial of the case at bar it has been decided by this court in the case of Englebert against Troxell and others, on an appeal, that the deeds to Mr. Pritchett were voidable and not void. (*Englebert v. Troxell*, 40 Neb., 195. See statement in body of opinion on pages 202 and 203.) This being true, the legal title was in Pritchett and his grantees from the time of the conveyances to them respectively until such time as they, by conveyance to other parties, parted with it; and the premises being vacant and unoccupied during the time Pritchett and the successive grantees, including Troxell, held the title, they must be presumed to have been in possession. (*Yorgensen v. Yorgensen*, 6 Neb., 383; *Real v. Hollister*, 20 Neb., 112; *Daggett v. Reas*, 48 N. W. Rep. [Wis.], 127; *Devore v. Sunderland*, 17 O., 52); and nothing was proved to rebut this presumption. On the contrary, as to Troxell it was proved that he exercised many acts of ownership of the property. It follows that no action accrued in favor of defendant in error until she was evicted or surrendered in favor or by reason of the paramount title. (*Real v. Hollister*, *supra*; *Cheney v. Straube*, 35 Neb., 521.) The judgment of the district court must be reversed and the cause remanded.

REVERSED AND REMANDED.

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## UNION PACIFIC RAILWAY COMPANY V. ELIAS EVANS.

FILED JUNE 15, 1897. No. 7377.

1. **Railroad Companies: APPROACHES TO STATIONS: NEGLIGENCE.** It is the duty of a railway company to provide and keep approaches to its platforms at its depots where, from the manner of construction of the platforms, approaches are necessary, which are reasonably convenient and safe for the passage of the public to or from the depot for, or in the transaction of business with, the company.

2. ———: NEGLIGENCE: QUESTION FOR JURY. The questions of the negligence of a defendant in an action, or of contributory negligence of the plaintiff, where not conclusively established by the evidence, must be submitted to the jury for determination.

3. ———: ———: PERSONAL INJURIES: PROXIMATE CAUSE. The question of what was the proximate cause of an injury is generally a question of fact to be settled by the jury.

4. ———: ———: ———: ———. Where there are several agencies or causes of an injury, the question is, which was the efficient, dominant cause?

5. Trial: EXCLUSION OF EVIDENCE: REVIEW. Alleged error in the exclusion of offered testimony is of no avail if the same testimony, or testimony to the same effect, had been, or was afterwards, allowed to be given by the witness.

6. ———: ———. It is not error to exclude testimony for the introduction of which no proper foundation has been laid.

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

*J. M. Thurston, W. R. Kelly, E. P. Smith, Charles L. Dundy, John Patterson,* and *C. A. Baldwin,* for plaintiff in error.

*W. T. Thompson, contra.*

HARRISON, J.

This action was instituted in the district court of Merrick county by defendant in error to recover of the Union Pacific Railway Company damages which he alleged had accrued in his favor by reason of the negligence of the company in the construction of a portion of its platform, or the approach thereto, at its depot in Silver Creek, a station on its line of road in Merrick county. A portion of the petition was as follows:

"3. That on said 13th day of February, and for a long time prior thereto, defendant herein kept and maintained a depot platform, and an approach thereto, at and for said depot, within said village of Silver Creek, and which said approach, leading from the ground at or near the west end of said platform up onto said platform, and

which was the main and only approach or means provided by said defendant at said point, and the only means or way for persons to go upon said platform to said depot, which said platform was about three feet from the ground, was by the defendant so carelessly, negligently, and unlawfully constructed and maintained, in this, that it was so constructed as to form an inclined plane eight feet long and about six feet wide, whose west or lower end, resting upon the ground, was thirty-two inches lower than the east or top end, resting against the said platform near the top thereof, so as to thereby render the same very precipitous, unsafe, and highly dangerous to any one passing upon or over the same, going to or coming from said depot, all of which facts were well known to said defendant railroad company, its agents, servants, and employes, at and prior to said 13th day of February, 1893.

"4. That on said 13th day of February, 1893, plaintiff herein, being desirous of purchasing a ticket for his wife over the defendant's said line of railroad, at the request of said defendant went to said depot at said village of Silver Creek, for the purpose and with the sole intention of buying a ticket for his wife over said defendant's line of railroad from said village of Silver Creek to the city of Omaha, Nebraska, and that while at and about said depot for the purpose aforesaid, and while lawfully passing on and over the approach to said platform, hereinbefore mentioned, without any fault, carelessness, or negligence whatever on his part, but through and by reason of the careless, negligent, and unlawful construction by defendant of said approach, hereinbefore mentioned and described, plaintiff slipped, fell, and broke the bone of his leg commonly called the fibula, and dislocated the ankle joint, whereby and by reason whereof plaintiff has been damaged in the sum of $1,990."

There was a further detailed statement of the damages. The answer contained denials of the allegations of the petition of the negligence of the company, and asserted

that if defendant in error had been injured it was by his own carelessness and negligence. Of the issues there was a trial, which resulted in a verdict and judgment against the company. It seeks a review in this court of the proceedings in the trial court. The gravamen of the action was that the company had so constructed the slanting portion of the platform, or rather the inclined approach to the platform proper, that it was an unsafe and dangerous structure for the use of members of the public who passed over it in going to and from the depot in the course of business transactions with the company, and had maintained the structure in its unsafe and defective condition. There was in the petition but this one sole charge of negligence.

Counsel for the company prepared the following instruction and requested that it be given in the charge to the jury: "You are instructed that under the law and the evidence in this case your verdict must be for the defendant." The request was refused, which was assigned as error, and under this assignment it is argued that the proof failed to show any negligence on the part of the company in the particulars alleged in the petition; and further, that the evidence disclosed, conclusively, negligence on the part of defendant in error which precluded his recovery.

We will examine the points raised in the order which we have just stated them. It is not controverted that the evidence established that defendant in error slipped and fell on the approach to the platform at the depot in Silver Creek and sustained injuries; nor is there any controversy over the amount of damages allowed. The inclined plane or approach where defendant in error fell was made by placing timbers or "stringers" with one end resting on and attached to the platform and the other end on the ground, and placing and fastening on these a sufficient number of heavy planks or boards, each twelve inches in width, to cover the space from the platform proper to the ground, about eight feet. The approach was six or eight feet

wide. The walk was thus composed of the plain surface of the planks as they laid, the edges adjoining. It was stated by the witnesses called on behalf of defendant in error that the platform proper was about three feet above the ground, and the approach was at least thirty inches from the ground where it was attached to the platform. Some witnesses gave it one or two inches more. It was shown by testimony introduced on the part of the company, one witness stating that he had, during twelve years in succession, been building platforms to depots, and approaches, or assisting in so doing, along the line of the Union Pacific railway main line and branches, that there was a standard uniform height for platforms like this one in question, which was fourteen inches above the rail, with an "eight-foot drop on it," meaning the approach, and that the one at Silver Creek was built according to the standard. It is settled by a long line of decisions that it is the duty of a railway company to provide and keep an approach, where one is necessary, to its platform at a depot in a reasonably safe and convenient condition for passage of the public over it for or during the transaction of business with the company. (2 Am. & Eng. Ency. of Law, 760, and note; *Buenemann v. St. Paul, M. & M. R. Co.*, 32 Minn., 390; *Christie v. Chicago, M. & St. P. R. Co.*, 63 N. W. Rep. [Minn.], 482; *Skottowe v. Oregon S. L. & N. N. R. Co.*, 30 Pac. Rep. [Ore.], 222; *Collins v. Toledo, A. A. & N. M. R. Co.*, 45 N. W. Rep. [Mich.], 178.) Under the evidence introduced it was for the jury to determine the conflict on the question of fact in relation to the height of the platform from the ground, and the consequent increase in the pitch or slope of the approach, and also, as a matter of fact, whether the approach as constructed was reasonably safe for the purpose for which it was constructed. The evidence for the company on this point disclosed the standard which it had adopted for the construction of platforms and approaches, presumably as a reasonably safe one. The evidence of the defendant in error was to the effect that the structure in

question was more than double the height of the standard approved by the company. With these conditions of the evidence the questions were not of law and for the court, but of fact for determination by the jury. The defendant in error was well acquainted with the approach to the platform, had walked over it very frequently, but his knowledge of the approach and its condition as to steepness of incline would not bar him of his recovery if injured because of its unsafeness occasioned by such steepness, provided he was at the time, all the circumstances considered, exercising ordinary care. The company presented its depot platform and approach thereto as reasonably safe and suitable for the use and passage of the public in transacting business with it. The approach had been used for years by numerous persons, and often by defendant in error, in its then condition. It cannot be said as a matter of law that it was contributory negligence that he used it again. (*White v. Cincinnati, N. O. & T. P. R. Co.*, 12 S. W. Rep. [Ky.], 936.) There was evidence from which it may be said that the approach to the platform was, at the time the defendant in error slipped and fell thereon, wet or damp, and was thus rendered somewhat unsafe for foot passengers, and that this entered into the injury as one of its causes, or its proximate cause; also that the fact of the slipping of defendant in error's foot was the proximate cause of the injury, but antecedent to this was the alleged structural defect of the approach. It has been stated: "On the intervention of other agencies the inquiry should be, is the original wrongful act an antecedent, efficient, and dominant cause, which put the other causes in operation." (*Alabama G. S. R. Co. v. Arnold*, 2 So. Rep. [Ala.], 337, citing Cooley, Torts, 70; *Ætna Fire Ins. Co. v. Boon*, 95 U. S., 117; *Billman v. Indianapolis, C. & L. R. Co.*, 40 Am. Rep. [Ind.], 230; *Jordan v. Wyatt*, 4 Gratt. [Va.], 151; *Ricker v. Freeman*, 9 Am. Rep. [N. H.], 267; *Sheridan v. Brooklyn, C. & N. R. Co.*, 36 N. Y., 39; *East Tennessee, V. & G. R. Co. v. Lockhart*, 79 Ala., 315. See, also, *Spears v.*

*Chicago, B. & Q. R. Co.*, 43 Neb., 720.) The questions of the negligence of the company, of contributory negligence of the defendant in error, and what was the proximate cause of the injury were matters or inferences of fact to be settled by the jury; hence they were properly submitted to it for determination. There was some apparent conflict in the evidence in regard to the purpose for which the defendant in error had gone to the depot on the day he was injured, whether on business or merely as a loiterer or idler. This the jury solved in favor of the view that he was there on business, and as this disposition of it has support in the evidence, it will not be disturbed.

It is urged that the court erred in sustaining an objection to the following question, and thus excluding the testimony sought to be elicited by it: "Now, tell the jury, if you please, Mr. Bennett, whether that platform, with its approaches, are according to the standard rules." The witness to whom this question was propounded had stated the standard adopted by the company for construction of its platforms and approaches and given in detail a description of the one at Silver Creek, covering the points included in the general question which we have quoted, to which objection was sustained, hence, if there was any error in the action of the trial court, it was without prejudice. (*Halbert v. Rosenbalm*, 49 Neb., 498; *Denise v. City of Omaha*, 49 Neb., 750.)

To the interrogatory, "I ask you, Mr. Bennett, as an expert platform runway builder, what is your opinion as to the pitch of that runway as to its being dangerous or not dangerous?" an objection was interposed including that no proper foundation had been laid for the testimony. This objection, we think, was well taken; hence the argument on this point must be overruled.

No available errors having been presented, the judgment of the district court must be

AFFIRMED.

GEORGE B. FRANCE, APPELLANT, V. JOHN BELL ET AL., APPELLEES.

FILED JUNE 15, 1897. No. 7206.

1. **Appeal in Equity.** In all actions in equity either party may appeal from the judgment or decree or final order made by the district court to the supreme court. (Code of Civil Procedure, sec. 675.)
2. **Mortgages: FINAL ORDER: REVIEW.** In an action to foreclose a mortgage it was determined and adjudged that the mortgage was void and the mortgagee entitled to no relief thereon, and the action was continued for hearing of the controversy in regard to the indebtedness, the payment of which the mortgage purported to secure. *Held*, To be a final order in relation to the mortgage, within the meaning of the Code, and appealable.
3. **Deeds: HOMESTEAD: ESTOPPEL.** The mere fact that a grantor in a conveyance of a family homestead is described therein as a single person, will not estop the grantor from asserting the homestead character of the premises included in the conveyance or the right of homestead therein as against a grantee or mortgagee.
4. **Homestead: EXECUTION OF MORTGAGE.** The homestead of married persons may be property the title to which is in either the husband or wife, and to be valid a mortgage thereof must be signed and acknowledged by both the husband and wife. The fact that they are not living together at the time of the execution of the instrument does not affect the rule or rob it of any of its force.

APPEAL from the district court of York county. Heard below before BATES, J. *Affirmed.*

*Harlan & Taylor* and *George B. France*, for appellant.

*F. C. Power, contra.*

HARRISON, J.

This action was instituted in the district court of York county to foreclose a mortgage on lot numbered 2, in block numbered 25, in the village of York, York county, Nebraska, which had been given to secure to appellant the payment of a promissory note in the principal sum of $100. In the answer it was stated:

"Comes now the defendant Amanda M. Bell, and for

answer to the petition filed against her in said cause says that she has never seen the note set forth and described in the plaintiff's petition to her knowledge; that the original note, if such note exist, is in the possession of the plaintiff, and this defendant has no access thereto, and therefore cannot say whether her genuine signature appears upon said note or not, but she alleged the facts to be that if her signature and name signed to a note for $100, as set forth in the plaintiff's petition, that her signature to the same was obtained fraudulently and without her knowledge and consent.

"2. The defendant further answering, says that on or about the —— day of February, 1888, she was, and still is, a married woman and the head of a family and was occupying and residing upon the premises described in plaintiff's petition and ever since has resided upon and occupied the same as her homestead, under the laws of the state of Nebraska, and the said premises on the 9th day of February, 1888, were and ever since has been, and still are, the homestead of this answering defendant; and that said premises at that time were, and still are, and ever have been, of less value than $2,000, and of about the value of $500 and no more, and consists of one lot within the corporate limits of the village of New York, in York county, Nebraska, and now a part of the city of York in said county, with a small dwelling house thereon, in which this answering defendant then resided and still resides, as hereinbefore alleged, and said mortgage was not signed, executed, or acknowledged by the husband of this defendant."

It was further pleaded in the answer that on or about the date of the mortgage in suit the son of appellee was held to answer to a criminal charge in the district court of York county, and desired to give a recognizance for his appearance before said court on a certain day, and it was represented to appellee by the attorneys, of whom appellant was one, who had been employed to defend her son, that a note in the sum of $500 and a mortgage on

her real estate must be delivered to the parties to secure them in signing the recognizance as sureties; that she agreed to and did comply with this demand; that about the time of the execution of the note and mortgage she was about sixty-five years old, her eyesight was poor, and she did not have her spectacles, and could not or did not read the papers then signed, but was told that it was a note in the sum of $500, and the mortgage to secure the same, and nothing other, further or different, and that if the $100 note was then signed and included in the mortgage it was without her knowledge and consent, and fraudulently procured to be done; that the case in which the recognizance was given had been disposed of and ended, and she had become entitled to have the mortgage in suit canceled and annuled, for which, as relief, she prayed. The reply, to the extent it referred in direct terms to the portion of the answer in which the mortgaged property was described as the home of the appellee, was as follows: "The defendant admits that the said Amanda Bell, at the time of the execution of the said mortgage deed, and ever since said time, was and has been residing upon the premises described in the petition and in said mortgage deed, and that said premises at that time was and have been of less value than $2,000, and are of the value of $500 or $600 and that the same consists of one lot within the corporate limits of New York, and the same is now a part of the city of York, all in York county, Nebraska, and that the said lot has a small dwelling thereon." There was also stated in the reply that the mortgage had been given to secure the parties in signing the bail bond of appellee's son, and further, that the $100 note evidenced the amount of the fee which was to be paid the attorneys in defense of appellee's son, and that the same was included in the mortgage with the full knowledge and agreement of the appellee. There was also a general denial of all matters alleged in the answer not expressly admitted. There was a hearing, the following being a copy of the journal entry thereat:

"This cause came on this day to be heard on the issues joined and the evidence, and was submitted to the court, on consideration whereof the court finds that the mortgage deed described in the petition executed by the defendant, Amanda M. Bell, to the plaintiff, George B. France, is invalid and ought to be canceled of record. It is therefore considered, and adjudged, and decreed that the mortgage dated February 9, 1888, conveying lot number 2, in block number 25, in the village of New York, York county, Nebraska, executed by Amanda M. Bell to George B. France, and recorded in the office of the county clerk of York county on the 10th day of February, 1888, be, and the same hereby is, canceled of record, and the said mortgage deed is hereby declared null and void. To said finding and order of the court the plaintiff duly excepts, and forty days allowed plaintiff to prepare and file bill of exceptions. Supersedeas bond fixed at the sum of $100.

"This cause coming on for further hearing on the note against John Bell and Amanda Bell, on motion of defendant is continued. To the continuing of said cause plaintiff duly excepts. Plaintiff demands judgment against defendants on the note sued, same denied by the court at this term, and plaintiff duly excepts. Defendants object to the jurisdiction of the court further over this case and asks that the same be dismissed, on consideration whereof the court overrules the same and defendant duly excepts."

It is claimed by appellee that inasmuch as the trial court continued and retained the controversy between the parties in regard to the note, that the decree by which the mortgage was canceled and annulled was not appealable. In section 675 of the Code of Civil Procedure it is provided: "That in all actions in equity either party may appeal from the judgment or decree rendered or final order made by the district court to the supreme court." For a definition of a final order see section 581 of the Code of Civil Procedure. It is clear that the controversy, to the extent it involved the mortgage and any rights of

either party to the action thereunder, was fully and finally adjudicated. The further proceedings in regard to the note, and their final termination, no matter what it might be, could not in any manner or degree affect the decree by which the mortgage was ordered canceled. The suit, in so far as it related to the mortgage, was finally determined and the rights of the parties settled; hence we must hold that the decree was appealable. In the state of Maryland the Code provided: "An appeal shall be allowed from any final decree or order in the nature of a final decree, passed by a court of equity." (Md. Code, art. 5, sec. 20.) In an action by a building and loan association to foreclose a mortgage executed by the defendants it was held: "An order passed in a proceeding to foreclose a mortgage executed by defendants to a building and loan association, which determines that the plaintiff is not entitled to the relief prayed for in its bill, and directs the auditor to state an account, simply as between debtor and creditor, is a final order and is appealable." (*Waverly Land Ass'n. v. Burk*, 1 Cent. Rep. [Md.], 484; 2 Ency. Pl. & Pr., 71; *Forgay v. Conrad*, 6 How. [U. S.], 201; *Ray v. Law*, 3 Cranch [U. S.], 179; *Bronson v. La Crosse & M. R. Co.*, 2 Black [U. S.], 524; *Thomson v. Dean*, 7 Wall. [U. S.], 342; *First Nat. Bank of Cleveland v. Shedd*, 7 Sup. Ct. Rep., 807.)

It is urged that it was recited in the mortgage that the appellee who signed it was an unmarried woman; that, having signed the mortgage containing such a statement, she is estopped by the recital from making the defense that the premises mortgaged were her homestead, involving, as such defense does, the assertion that she was and is a married woman. From the mere fact that she is described in the mortgage as an unmarried woman, she is not estopped to plead and prove, in an action to foreclose the mortgage, that she was a married woman and the mortgage invalid as purporting to convey a homestead and signed by both husband and wife. (*Whitlock v. Gosson*, 35 Neb., 829; *Giles v. Miller*, 36 Neb., 346.) Another

question for consideration in this case is, was the property described in the mortgage her homestead? It was disclosed by the evidence that appellee was a married woman; that about fourteen years prior to the time of the trial she became a resident of this state, removing here from Maquon, Illinois, where she and her husband had been living some twenty-eight years in property which was then their home and which belonged to her. About one week before appellee left Illinois she and her husband ceased to live together, the home was sold and appellee came to York, and with the proceeds of the sale of the Illinois property purchased that in controversy, and which she had occupied as her home during fourteen years. There were several children. Appellee stated in one portion of the evidence: "My two girls are married and I have five boys single." She also said of her children: "When they go away to work and when they get done they come there and stop for a week or so and then go again, and that is their home;" also, that her youngest daughter lived with her two years and one unmarried son "lived there most of the time." That she had been working and partially making her own living, and had been supported in part by the children; that the husband had been in this state three times during the fourteen years, staying "a week or two at a time." He was in York at one time with her at the house for a day or two and had lived at Galesburg, Illinois, in a hotel since she came to this state. The appellee received "letters from him every three or four weeks." In regard to the reason the husband and wife were living separate the following appears. She was asked: "When you came here did you tell him that you were going to leave him?" To which she answered: "No, I never told him. I told him when he quit drinking whiskey we would live together, but I would not live with a man that drank as much whiskey as he did." The main or dominant idea and purpose of the homestead law is to preserve the home not particularly for the benefit of any one member, but the family home for the benefit of

the family and any and all of the persons composing it. The evidence in this case clearly established that this York property was the family home. It is true that as a rule the domicile of the husband is presumed to be that of the wife, and should be; but human nature will not always observe or live according to fixed rules,—it probably cannot,—and we must deal with and adjust the various conditions and situations which arise from the acts of members of humanity as best we may and accomplish the greatest good to the greatest number and justice to all. This man and woman thought they could not, and did not, live together. The wife held and preserved the family home, the husband had practically no other. Our statute allows the title of the homestead to be in either the husband or wife (Compiled Statutes, ch. 36, sec. 2), and it cannot be conveyed or incumbered unless the instrument of conveyance or incumbrance be signed by both the husband and wife. (Compiled Statutes, ch. 36, sec. 4; *Aultman v. Jenkins*, 19 Neb., 209; *Swift v. Dewey*, 20 Neb., 107; *Bonorden v. Kriz*, 13 Neb., 121.) This husband and wife were not living together, but they were not divorced. The facts in this case bring it within the rule announced in the opinion in the case of *Larsen v. Butts*, 22 Neb., 370, wherein a similar question was considered and determined, and it was said: "A contract to convey a homestead, entered into by a wife in her own name, will not be specifically enforced, as the statute requires the instrument of conveyance to be signed and acknowledged by both husband and wife." "The fact that the husband and wife are not living together at the time the contract was made, will not render her contract for the conveyance of the homestead valid." It has been suggested that the husband might claim a homestead, and if allowed and the wife allowed this, then there would be the two. This would be a matter to be shown in evidence and fully under the control of the courts. The evidence in the case at bar shows to the contrary; that the wife was occupying and preserving the family home, and it was within

the doctrine approved by this court to stamp it with the homestead character. (*Larsen v. Butts, supra.*) The judgment of the district court is

AFFIRMED.

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HUNN H. GRISWOLD ET AL., APPELLEES, V. GEORGE HAZELS ET AL., APPELLANTS.

FILED JUNE 15, 1897. NO. 7314.

1. Deceit: RESCISSION OF CONTRACT: PLEADING AND PROOF. Where rescission of a contract is sought on the ground of deceit, the one injured must allege and prove that he relied upon the false representations of the other party.
2. ———: ———: ———. *Held,* The petition states a cause of action.
3. Review: CONFLICTING EVIDENCE. This court will not disturb findings made upon conflicting evidence.

APPEAL from the district court of Pawnee county. Heard below before BUSH, J. *Affirmed.*

*F. Martin* and *John B. Raper*, for appellants.

*Story & Story, contra.*

NORVAL, J.

This is an appeal by defendants from a decree setting aside a conveyance of real estate. Plaintiffs on January 16, 1893, and for many years prior thereto, were husband and wife, and, with their children, resided upon their farm in Pawnee county, consisting of 160 acres, as their homestead. On said date they conveyed said farm to the defendant George Hazels, in exchange for an elevator owned by the latter situated in Sabetha, Kansas, and for ten shares of stock in the Fairmont Building Association of Fairmont, this state. The ground of action is that plaintiffs were induced to make the trade or exchange by certain fraudulent representations alleged to have

been made by said George Hazels as to the condition, location, and value of the elevator property and the said shares of stock.

The first point urged for a reversal is that the petition does not state sufficient facts to entitle plaintiffs to the relief demanded, on the ground it did not aver that they were induced to make the exchange by reason of the statements or representations of Mr. Hazels. Undoubtedly, where one seeks the rescission and cancellation of a contract on the ground of fraudulent representations, it must be alleged and proved on the trial that the party injured relied upon and was misled by them. This doctrine is too well settled to necessitate the citation of the authorities in support thereof. The petition in the case at bar, when tested by this rule, is not faulty in the respect suggested by the counsel for defendants, since, after setting forth specially the negotiations leading up to the trade or exchange in question, the terms of the contract and the representations of the defendant George Hazels, it contains these averments: "Relying upon the said representations of defendant George Hazels, the plaintiffs on said day entered into a written agreement with defendant for the exchange of said properties. * * * And on the 16th day of January, 1893, pursuant to said written agreement, the plaintiffs, relying upon said representations of the defendant George Hazels, conveyed their said land to him." It is evident from the above that plaintiffs relied upon and were misled by the representations of the defendant set forth in the petition.

The findings of the lower court are assailed as not being supported by the proofs. The evidence tends strongly to establish that, in order to induce plaintiffs to make the trade, Hazels represented to them that said elevator was the only one in Sabetha; that it was erected six years before and contained machinery which was new when the elevator was erected; that it was in perfect condition and good running order, worth $3,200, and could be rented readily for $55 per month; that there was a man ready

and willing to rent it at that sum. The assets of the Fairmont Building Association consisted of the opera house building in the city of Fairmont, which, there was evidence conducing to show, Hazels represented to plaintiffs was located on the main street, in the business center and next to the post-office; that it was in good repair, and he had recently received a dividend of $45; that the ten shares of stock owned by him were worth $800, and they could be readily sold at a discount from ten to twenty per cent. If the evidence adduced by plaintiffs is worthy of belief,—and it was given by disinterested witnesses, so far as we can discover,—nearly every one of the above representations was untrue. The elevator and machinery were old and in a dilapidated condition, the boiler leaked, the roof was full of holes, and the property could not be rented; besides, there were three other elevators in Sabetha, and the one in question, including the machinery, was not worth more than $200 above incumbrances thereon. The Fairmont opera house was not located as represented, the net annual income thereof was little over $100 a year, and the stock traded to these plaintiffs was not worth more than $100, while the farm was of the value of $2,500 above incumbrances. There is ample evidence, although conflicting, to sustain the averments of the petition as to the representations made by Hazels, and that they were untrue. Findings of a trial court, made upon conflicting evidence, will not be disturbed in the appellate court.

It is urged that plaintiffs in making the trade did not rely upon representations or statements made by Hazels. This contention is based upon the fact that Mr. Griswold, prior to the making of the contract for the exchange of properties, visited Sabetha and examined the elevator, and also caused a letter to be written to Fairmont making inquiry concerning the opera house and the stock, and received a reply, which gave no satisfactory information. It may be true that Mr. Griswold, under the facts disclosed, did not rely, or at least should not have relied,

upon the representations of Hazels. But this is not true as regards Mrs. Griswold. She did not examine the properties, or make any inquiries regarding the same, but, according to her testimony, relied exclusively upon the representations of Mr. Hazels. Whether her husband so relied or not is not of much consequence, since the farm was the homestead of plaintiffs, and it could not be conveyed without the joint consent of both husband and wife. If she was induced to sign by fraud, equity will relieve her from the effects of her signature, and in which case the entire conveyance necessarily falls. The decree is

AFFIRMED.

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## CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY V. JOSHUA VAN CLEAVE.

FILED JUNE 15, 1897. No. 7316.

1. **Garnishment:** FEES OF GARNISHEE. By section 221 of the Code of Civil Procedure a garnishee is not required to appear and answer until he is tendered the same fees as the law allows a witness in the suit in which the garnishment proceedings are had.

2. ———: ———: FAILURE TO APPEAR. A garnishee is not liable for a failure to appear and answer where the requisite amount of fees has not been tendered him.

3. ———: LIABILITY OF GARNISHEE. A garnishee cannot be charged as the debtor of the defendant unless it appears affirmatively that at the time he was garnished a cause of action existed against him, and in favor of the defendant, for the recovery of a legal debt due, or to become due by the efflux of time. *Edney v. Willis*, 23 Neb., 56, followed.

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

*Charles J. Greene, Ralph W. Breckenridge, J. W. Deweese,* and *Byron Clark,* for plaintiff in error.

*L. W. Billingsley, R. J. Greene,* and *C. S. Polk, contra.*

NORVAL, J.

Joshua Van Cleave recovered a judgment against one R. G. Wilson, before a justice of the peace in Cass county, on February 4, 1890, for $56, including costs of suit; and an execution was issued on said judgment on the same day, which was returned unsatisfied for the want of property whereon to make a levy. Subsequently, Van Cleave's attorney filed an affidavit in garnishment under section 244 of the Code of Civil Procedure, and a summons in garnishment was served upon the Chicago, Burlington & Quincy Railroad Company, by leaving a certified copy thereof with J. W. Bowker, its station agent at Greenwood, to appear before the justice on February 12, 1890, at 9 o'clock A. M. The garnishee having failed to appear and answer, this action was instituted by Van Cleave against the railroad company, under section 225 of the Code, and from a judgment recovered against the defendant for $56 and costs, taxed at $50.78, it prosecutes error to this court.

A reversal is asked upon two grounds:

First—That plaintiff never paid or tendered to defendant or its agent or officer the fees which a garnishee is entitled to receive.

Second—It was not shown that the railroad company was indebted to the judgment debtor, Wilson, at the date of the service of the garnishment process.

As to the first point it is undisputed that when the garnishee summons was served upon Mr. Bowker no fees were paid or tendered him. Subsequently, on February 12, 1890, the day the garnishee was commanded by the writ to appear, whether it was before or after the hour fixed in the summons for that purpose the witnesses do not agree, the constable paid to Mr. Bowker, at the depot in Greenwood as fees, the sum of $1, which amount on a subsequent day was returned to the justice by Mr. Bowker. The hearing on the garnishment proceedings was continued until February 20, 1890, but no notice of such

continuance was ever given the railroad company or Mr. Bowker, nor did the garnishee appear before the justice on the return day, or at any other time, or make answer in the garnishment proceedings. The place where the garnishee summons was served was within one mile of the office of the justice of the peace. Section 221 of the Code of Civil Procedure provides that "a garnishee shall not be required to appear in this or any other case, unless there is tendered to him the same fees as a witness is entitled to in the suit in which the garnishee proceedings are had, and such fees may be taxed and collected in the same manner as other costs in such proceedings." Witnesses before a justice of the peace are allowed for each day's attendance $1, and mileage at the rate of five cents for each mile necessarily traveled. (Section 25, chapter 28, Compiled Statutes.) It follows, if said section 221 is applicable here, that Bowker was entitled to receive a dollar as fees for each day's attendance, besides ten cents as mileage. If the tender was made in time, it was insufficient in amount, and Bowker was not required to appear; hence no liability existed against the company for his failure to do so. Again, no fees were tendered for the day to which the hearing was adjourned, nor was the company or Mr. Bowker advised of the adjournment. The contention that section 221 is not applicable to garnishment after judgment, or proceedings in aid of execution, is not tenable. The section plainly applies to all garnishment cases, whether brought before or after judgment.

The evidence adduced on the trial fails to establish that the garnishee was indebted to Wilson, the judgment debtor, when the garnishee summons was served. The only testimony on behalf of the plaintiff below on that subject was given by G. W. Clark, which was to the effect that Wilson was in the employ of the company, and through a conversation which Mr. Clark had with Mr. Bowker, the witness ascertained that Wilson was receiving wages about enough to pay the claim in controversy;

but there is not a scintilla of evidence to show that anything at the time was due him from the company. A person is not liable as garnishee unless it affirmatively appears that at the time of the garnishment the defendant had a cause of action against him for the recovery of a legal demand due, or to become due by the efflux of time. (*Edney v. Willis*, 23 Neb., 56.) The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

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## JOHN R. SMITH V. HAINES MEYERS.

FILED JUNE 15, 1897. No. 7299.

1. **Criminal Conversation:** EVIDENCE. In an action for damages for criminal intercourse with plaintiff's wife, the petition may lay the time of the alleged wrongful act with a *continuando*, and the evidence may be directed to any time within that covered by the petition, and within the period of the statute of limitations.

2. ———: PLEADING. *Held*, No abuse of discretion in denying defendant's motion to require the plaintiff to state in his petition the times and places of the committing of the alleged acts of adultery with more particularity.

3. ———: ———. *Held*, That the petition stated a cause of action for criminal conversation.

4. **Jurors:** CHALLENGES: HARMLESS ERROR. The improper excusing of a juror for cause will not work a reversal, where the complaining party has not availed himself of all of his peremptory challenges.

5. **Criminal Conversation:** WITNESSES: HUSBAND AND WIFE. In an action for criminal conversation in this state the plaintiff's wife is a competent witness in his behalf.

6. ———: DAMAGES: HUSBAND AND WIFE. Cohabitation by the husband with the wife after knowledge of her infidelity will not defeat an action against her seducer for damages.

7. **Instructions.** Instructions stating the law correctly as a whole, *held* sufficient, though one or more of them, taken separately, may not have been accurate.

8. **Criminal Conversation:** DAMAGES. In an action of this character, a

plaintiff may recover, aside from the loss of services of the wife, for mental anguish, mortification, injured feelings, and disgrace he has sustained in consequence of the acts of the defendant.

9. ———: INSTRUCTIONS: EVIDENCE. It is not error to refuse an instruction which informs the jury that certain facts are entitled to great weight.

10. ———: DAMAGES. Evidence *held* to sustain the verdict, and that the damages assessed at $3,000 are not excessive.

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

*Isham Reavis* and *C. Gillespie*, for plaintiff in error.

*F. Martin, contra.*

NORVAL, J.

This is an action by Haines Meyers against John R. Smith for criminal conversation, in which plaintiff had verdict and judgment in the sum of $3,000. The defendant has brought the record into this court for review.

The petition alleged "that on the 21st day of October, A. D. 1893, and on divers other days between that and the commencement of this action, said defendant wrongfully, wickedly, and unjustly debauched and criminally knew one Vernie Meyers, then and still being the wife of plaintiff, and thereby the affection of said Vernie Meyers for plaintiff was alienated and destroyed, and the plaintiff has been deprived of the comfort, fellowship, society, and assistance of his wife in domestic affairs, and has been brought into dishonor and disgrace, to his damage in the sum of $5,000, for which sum, together with costs herein, he prays judgment." To this petition defendant filed a motion—which the court overruled—to require plaintiff to make his said pleading more specific by stating the times and places the several acts of unlawful sexual intercourse were had, and "to furnish a bill of particulars of all such acts, including the one alleged to have taken place on October 21, 1893; stating with reasonable cer-

tainty the times and places where the same occurred, and whether in the daytime or in the night-time." No error was committed in overruling this motion. Had this been a criminal prosecution for burglary, an averment in the complaint stating the time when the unlawful entry was made,—that is, whether in the daytime or night season,—would have been necessary. It was not essential to allege the place or places the sexual intercourse occurred, since the action is transitory. This being the case, an averment as to the place is treated as formal merely, and need not be proven. (5 Ency. Pl. & Pr., 617; *Huckabee v. Shepherd*, 75 Ala., 342; *Long v. Booe*, 17 So. Rep. [Ala.], 716.) This action belongs to that class in which a *continuando* may be laid in the petition, and proof thereunder may be given of the wrongful act in issue committed on any day within the time stated in the pleading, and within the period of the statute of limitations. (5 Ency. Pl. & Pr., 618; *Lemmon v. Moore*, 94 Ind., 40; *Johnston v. Disbrow*, 47 Mich., 59; *Vatter v. Miller*, 17 Atl. Rep. [Vt.], 850.) It is not necessary to prove that the adultery was committed at the precise time alleged in the petition, if the variance is not so great as to mislead the defendant. (*Miller v. Miller*, 20 N. J. Eq., 216.) There are authorities to the effect,—some of which are cited* in the brief of defendant below,—that when the time and place are not alleged with particularity in the petition in such an action, the court in its discretion may order a bill of particulars. Even though this rule should obtain, we are convinced there was no abuse of discretion in refusing the motion directed against the petition.

Complaint is made of the overruling of a general demurrer to the petition. Plaintiff, in preparing his pleading, followed the form laid down in all the standard works on pleading in this country which we have ex

**Adams v. Adams*, 16 Pick. [Mass.], 254; *Commonwealth v. Davis*, 1 Pick. [Mass.], 432; *Commonwealth v. Snelling*, 15 Pick. [Mass.], 321 *Wood v. Wood*, 2 Paige Ch. [N Y.], 108; *Morrel v. Morrel*, 1 Barb. [N. Y.] 319; *Wright v. Wright*, 3 Tex., 168; *Miller v. Miller*, 20 N. J. Eq., 216; *Tilton v. Beecher*, 59 N. Y., 176; *Kane v. Kane*, 3 Edw. Ch. [N. Y.], 339.

amined. The only alleged defect in the petition suggested by counsel is that it omits to state that the criminal intercourse charged was committed without the privity or consent of plaintiff. The collusion or connivance of a plaintiff is a bar to such an action; but that defense was for the defendant to establish, and plaintiff was not required to negative the same in his petition.

Some immaterial allegations in the answer were met by redundant averments in the reply, and the latter the court declined to eliminate from the record, and of which the defendant complains. He invited the irrelevant matter by the statements in his answer, and ought not to be heard to complain. Moreover, we fail to discover that he could have been in the least injuriously affected by the ruling in question.

The next point made is that the trial court erred in sustaining plaintiff's challenge for cause to venireman Santo. Whether he was improperly excused or not is wholly unimportant, since defendant was not prejudiced by his being excused. It does not appear that defendant exercised any of his peremptory challenges, and hence it may be presumed that twelve competent men, possessing all the requisite qualifications of jurors, heard and decided the cause. (*Richards v. State*, 36 Neb., 19; *Omaha S. R. Co. v. Beeson*, 36 Neb., 362; *Brumback v. German Nat. Bank of Beatrice*, 46 Neb., 540, and cases there cited.)

Another assignment is that the court erred in permitting one Lichty, a witness on behalf of plaintiff, to testify to a conversation with defendant, as it related to an attempt to compromise the case. Defendant having not only pleaded in his answer, but proved on the trial, an offer of compromise made by the plaintiff to the defendant, it was not very consistent for the latter to urge that character of testimony was inadmissible. Lichty did not testify to a compromise, but his testimony was to bring out the fact that the defendant admitted to him he caught and kissed plaintiff's wife, and had a conversation with her which a man should not have with another's wife.

We are unwilling to predicate a reversal upon the admission of Lichty's testimony, or the permitting of plaintiff to answer question 128, as it was preliminary in its nature, whether he had had a conversation relating to a compromise, but the conversation was not narrated.

It is strenuously insisted that error was committed in allowing plaintiff's wife to testify on behalf of her husband, over the objections of the defendant, because she was not a competent witness by reason of her marital relations. Section 328 of the Code of Civil Procedure provides: "Every human being of sufficient capacity to understand the obligation of an oath is a competent witness in all cases, civil and criminal, except as otherwise herein declared. The following persons shall be incompetent to testify: * * * Third—Husband and wife, concerning any communication made by one to the other during marriage, whether called as a witness while that relation subsists or afterward." This language is plain, and needs no construction. It makes every person capable of understanding the nature of an oath a competent witness in a court of justice, unless such person comes within one of the five exceptions named in the section. The third excludes a husband and wife from testifying as to communications made from one to the other during marriage. Mrs. Meyers did not violate this statute, nor the provisions of sections 331 and 332 of the Code, in the giving of her testimony. There is no statute in this state which forbids a wife from testifying for her husband in an action for criminal conversation, nor is it against public policy to permit her to do so. She is disqualified from being a witness against him in such an action, but the law allows her to testify in his favor. We find no reversible error in the rulings on the admission of the testimony.

The following instructions given on the request of the plaintiff below are assailed:

"1. The jury are instructed that where a defendant has debauched the wife of a plaintiff, the right of action of the latter is complete; and the mere fact that such plaint-

iff forgives his wife and continues the marital relation does not necessarily have the effect to establish his connivance or assent to the misconduct of such defendant.

"2. And if the jury believe from the evidence that defendant committed the offense charged in the petition herein, and that plaintiff has forgiven his wife and is living with her, through the exercise of Christian virtue, the influence of family interest, or even in the want of what may be regarded as a true manly spirit, that fact could not destroy his right of action for the injury done him by this defendant."

The cohabitation of plaintiff with his wife after knowledge of her intimacy with the defendant did not bar the right of action, nor did such fact necessarily prove collusion between plaintiff and his wife. (*Verholf v. Van Houwenlengen*, 21 Ia., 429; *Stumm v. Hummel*, 39 Ia., 478; *Sanborn v. Neilson*, 4 N. H., 501; *Sikes v. Tippins*, 11 S. E. Rep. [Ga.], 662.)

The following were given at the request of the plaintiff below:

"5. The jury are instructed that the law forbids the debauching of a man's wife. And if a man violates the sanctity of another's household by having carnal intercourse with another's wife, the person so offending is liable in damages to the party injured for such misconduct.

"6. And if the jury believe from the evidence that the defendant had carnal intercourse with the wife of the plaintiff, as alleged in the petition herein, then your verdict should be for the plaintiff, in such sum as you believe from the evidence will compensate him for the injury and damage he has suffered, not exceeding the amount claimed in the petition. And in determining the amount of such damages you should take into account the shame and ridicule plaintiff is subject to, and the mental anguish and distress he would necessarily suffer by the action of the defendant."

The contention is that all four of the instructions copied

above are erroneous, because they omitted the ingredient of want of consent of plaintiff to his wife's intimacy with the defendant. The first answer to the criticism is that there was no evidence adduced from which such consent could be inferred. Again, if the instructions were faulty by ignoring the element of consent, the error was cured by the giving of the following instructions requested by the defendant:

"6. If you believe from the evidence that the plaintiff was willing, or contributed in any degree, to have his wife throw herself in the way of the defendant, and to try to entrap him into having connection with her, the plaintiff cannot recover.

"7. If you believe, from the evidence, plaintiff and his wife tried to entrap the defendant into having improper relations with his wife, for the purpose of blackmailing him, or getting money from him, then plaintiff cannot recover."

Construing the foregoing in connection with the instructions given on behalf of plaintiff, we are convinced it was made plain to the jury that there could be no recovery in this case if the adultery charged was committed by the wife with the consent or connivance of her husband. It is a familiar rule that instructions must be construed as a whole. When thus considered, if they fairly state the law, it is sufficient. (*St. Louis v. State*, 8 Neb., 406; *Murphy v. State*, 15 Neb., 383; *Bartling v. Behrends*, 20 Neb., 211; *Campbell v. Holland*, 22 Neb., 587; *City of Lincoln v. Smith*, 28 Neb., 762.)

Complaint is made of this instruction, which was given by the court on its own motion:

"6. The jury are instructed that if you find for the plaintiff, in estimating the injury he has sustained the jury may take into consideration the wounded feelings and affections of the husband, the wrong done to him in his domestic and social relations, the stain and dishonor he has sustained, and the grief and affliction suffered in consequence of the act complained of, and give damages accordingly."

The elements of damages enumerated in this paragraph of the charge were proper subjects for the consideration of the jury in reaching a verdict, and it is an unfair criticism of this instruction, when read in the light of the remainder of the charge, to say the court assumed plaintiff had sustained all those different items of damages. If the mere statement of the elements which the jury might consider in fixing the amount of recovery created an impression unfavorable to defendant, he is to blame for having so acted as to cause a judicial investigation of the facts. Plaintiff was not limited in the amount of recovery to such sum as would merely compensate him for loss of services of the wife during the time they were separated. Using the language of Chief Justice Walker in *Yundt v. Hartrunft*, 41 Ill., 12: "In this class of cases the loss of services may be alleged injury, but the injury to the character of the family is the real ground of recovery when the cause of action relates to the wife or daughter. The degradation which ensues, the distress and mental anguish which necessarily follow, are the real causes of recovery. It has been the policy of the law to confine the recovery by the injured party to the precise amount of money which he has proved he has lost by the deprivation of labor ensuing from the injury. But the law has, in a more just spirit, allowed a recovery for injury to family reputation and anguish growing out of the injury." (See *Stumm v. Hummel*, 39 Ia., 478; *Long v. Booe*, 17 So. Rep. [Ala.], 716; *Rice v. Rice*, 62 N. W. Rep. [Mich.], 833; *Cross v. Grant*, 62 N. H., 675.)

Error is assigned for the refusal of defendant's ninth request, which was in this language:

"9. The jury are instructed that the gist of this action is the loss of the comfort and society of the plaintiff's wife, and if you find from the evidence that the plaintiff continued to live with his wife after he has heard of her alleged illicit connection with the defendant, the jury is justified in concluding that the plaintiff has condoned the offense of the wife, and this circumstance is entitled to

great weight in considering the question of damages the plaintiff has sustained by reason of the wrongful conduct of the defendant, provided that the jury shall believe that the defendant has in fact committed any wrong against the plaintiff."

This instruction was properly refused, because loss of comfort and society of the wife were not the only injuries for which compensatory damages could be awarded, *supra*. Again, it was not the province of the court to tell the jury what circumstance was "entitled to great weight." It was for the jury alone to determine the weight to be given the testimony.

Of the other requests of the defendant which were refused, all we need say is that we have examined them all and find they were properly rejected,—some because they did not correctly state the law, and others for the reason they had already been covered by the instructions given. We are convinced no substantial error was committed in the giving and refusing of the instructions.

It is said that the testimony was insufficient to justify the verdict. The contention of defendant in his brief is: "No disinterested witness testifies to even seeing Smith, the plaintiff in error, with the wife of defendant in error in any compromising attitudes, or guilty of any improper conduct whatever. No presents or gifts made. No letters exchanged. None of the badges or indicia that usually surround and accompany a truthful charge of this character." This argument is not convincing. It was not indispensable to a recovery that the acts of sexual intercourse should have been established by the testimony of a disinterested eye-witness. Adultery would be very difficult of proof if such were the rule, but it may, like any other fact, be established by circumstantial evidence. In this case, however, the wife testifies to more than one act of illicit intercourse with the defendant. She is to some extent corroborated by other testimony adduced on the trial. Without entering into a discussion of the testimony, it is obvious it was sufficient, if believed, to sustain

the verdict. The amount of damages found by the jury does not appear to have been the result of passion and prejudice, and we do not feel warranted in reversing the judgment on the ground of excessive damages. The judgment will be

AFFIRMED.

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## ADAMS-SMITH COMPANY V. HARRY V. HAYWARD.

FILED JUNE 15, 1897. No. 7267.

1. **Assignments of Error: WAIVER.** An assignment of error not argued will be deemed waived.
2. **Instructions: EXCEPTIONS.** An exception to the entire charge of the court, which contains several distinct instructions, is insufficient on review unless each paragraph is bad.
3. **———: ASSIGNMENTS OF ERROR.** Errors in respect to giving instructions must be separately assigned.
4. **Contract of Employment: PENALTY.** The provision in the contract of employment set out in the opinion relating to the retention by the employer of one month's wages, *held* to be in the nature of a penalty to secure a faithful performance of the stipulations on the part of the employe.
5. **Action for Commissions and Salary: VERDICT FOR PLAINTIFF.** *Held*, That the verdict is sustained by sufficient evidence.

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

*Bartlett, Baldrige & De Bord*, for plaintiff in error.

*Brome & Burnett, contra.*

NORVAL, J.

Adams-Smith Company, a corporation, is a wholesale dealer in wines, liquors, and cigars. Harry V. Hayward, plaintiff below, was its traveling salesman, and he brought this action to recover a balance alleged to be due

him for salary and commissions earned. The petition contained three counts: (1.) To recover $34.65 as commissions on a sale of a bill of goods for the defendant to Lueck & Warney of Stanton. (2.) The sum of $23.92 as a balance on commissions earned while in the defendant's employ. (3.) $416.69 as salary for the month of October, 1891. A jury trial resulted in a verdict and judgment for plaintiff for the full amount claimed.

The several assignments of error, nine in number, relating to the admission and rejection of testimony, not having been argued in the brief, will be treated as waived.

The charge of the court consisted of five distinct and separately numbered paragraphs, and the one numbered 4 is criticised in the brief of counsel. It cannot be reviewed, since an exception to the instructions given was taken in the court below *en masse*, and they were grouped in one assignment in the motion for a new trial. (*Union P. R. Co. v. Montgomery*, 49 Neb., 429.)

The sole assignment requiring attention relates to the sufficiency of the evidence to sustain the verdict. For convenience the first two causes of action will be considered together. It is not disputed that plaintiff below sold Lueck & Warney for defendant a bill of goods; and that if the sale was absolute and not conditional, plaintiff is entitled to commissions thereon in the sum of $34.65. The defendant insists that without its knowledge and consent the goods were sold to Lueck & Warney upon their approval merely, and that the vendees had the option of returning the goods if they were found upon delivery to be unsatisfactory; that this option was exercised, and the goods for the sale of which the commission is charged were returned to the defendant. The testimony of Emil Lueck tends to establish that the sale was made upon the condition above stated. On the other hand, plaintiff testified positively that there was no such agreement or arrangement, but that the sale was an absolute one. A perusal of the evidence convinces us that it was ample to sustain the theory of plaintiff as to his first

cause of action. It is not controverted that defendant at one time owed plaintiff a balance of $23.92 on commissions. But this sum was paid by the defendant as return freight on the said goods shipped to Lueck & Warney, and then charged plaintiff therewith. The jury having found in favor of plaintiff's contention as to the first cause of action, it follows that he is not chargeable with the said sum paid by defendant as freight, and that the finding of the court relating to the second count of the petition is upheld by the evidence.

We pass to a consideration of the third cause of action. Prior to June 30, 1891, plaintiff was to receive from defendant commissions on sales, as compensation for his services. On said date the parties entered into a written agreement, of which the following is a copy:

"This agreement, made June 30, 1891, between Adams-Smith Co., Chicago, Ills., party of the first part, and H. V. Hayward, party of the second part.

"Adams-Smith Co. does hereby engage H. V. Hayward as traveling salesman for the term of one year, commencing today, and to pay him for his services five thousand ($5,000) dollars, payable in monthly installments of four hundred and sixteen dollars and sixty-seven cents, which amount includes salary and traveling expenses.

"H. V. Hayward, in consideration of above, agrees to travel ten full months on the road, and to sell not less than fifty thousand ($50,000) dollars worth of our goods at list prices, exclusive of champagnes, case brandies, Dekuyper gin in cases, ales and stout, and mineral waters; and H. V. Hayward further agrees that the sum of four hundred and sixteen ($416) dollars and sixty-seven cents *shall be held back by Adams-Smith Co., and be forfeited at any time it (A. S. Co.) so elects to cancel this agreement.* H. V. Hayward further agrees that A. S. Co. shall have the right to reject any orders taken by him, and that they shall be the sole judges of credits.

"It is further understood and agreed that Adams-Smith

Co. *reserve the right to cancel this agreement, and that it shall be void at any time they so elect.*

"ADAMS-SMITH CO.,
"By J. FLEISHMAN, *Pres.*
"H. V. HAYWARD."

Plaintiff worked for the defendant under said contract from July 1 to November 1, 1891, when the former was discharged by the latter, who terminated the employment under the option given it by the contract. Plaintiff received his salary for the months of July, August, and September; but defendant refused to pay the same for the month of October on the ground that the same was forfeited by the terms of the said agreement. It is true the right was reserved to the defendant to cancel and terminate the contract of employment. The agreement under consideration gave to the employer the power to withhold from plaintiff a sum equal to one month's salary, which amount was to be forfeited to the defendant at any time it should elect to annul the agreement, but its right to claim the forfeiture depended upon whether good and substantial ground existed for the termination of the contract of employment. It was never contemplated by the parties that the defendant should forever retain one month's compensation should it arbitrarily and without reasonable cause discharge plaintiff, but its right to it depended upon whether the latter was responsible for the termination of the agreement. Unless plaintiff was in default, or violated his agreement, it could not have been the intention of the parties that he should forfeit any portion of his salary. The provision for retaining one month's salary was in the nature of a penalty to secure a faithful performance of the agreement by the plaintiff. The evidence was sufficient to justify the jury in returning a verdict against the defendant upon each cause of action. The judgment is

AFFIRMED.

## HERMAN BUSCH V. MOLINE, MILBURN & STODDARD COMPANY ET AL.

FILED JUNE 15, 1897. No. 7373.

1. **Replevin: BOND: NOTICE OF EXCEPTION.** Section 189 of the Code of Civil Procedure, requiring defendant in replevin to give notice that he excepts to the sufficiency of a replevin bond, is not applicable to such a bond taken by a constable in an action pending before a justice of the peace. *Thomas v. Edgerton*, 40 Neb., 25, followed.
2. ———: ———: **APPROVAL: LIABILITY OF CONSTABLE.** Under section 1040 of said Code, a constable who takes insufficient security on an undertaking in replevin is liable in damages to the defendant in the action in which the same is taken.
3. ———: ———: ———: ———. Evidence examined in this case, and *held* not to establish that the officer accepted insufficient security.

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

*Charles W. Haller*, for plaintiff in error.

*G. A. Rutherford, contra.*

NORVAL, J.

This was an action upon a constable's bond by the Moline, Milburn & Stoddard Company against Paul Stein and others, to recover damages caused by Stein's approval, as constable, of an insufficient undertaking in an action of replevin. There was a dismissal by the plaintiff without prejudice as to Thomas H. Price, one of the sureties, and upon a trial to the court, judgment was entered against Stein and Herman Busch, the remaining defendants. Busch alone has prosecuted error proceedings.

There is no controversy over the facts, which may be summarized as follows: During 1891 plaintiff below recovered two judgments before a justice of the peace within and for Douglas county against J. H. Wood, one for $43.50 and the other for the sum of $199.63, besides costs. An execution was issued on each of said judg-

ments and placed in the hands of constable S. B. Clark for service, who levied the writs upon a two-story brick building situate on leased grounds, and on the following day the said Wood instituted an action of replevin against Clark before A. J. Hart, a justice of the peace, to recover said building. A writ of replevin was issued by said justice and delivered to Paul Stein, a constable, who took the property into his possession and duly appraised the same at $300. An undertaking in replevin was executed on behalf of Wood, which was approved by Stein, as constable, and the possession of the property was thereupon delivered by him to said Wood. The replevin action was certified by the justice to the district court for the reason the appraised value of the property exceeded the jurisdiction of a justice of the peace, where upon the trial judgment was rendered in favor of Clark, the defendant therein, and against Wood, in the alternative, for a return of the property or its value assessed at $304.08. Subsequently, execution was issued upon said judgment, which was returned by the sheriff unsatisfied for want of property whereon to levy the writ, and thereafter Clark assigned and transferred said judgment to the Moline, Milburn & Stoddard Company. The latter brought suit in the county court of Douglas county and recovered judgment on the said undertaking in replevin against said Wood, as principal, and one Albert Sullivan, as surety, for the sum of $312.58 and costs. Execution on this judgment was issued, which was likewise returned *nulla bona*. Thereupon the present action was instituted in the court below.

The first argument advanced for the reversal of the cause is that there is no liability on the official bond of the constable Stein for the approval of the replevin undertaking, since no objections were made to the sufficiency of the sureties thereon within twenty-four hours after the undertaking was given. This court had a similar question before it for consideration in *Thomas v. Edgerton*, 40 Neb., 25, where, in an opinion by RYAN, C., construing

sections 189, 1037, 1040, and 1085, of the Code of Civil Procedure, it was held that said section 189, requiring defendant in replevin to give notice that he excepts to the sufficiency of a replevin undertaking, is not applicable to such a bond taken by a constable in an action before a justice of the peace, but that a constable is liable in damages if he take insufficient surety on such a bond, whether excepted to or not. We adhere to that decision, and the same will be followed in the case at bar. That the appraised value of the property replevied exceeded the jurisdiction of a justice's court cannot possibly take the case out of the rule stated in the case of *Thomas v. Edgerton, supra.* The legislature has not made any distinction as to the liability of a constable for approving an insufficient replevin undertaking in actions before justices of the peace, between cases where the appraised value of the property exceeds $200, and those where the appraisement is for a less sum, and the courts have no right so to do. The taking and approval of the bond by the constable were within the scope of his office, and he and the sureties on his official bond are answerable for any damages resulting from the approval of an insufficient undertaking.

The evidence fails to sustain the judgment, for the reason it is not disclosed that the constable accepted insufficient sureties on the replevin bond. The return *nulla bona* of the execution issued on the judgment recovered on the replevin undertaking is evidence of insolvency at that time of Wood and Sullivan, but it did not establish that the surety on the replevin bond was insufficient when it was accepted and approved. The burden was upon plaintiff to establish that insufficient security was taken by the constable. There not being a particle of proof in the record to show that Albert Sullivan, the surety on the replevin bond, was not solvent and ample surety when the replevin undertaking was given, the judgment under review must be reversed, and the cause remanded.

REVERSED AND REMANDED.

## MARY M. ROGERS V. KANSAS CITY & OMAHA RAILROAD COMPANY.

FILED JUNE 15, 1897. No. 7328.

1. **Railroad Companies: FIRE FROM LOCOMOTIVE: DAMAGES.** Where damage is caused by the escape of fire from a railroad engine, the burden is upon the company to show that the engine was properly constructed, equipped, and operated. (*Burlington & M. R. R. Co. v. Westover*, 4 Neb., 268.)

2. ———: ———: ———: **DIRECTING VERDICT.** When the evidence adduced tends to sustain the averments of the petition, it is error to direct a verdict for the defendant.

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

*A. H. Bowen*, for plaintiff in error.

*M. A. Reed* and *M. A. Hartigan, contra.*

NORVAL, J.

Plaintiff sued the defendant to recover damages for the destruction by fire of plaintiff's fence posts and trees. After the testimony was all in, the jury, under the directions of the trial judge, returned a verdict for the defendant, upon which judgment was duly entered, and to reverse which the case was brought here by petition in error.

Plaintiff, by permission of the court, filed an amended petition to conform to the evidence adduced by her, alleging substantially that the defendant negligently, in operating and running the engine over its line of road through plaintiff's premises, "permitted said engine to cast out sparks and coals of fire therefrom, and threw the same over and upon the premises of plaintiff, and then and thereby set fire to the grass on her land and burned up and destroyed 280 ash trees and 57 fence posts." The verdict was directed upon the theory that the evidence failed

to show that the fire which caused the damage escaped from the defendant's engine. If the proofs failed to disclose the origin of the fire, the duty to affirm the judgment is clear. There is no conflict in the evidence. O. C. Rogers, plaintiff's husband, testified substantially that he saw an extra train go over defendant's road at the rate of nearly twenty-five miles an hour, on or about the 22d day of April, 1889; that immediately after the engine passed, the fire which occasioned the damages started near the edge of the grass, which rapidly spread and burned to within a few rods of plaintiff's house, and that there had been no other fire in the vicinity that spring. The testimony of Mr. Rogers was corroborated by that given by his daughter, Nettie. It is true no witness testified to having seen the engine emitting sparks or coals of fire, but that was not absolutely essential to a recovery. The origin of a fire, like any other disputed question of fact, may be established by circumstantial evidence. While the testimony adduced in this case was not of the most convincing character, we cannot say that no inference could be properly drawn therefrom that the fire resulted from sparks or coals cast out by the engine. On the contrary, we are persuaded that the proofs should have been submitted to the jury for their consideration, under proper instructions. The rule in this state is that when fire is set out by sparks from a passing engine, negligence may be inferred, and that the burden of proof is upon the company to establish that the engine was not faulty in construction, and was properly equipped and operated. (*Burlington & M. R. R. Co. v. Westover*, 4 Neb., 268.)

It is insisted that plaintiff alleged one state of facts, and proved an entirely different set of facts. In other words, that negligence was alleged in the operation and management of the engine, and not that it was defectively constructed, and that there was not a scintilla of evidence in the case to establish the negligence charged in the petition. The inference of negligence in the operation

and running of the engine could as well be drawn from the fact that the engine communicated the fire to the grass as that the engine itself was faulty in construction. It devolved upon the defendant to prove that the engine was not carelessly and negligently managed or operated by its servants. For the error in directing the verdict, the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

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HOME FIRE INSURANCE COMPANY OF OMAHA, APPELLEE, V. WILLIAM FITCH ET AL., IMPLEADED WITH JOHN L. MCCAGUE, APPELLANT.

FILED JUNE 15, 1897. No. 7347.

1. **Interest.** Where an obligation stipulates for a specified lawful rate of interest before maturity, and for a higher lawful rate thereafter, interest will be computed according to the terms of the contract.
2. **Mortgage Bond: EXTENT OF LIEN.** A coupon bond secured by a real estate mortgage contained a provision that "it is secured by a first mortgage on real estate in Douglas county, Nebraska, which mortgage secures this note only to the aggregate amount of $1,500." *Held*, To be a limitation upon the amount of the mortgage lien.

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

*Howard B. Smith*, for appellant.

*W. H. De France* and *John F. Talbot*, *contra.*

NORVAL, J.

This is an appeal from a decree foreclosing a real estate mortgage, given to plaintiff and appellee, the Home Fire Insurance Company of Omaha, by William Fitch and wife to secure their coupon bond for $1,500, bearing date October 9, 1889. Subsequent to the execution and recording

of the mortgage, the premises were conveyed to the defendant John L. McCague, the present owner of the fee.

The first question argued is that the court erred in its computation of the amount due plaintiff, in allowing interest on the principal sum at eight per cent before maturity of the debt, and ten per cent thereafter; and *Richardson v. Campbell*, 34 Neb., 181, is cited in support of the contention. Interest was calculated according to the terms of the bond, which was in conflict with the rule stated in *Richardson v. Campbell, supra.* In that case it was decided that when a note provides for one rate of interest before maturity, and for a higher rate thereafter, the higher rate will be regarded as penalty and the obligation will draw the same rate after maturity as it did before that time. This proposition was disaffirmed, and the case in which it was announced, as to that point, was especially overruled in *Havemeyer v. Paul*, 45 Neb., 373, which fact counsel for appellant omitted to mention in his brief. In the case at bar interest was computed at eight per cent from date until due and ten per cent after maturity, which was clearly right and in harmony with the rule in *Havemeyer v. Paul, supra.*

Lastly, it is insisted that plaintiff was awarded a lien on the real estate for too large a sum. The bond secured by the mortgage in question contained a provision that "it is secured by a first mortgage on real estate in Douglas county, Nebraska, which mortgage secures this note only to the aggregate amount of fifteen hundred dollars." This sum limited the amount of the lien of the mortgage, yet plaintiff, by the decree, was given a lien on the mortgaged premises for the sum of $1,811.65. This was error. The decree is modified by reducing the lien on the land to $1,500, but in all other respects it is affirmed.

DECREE MODIFIED.

DAVID C. ZINK V. EDGAR M. WESTERVELT, RECEIVER, ET AL.

FILED JUNE 15, 1897. No. 8123.

Review: ABSTRACT. In a case submitted under rule 2, under an agreed printed abstract, this court will not look beyond the abstract; and to entitle the complaining party to a review of the judgment sought to be reversed the stipulation which identifies the record must show the rendition of a final judgment.

ERROR from the district court of Hall county. Tried below before KENDALL, J. *Proceeding in error dismissed.*

*W. H. Thompson* and *W. A. Prince*, for plaintiff in error.

*O. A. Abbott*, *Smith & Sheean*, and *Charles G. Ryan*, *contra.*

RYAN, C.

This cause was submitted on an agreed printed abstract under that portion of rule 2 which provides that a cause may be submitted at any time upon a written stipulation of the parties. This abstract began with a statement that on August 18, 1894, there was filed in the office of the clerk of the district court of Hall county a petition which was set out *in hæc verba.* In like manner were described other pleadings. These pleadings were followed by what is termed a decree, and a motion for a new trial ending with a journal entry, reciting the ruling on said motion for a new trial, and an exception thereto. At the close of the abstract is printed the following stipulation, which is the only one signed by the parties litigant: "The above and foregoing constitute the pleadings in this cause, and it is hereby agreed by and between the parties hereto that said cause may be submitted to the supreme court upon a printed abstract containing the pleadings as hereinbefore set forth." It is required by rule 2 that in the stipulation for a submission thereunder

there shall be contained an agreed printed abstract of the record. By the provisions of section 586, Code of Civil Procedure, a final judgment or a final order is recognized as an indispensable part of a record. In a case submitted under the provisions of rule 2, above noted, we have no means of determining what part of the record has in fact been brought up, except as we are advised by the written stipulation of the parties. (*Closson v. Rohman*, 50 Neb., 323.) Under a similar rule prescribed by the statutes of 1885 (Session Laws, p. 376, ch. 95, sec. 2) this construction was enforced in *Ballard v. Cheney*, 19 Neb., 58. In the stipulation above quoted there is identified nothing but the pleadings. There is no reference to a journal entry or to a final judgment. These proceedings are therefore

DISMISSED.

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## BEDFORD B. BOYD V. JOHN H. FELBER.

FILED JUNE 15, 1897. NO. 7378.

Review: SUFFICIENCY OF EVIDENCE. This case having been tried as a purely equitable action there is found no question presented by the petition in error except the sufficiency of the evidence to sustain the judgment, and this contention is found unsustained by the record.

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

*B. B. Boyd* and *Mell C. Jay*, for plaintiff in error.

*Wilbur Franklin Bryant, contra.*

RYAN, C.

On a motion this case was considered by this court and dismissed. (*Felber v. Boyd*, 44 Neb., 700.) Within one year of the date of the original judgment in the district court of Cedar county there was filed a petition in

error in this court, and upon the assignments therein presented this proceeding has been argued and submitted. The action was brought by John H. Felber against Bedford B. Boyd for the possession of a certain tract of land containing sixty acres, and for the recovery of rents and profits alleged to be due from Boyd by reason of his occupancy of said real property. The answer of Boyd, in addition to denials of the averments of the petition, contained allegations that plaintiff and defendant in October of 1883 had purchased 160 acres, which included the tract in controversy, from one L. M. Keene for the sum of $4,000; that $500 of this consideration was paid at the time of said purchase; that the balance was to be paid in five equal annual installments; that in 1884 the defendant Boyd went into possession of a portion of said premises and has ever since continued to occupy and improve the same as the owner thereof with the full knowledge and acquiescence of plaintiff, and that a portion of said premises has, since the purchase, been occupied by the plaintiff. It was further alleged in the answer of Mr. Boyd that in the year 1886 the contract for the purchase of the entire tract from Mr. Keene was assigned to Mr. Felber to enable said Felber to pay the balance due to Keene, it being understood that when this should be accomplished the undivided one-half of the title of said premises should be conveyed by Felber to Boyd. It was averred in the answer that Felber obtained a loan of the sum of $3,000, secured by mortgage in accordance with the above plan, and, having used only $2,747 of the proceeds of said loan to pay off the mortgage, that Felber appropriated the balance of the $3,000 to his own use. It was further alleged in the answer that Felber had held possession of the aforesaid premises for a long time and consequently was liable for a large sum as rents and profits therefrom arising, and in addition, for an amount paid to Felber as compensation for a strip of said land appropriated by the public for a highway. There was an offer by Boyd in his answer to make payment of one-half the sum the

court should find had been paid by plaintiff in excess of what defendant Boyd had paid in procuring title to said premises. There were claims asserted by Boyd in his answer of $1,260 by him paid as purchase money and of $1,575 for improvements by him placed on the premises. The prayer of the answer was as follows: "The defendant therefore prays that an account may be taken of the amount due the plaintiff, if any, from the defendant upon the purchase of said premises, and that upon the defendant paying the amount so found due into court for the benefit of the plaintiff that the plaintiff be then required to convey to defendant the one-half interest in said premises, and for such other and further relief as to equity pertains."

Aside from admissions of some averments of the answer and denials of others, there were the following allegations by way of reply, to-wit: "The plaintiff alleges the facts to be that the defendant, in the year 1886, assigned his interest in the said contract to the plaintiff in order to obtain a loan upon said premises, and the said interest was so assigned and a mortgage upon said premises was given by the plaintiff and a deed given to plaintiff by said L. M. Keene; but it was further agreed between the plaintiff and defendant that the said premises should be divided between them, and the part assigned to the defendant was the part described in the plaintiff's petition; and it was further agreed that the title in said premises should remain in the plaintiff, and the defendant was to pay his portion of the taxes, principal and interest of and above the mortgage,—that is to say, one-half when the same became due; that upon condition that the defendant should so pay such taxes, principal and interest as aforesaid, the plaintiff in consideration thereof agreed to sell and convey to the defendant the premises described in the plaintiff's petition; that the defendant has utterly failed on his part to fulfill any of the conditions on his part to be done and performed; that he has paid none of said taxes and none of said principal or interest, and

the plaintiff has been compelled to pay the same to protect his title." By way of further reply, plaintiff alleged that he had paid the $3,000 above referred to and the interest thereon, so that the total so paid equaled $4,355.82. On these payments interest was computed till the time of filing the supplemental reply in the sum of $1,163.45. The several amounts paid for taxes, with interest thereon till the time of pleading the same in the supplemental reply, amounted to $625.85. The aggregate of these three sums is $6,145.12.

The cause was tried to the court as an equitable action upon the issues presented by the answer and reply. This renders unavailable many of the errors assigned with respect to the admission of alleged incompetent evidence; indeed, it is probably owing to the manner in which this case was presented and determined that there is raised no question except that as to the sufficiency of the evidence to sustain the judgment rendered by the district court. The findings of the court upon sufficient evidence sustained the averments of the reply and on an accounting it was adjudged that there was due from the defendant to plaintiff the sum of $2,632.40, which amount defendant was required to pay within a fixed time to entitle him to a warranty deed for the north 100 acres of the 160-acre tract. The time elapsed for making this payment without such payment being made, whereupon, as the record recites, the cause came on for a remedial order upon the application of plaintiff, and the court further extended the time in which payment might be made and ordered that if there should be a default in making such payment that the said 100-acre tract should be sold and an order of sale be issued requiring such sale to be made. There is found in the record no copy of the application for the relief styled remedial, consequently we are precluded from a consideration of its sufficiency to justify the order in question. The defendant himself had first presented equitable issues and had prayed for general equitable relief between himself and plaintiff, and we

shall not infer that there was error in making an order after his default, which order, by such default, had been rendered necessary to the administration of complete equitable relief between the parties litigant. There is found no error in the record, and the judgment of the district court is

AFFIRMED.

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JOHN PEDERSON, APPELLANT, V. SOUTH OMAHA NATIONAL BANK, APPELLEE.

FILED JUNE 15, 1897. No. 7313.

**Bank Deposit: TRUST FUNDS: LIABILITY OF BANK: EVIDENCE.** The evidence in this case examined and *held* not to justify the claim of the appellant that the appellee, a bank, should be held liable as a trustee for the amount of the proceeds of a sale of cattle made by a live stock commission firm, which proceeds, in the name of said firm, had been deposited with the said bank, notwithstanding the fact that the said bank in the ordinary course of business had paid out a part of the same on the checks of the said firm and had applied the balance, the proceeds of the collection of a collateral, on the indebtedness of said firm to said bank for the security of which indebtedness the said collateral had been transferred to the bank before the cattle had been sold.

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

*Smith & Sheean*, for appellant.

*Charles Offutt, contra.*

RYAN, C.

This was an action in equity brought in the district court of Douglas county to hold the appellee liable for the proceeds of the sale of a certain car load of cattle. The cattle were shipped from Seward by the appellant on the 30th day of July, 1893. They were sold on July 31, 1893, by Gasman & Dudley, a live stock commission

firm doing business at the stock yards in South Omaha. The proceeds of this sale amounted to $952.42, out of which there were paid certain charges of freight, yardage, and the compensation of the commission firm, so that the net proceeds were $907.07. This entire amount the firm of Gasman & Dudley, in its own name and with the knowledge of appellant, deposited in the bank which is the appellee herein. There is no evidence that this bank knew or had any reason to suppose that appellant was interested in the deposit above referred to, which was made on July 31, 1893. On the same day, in South Omaha, the firm of Gasman & Dudley gave to appellant the individual check of that firm for the above named net sum of $907.07. This check was drawn on the appellee payable to the order of the Jones National Bank, Seward. On the day after it was drawn the appellant took this check to the Jones National Bank at Seward, and on said check received the full amount therein named. On the 3d day of August, 1893, this check was presented for payment to appellant and payment was refused, thereupon there was a protest for non-payment. This check was then returned to the bank at Seward, and upon being notified of its non-payment, the appellant took up this check and is now its holder. The firm of Gasman & Dudley ceased to do business on August 2, 1893, and at that time was insolvent. Mr. Dudley, the sole member of the firm remaining in this state, testified that the firm of Gasman & Dudley was probably insolvent on July 31, 1893. The proceeds of the sale of appellant's car load of cattle were lost through the insolvency of Gasman & Dudley, and the question now presented is whether this loss should be borne by the appellant or by the appellee. The district court was not of the opinion that a trust character had been so impressed upon the deposit in the bank that on account of such trust character it could be claimed by the appellant, and accordingly dismissed the action. The theory of appellant is that the firm of Gasman & Dudley was insolvent when the cattle

were sold on July 31; that said firm on that day was indebted to appellee, and from the fact that the instrument by virtue of which the deposit was made showed that the amount of such deposit had been derived from the sale of cattle made by Gasman & Dudley as agent, and not as the property of said firm, this deposit was impressed with a trust character. The manner in which it is insisted the appellee has diverted this fund from its proper use is described in the brief filed on behalf of appellant in this language: "The facts are that Gasman & Dudley were insolvent and were closed up by the defendant August 1st, 1893. Before this order from Swift & Co. for the proceeds of the plaintiff's stock was deposited in the defendant bank checks drawn by Gasman & Dudley in favor of other parties had been presented to and paid by the defendant bank, and an overdraft amounting to several hundred dollars existed against Gasman & Dudley. When this order was deposited it was used by the defendant bank to liquidate this overdraft. In other words, the proceeds of the plaintiff's stock was, without the knowledge or consent of the plaintiff, or Gasman & Dudley either, for that matter, applied by the bank to the payment of a pre-existing debt in favor of the defendant bank and of Gasman & Dudley."

There was introduced in evidence by appellant a written transcript from a book of the appellee showing the condition of the bank's account in 1893 of Gasman & Dudley, between the 14th day of July and the 2d day of August, inclusive of both days just named. This account shows that on the 14th, 15th, 18th, 22d, 24th, 25th, and 26th days of July of the year named the account of said firm with appellee was overdrawn in different amounts, ranging from $27.35 to $1,800.20. On July 17, 19, 20, 21, 27, 28, and 29 there were credits in favor of said firm in said book in different amounts, the least of which was $143.24 and the greatest was $3,991.60. On the morning of July 29th there was a balance to the credit of Gasman & Dudley of $584.25. On that day the account of the firm

was credited with $1,500 in one item and $2,283.33 in another. There were checks paid that day out of this account to the sum of $4,102.90. This left to the credit of Gasman & Dudley the sum of $264.68 to commence business with on the morning of July 31st, for the intervening day, July 30th, was Sunday. On July 31st there was made but one deposit, of the sum of $1,034.90. The original deposit slip accompanying this deposit was introduced in evidence and showed that the $1,034.90 was made up of four items, respectively of $952.42, $30.40, $26.32, and $25.76. Of these the first was the amount of the proceeds of the sale of appellant's cattle, but there was no indication upon this deposit slip from whence any of the items therein described had been derived. On the same day that this deposit was made there were paid nine checks drawn by Gasman & Dudley to the aggregate amount of $1,411.44. The appellant urges that the appellee should not be allowed credit for the payment of one of these checks, in particular,—that of John P. Danforth,—for the sole reason that this check, as appellant insists, was paid before the deposit was made on the 31st and therefore must have been paid by allowing the firm of Gasman & Dudley to overdraw its account. This conclusion is reached by assuming that the deposit, as was usually the case with deposits of the proceeds of sales, must have been made late in the afternoon, whereas, as shown by the testimony of Mr. Danforth, this check was cashed before 12 o'clock noon of that day. It may well admit of doubt whether or not, in the face of the general finding of the court in favor of the bank, this presumption should be entertained. It must, however, be borne in mind that the bank had no special knowledge of the nature of the deposit which included the proceeds of the sale of the cattle of appellant. By the testimony of Mr. Danforth it was shown that he received a check drawn in his favor on the 29th and that he presented it for payment on the first secular day thereafter. This check was against the proceeds of sale of cattle made on the 29th of

July, and on that day deposited to the credit of Gasman & Dudley, just as were the proceeds of the sale of the cattle of appellant on the second day afterward.

It seems to us that there is in this transaction no circumstance which should entitle appellant to hold the bank liable for not withholding the payment of the check of Mr. Danforth; that the check for the proceeds of the sale of appellant's cattle might be paid when presented, as it subsequently was on August 3d. There were two checks on August 1st, of the aggregate amount of $56.48, against the account of Gasman & Dudley, and there was a deposit in said account of $128.35 on the same day —reducing the overdraft of said firm to $39.99. With this balance against that firm its business operations began on August 2, 1893. On this day there was made one deposit of $160.43, followed by another of $1,498.50. There were three checks, the cost of transmitting a telegram, and a demand note in favor of the bank with interest thereon of the entire amount of $1,501.67, together with a fee for collection and exchange, of $2. This left a balance to the credit of Gasman & Dudley of only 17 cents, and with this balance in its favor that firm ceased to do business. The appellant has directed his argument against but one item of this day's transactions and that item is the charge of the amount of the demand note and interest. This note was given by Gasman & Dudley to appellee on July 29 and the firm just mentioned was credited with the face value thereof on that day. Contemporaneously with the execution of this note there was given the bank, as collateral security to said note, a draft for $1,500 drawn on Henry Hobson, a shipper of live stock at Cozad. This draft was forwarded for collection and was paid in Cozad on July 31. The net proceeds of this collection, amounting to $1,498.50, were received by appellee on August 2d, and at once credited in its account with Gasman & Dudley. At the same time the amount of the demand note was entered as a debit item in the same account. Aside from the small expense of making

and remitting this collection, which expense was charged against Gasman & Dudley, this transaction amounted to giving a credit to that firm on the 29th of July of $1,500, —the amount of the demand note of that date,—the forwarding for collection of an equal claim put up as collateral to said note, and, upon the receipt of the proceeds of this collection, the taking up therewith of the demand note with its accrued interest. This collateral was received for a specific purpose by the bank and applied to that purpose. The bank made this demand loan in the ordinary course of business and in the ordinary course of business received collateral security upon said loan, and this collateral was forwarded as a collection by the bank solely for its own benefit. The mere fact that the amount of this particular collection, when received by the bank, was entered in its account with Gasman & Dudley as a credit in favor of that firm, did not change its intrinsic character nor deprive the appellee of the right to apply it as the proceeds of the collection of collateral security held by it. It is clear from this analysis of the items concerning which appellant has complained, that there is in this case no ground for the application of the rule which was enforced in *Cady v. South Omaha Nat. Bank*, 46 Neb., 756, and the judgment of the district court is accordingly

AFFIRMED.

NORVAL, J., not sitting.

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PETER L. HOLLAND, APPELLANT, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLEE.

FILED JUNE 15, 1897. No. 7399.

1. **New Trial:** BILL OF EXCEPTIONS: NEGLECT OF STENOGRAPHER: REVIEW. A party or his attorney is justified in relying upon the stenographic reporter for a transcript of the oral proceedings of a trial, and if, without fault on his part, such transcript cannot

be furnished by the reporter, and in consequence of this inability a bill of exceptions cannot be had, a court of equity in a proper case will grant a new trial.

2. ———: ———: ———. A litigant should not be deprived of the right to have his case heard in a court of last resort on account of the failure of the official stenographer to furnish him with a copy of the testimony.

3. ———: ———: ———. It will not serve to impair or modify the operation of the above rules to show that a party in error proceedings might be furnished with a transcript of evidence preserved in a trial of the same case had before that wherein the reporter is unable to furnish a transcript, for, while it is probable that the evidence in one trial resembled that in the other, it is not by the court to be presumed that there was absolute identity with respect to the history of alleged errors.

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

*B. F. Johnson,* for appellant.

*J. W. Deweese* and *F. E. Bishop, contra.*

RYAN, C.

The petition in equity filed by the appellant in the district court of Lancaster county in this case contained averments that in said court in a certain case wherein appellant had been plaintiff and the appellee had been defendant there had been a judgment adverse to the defendant; that within the forty days allowed by the court for settling a bill of exceptions plaintiff had applied to the stenographic reporter of said court, who had taken shorthand notes of the evidence, for a transcript of the same that plaintiff might prepare his proposed bill of exceptions; that by reason of having lost a part of his said notes the said reporter was unable to furnish a transcript as required; that the plaintiff had relied upon being able to obtain a transcript of the evidence and therefore had not taken down the testimony in writing; that the failure to prepare the bill of exceptions was due solely to the loss of said notes by the reporter, and not

to any negligence of the plaintiff or his attorney, and that plaintiff, by reason of said inability to prepare a bill of exceptions, was unable to secure a review of his case in the supreme court. There was a prayer for a new trial and for general equitable relief. There was an answer in denial in connection with averments that a bill of exceptions might have been prepared without the missing parts of the stenographic notes, which, as the appellee alleged, embraced but a small part of the testimony in question. There was a reply by which the averments of the answer were denied. The district court made findings of fact, from which it appears that previous to the trial above referred to there had been a trial of the same case in which another reporter had acted, and that the minutes of the testimony on the trial first in order of time were still in existence and might be made use of in the preparation of a bill of exceptions showing what evidence was introduced on the final trial. There was also a finding of a deposition used in both trials which might also be used in accomplishing the purpose indicated. It was also specially found that a portion of the notes of the stenographer had been lost, but that the plaintiff had made no effort to prepare a bill of exceptions, except to ask a transcript of the evidence from the reporter. There was a dismissal of the petition, and to review the judgment thereon this appeal is prosecuted.

In *Curran v. Wilcox*, 10 Neb., 449, it was held that a party litigant had the right to rely on being furnished with a transcript of the testimony of the court reporter in the preparation of a bill of exceptions. In *State v. Gaslin*, 32 Neb., 291, this proposition was reasserted with approval, and in that connection it was said: "A litigant should not be deprived of the right to have his case heard in a court of the last resort on account of the failure of the official stenographer to furnish him with a copy of the testimony." It was immaterial whether or not there were, after the close of the second trial, complete data on which the entire evidence on the first trial might have

been reproduced. There is a strong probability, perhaps, that the proofs on one trial very closely resemble those produced on another trial in the same case. In an error proceeding the possible difference may become very material. It is provided by section 309, Code of Civil Procedure, in regard to exceptions, that no particular form is necessary, but that "The exception must be stated, with so much of the evidence as is necessary to explain it, and no more, and the whole as briefly as possible." In the first trial the same questions as to the admissibility of testimony may not have been presented as was presented at the last trial. "A judgment rendered or final order made by the district court may be reversed, vacated, or modified, by the supreme court for errors appearing on the record." (Code of Civil Procedure, sec. 582.) What we wish to enforce by these quotations from the statute is that by error proceedings it is not intended that in the supreme court there shall be a trial *de novo*. The proceedings in such case are for the review of alleged errors, and these must have been properly excepted to in the district court and by petition in error must be specifically pointed out in the supreme court. The very particularity required in each court necessarily implies on the part of the complaining party the correlative right of selection of particular questions with a view to the presentation of the special points involved. It would therefore be extremely dangerous to require him to act, not upon an exact transcript of the evidence which the law provides he shall be entitled to secure at the hands of the official stenographer, but upon a transcript, at best, only approximately correct. As the appellant was free from blame for the loss of the reporter's notes he should not be held responsible upon an assumption that if the transcript had been sooner ordered it could have been furnished. The appellant gave the order for his transcript within the time limited for that purpose, and there should be no inference that if he had been more diligent than the requirement of the court demanded, the official reporter might

have been able to supply the necessary transcript. The judgment of the district court is reversed and this case is remanded, with instructions to allow a new trial in the case wherein the notes of the testimony were lost by the official reporter.

REVERSED AND REMANDED.

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SCOTTISH-AMERICAN MORTGAGE COMPANY, APPELLEE, V. WILLIAM BIGSBY ET AL., APPELLANTS.

FILED JUNE 15, 1897. No. 7392.

1. **Judicial Sales:** OBJECTIONS TO CONFIRMATION. Certain objections to the confirmation of a foreclosure sale involving only questions of fact considered, and *held* not well taken in view of the evidence adduced.

2. ———: APPRAISEMENT: OBJECTIONS. An objection that the appraisement was too low *held* made too late when not urged till after the sale.

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

*Francis G. Hamer*, for appellants.

*Dryden & Main, contra.*

RYAN, C.

The appeal in this case is from the orders of the district court of Buffalo county in overruling a motion of the appellants to set aside a sale under a decree for the foreclosure of a mortgage and in confirming such sale. The motion to set aside the sale was based on grounds which will now be considered separately.

It was first urged that notice of the sale was not published for 30 days previous to the sale. As the sheriff in his return stated that he had caused a notice of the sale

to be published more than 30 days previous to the sale this proposition can receive no further consideration.

In respect to the next complaint,—that the notice of sale was insufficient,—we must say that we have not been able to discover any ground for this criticism. The objection is so general in its nature that it is doubtful whether under it the district court was bound to search for errors. Certainly that court was scarcely to be held at fault in finding none. It was urged in the motion in question that the amount for which the foreclosure was had was not stated as being the same in the decree and in the notice of sale. In each the sum named was $1,370.86, but in the notice of sale there was in addition a statement of the amount of accruing costs. This was not a material variance. The objection that the appraisement was too low came too late after the sale. (*Vought v. Foxworthy*, 38 Neb., 790.) The appraisement shows that the interest of defendants, Bigsby and others, was appraised, and the objection that the interest was not appraised has therefore no weight. There was no evidence to support the other objections which involved merely the existence of alleged facts. The district court must therefore be assumed to have properly overruled the motion to set aside the sale, and both that ruling and the order confirming the sale are accordingly

AFFIRMED.

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UNION PACIFIC RAILWAY COMPANY v. MARY A. LANGAN.

FILED JUNE 15, 1897. No. 7340.

**Contract for Shipment of Live Stock: NEGLIGENCE: ACTION AGAINST CARRIER FOR DAMAGES: VERDICT FOR PLAINTIFF.** The evidence in this case examined, and *held* to sustain the verdict.

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

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

*Abbott & Caldwell, contra.*

RYAN, C.

On the 25th day of April, 1892, a contract was entered into between the agent of the defendant in error as shipper and the Union Pacific Railway Company. By the terms of the contract the railway company undertook to transport three double-deck car loads of sheep from Wood River to Fremont. When these cars reached Grand Island it was discovered that one end of the upper deck of one of the cars had fallen and that by this fall some of the sheep in that car had been injured and others had been killed. This car was taken to the stock yards in Grand Island and the living sheep were transferred to a suitable car and forwarded by a train which followed that in which the two other cars had meantime been hauled to Chicago. There was a verdict and judgment in the district court of Hall county in the sum of $979.71, the value of the entire car load of sheep which had been shipped in the car wherein a part of the upper deck had fallen before it reached Grand Island. By the aforesaid contract it was provided that the shipper "agrees to load and unload and reload all said stock at his own expense, and to feed, water, and attend the same at his own expense and risk, while it is in the stock yards of said company awaiting shipment and while on the cars or at the feeding or transfer points, or where the same may be unloaded for any purpose." It was further provided in the contract of shipment as follows: "The said shipper himself assumed the duty of properly and securely placing all the said stock in the cars, and keeping said cars securely locked and fastened, so as to prevent escape of such stock therefrom. In case the said company shall furnish any laborer or laborers to assist in loading or unloading said

stock at any point no additional charge will be made therefor, and such laborer or laborers shall, while so engaged, be deemed exclusively the employes of said shipper; and the said company shall not be liable for anything done or omitted to be done by such laborer or laborers while so engaged."

Plaintiff in error insisted in the district court, and still insists, that the shipper overloaded the car in which the deck fell, and that this was in violation of one of the above quoted undertakings. The freight charge was on 19,000 pounds, and the sheep in this car weighed less than this figure fixed by the carrier. The jury, therefore, was justified in finding that this car was not overloaded.

It is furthermore argued by the plaintiff in error, in view of the above extracts from the contract of shipment, that it was the duty of the shipper to accompany and care for his sheep, and that his failure to accompany and care for the car load left at Grand Island was, in effect, an abandonment of that car load, from which abandonment it resulted that the employes of the railway company were required to care for the sheep, and that for any negligence in that respect the railway company could not be held liable under the conditions of the shipping contract above quoted. There were three cars loaded with sheep of Mrs. Langan shipped at the same time. Her husband accompanied and cared for the sheep until the train reached Grand Island. Here one car load was detained by the railway company and Mr. Langan went forward with the other two cars. The plaintiff in error took the depositions of the persons who, in transit, took care of the detained car load of sheep until these sheep were delivered at the stock yards in Chicago, and from this evidence it seems clearly established that there was no failure to properly take care of these sheep during this time. The only evidence as to injuries received was that which indicated that the cause of the injuries was the above mentioned falling of the upper deck of the car. The jury could, and we think under the circumstances should, have

found that the injuries which decreased the value of this car load of sheep were sustained at the time of, or before, reaching Grand Island. Mr. Langan could not be said to be guilty of negligence in electing to accompany the two cars, instead of remaining with one, and, at any rate, there was no evidence whatever that this election was the occasion of any injuries to the sheep being shipped. It therefore seems to us that there is no ground for the complaints made in regard to the course pursued by Mr. Langan, nor should there be of the action of the jury in holding the plaintiff in error liable for such injuries as the sheep sustained, on the theory that these injuries had been received before they left Grand Island. In this view of the case there is involved no question of interstate commerce on the theory of the railroad company itself, for on its behalf it is strenuously urged that its duties with respect to this shipment by contract ended at Fremont in this state.

It appears from the evidence that the plaintiff in error, as it argues it had the right to do, caused the car load of sheep which, as it says, Mr. Langan abandoned at Grand Island, to be shipped to Chicago and there sold, and that the proceeds of said sale were paid to plaintiff in error. There should be no inference of unfairness from this for an amicable arrangement was afterwards made between the contestants, for these proceeds to be paid to defendant in error without either party waiving any right by reason of such payment. We mention the fact that the sale was on account of the railway company merely as introductory to another remark, and that is, that it is conceded on all hands that the sale was for the full value of the car load of sheep in the condition in which they were when sold in Chicago. The other two car loads were sold in the same market and at almost the same time as this particular car load and there was evidence showing how the different car loads compared and for what each sold, from which showing and comparison the jury was able to judge for how much less the injured sheep sold

than they would have sold if these sheep had not been injured. The verdict was less than this proof justified, and the plaintiff in error has no good ground for complaint with respect to the amount found due.

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

AFFIRMED.

HARRISON, J., took no part in the final determination of this case.

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M. D. HATHAWAY ET AL., APPELLANTS, V. F. NELSON ET AL., APPELLEES.

FILED JUNE 15, 1897. NO. 7365.

**Foreclosure of Tax Lien:** LIMITATION OF ACTION. An action for the foreclosure of a tax lien cannot be maintained after the lapse of more than nine years from the date of the tax sale by virtue of which such lien is claimed to have originated.

APPEAL from the district court of Knox county. Heard below before ROBINSON, J. *Affirmed.*

*Joy, Call & Joy*, for appellants.

*J. C. Robinson*, *Solomon Draper*, and *Isaac Powers, Jr.*, *contra.*

RYAN, C.

This action was tried in the district court of Knox county as one for the foreclosure of liens for taxes paid on certain real estate assessed for the years from 1875 to 1881, inclusive. The tax sale for the payment of these taxes was had on January 15, 1883. Subsequently, the assignee of the certificate of purchase paid taxes on the same land for the years beginning with the year 1882 and ending with the year 1890, inclusive of those first and

last named. This action was begun May 14, 1892, consequently between that time and the date of the aforesaid sale a period of more than nine years had intervened. The bar of the statute was for this reason complete before this suit was instituted. (See *Alexander v. Thacker*, 43 Neb., 494, and cases therein cited.) The judgment of the district court dismissing plaintiffs' action is therefore

AFFIRMED.

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CHARLES E. PERKINS, TRUSTEE, APPELLANT, V. EDWARD POTTS, APPELLEE.

FILED JUNE 15, 1897. No. 9235.

1. **Landlord and Tenant:** ADVERSE POSSESSION. One who takes possession of real estate as the tenant of another cannot hold said real estate adversely to his lessor without first having actually or constructively surrendered the premises to him.

2. ———: ———: ATTORNMENT. Where a tenant in possession without his landlord's consent attorns to a third party,—the latter not having acquired the interest of the landlord in the real estate either by grant or operation of law,—the possessory rights of the landlord are not thereby affected as such an attornment is void.

3. **Vendor and Vendee:** FORFEITURE OF CONTRACT: RIGHT OF POSSESSION: INJUNCTION. The vendee of an executory contract for the sale of real estate, by virtue of such contract, entered into possession, made certain improvements upon the premises, and partly performed his contract of purchase. Afterwards the vendee, while in default of the performance of his part of the contract of purchase, leased the premises to a tenant for one year and put him in possession. The vendor, by reason of the default of the vendee, and in pursuance of the provisions of the contract of sale, declared the same forfeited and demanded possession of the premises from the vendee. The possession was not surrendered and thereupon the vendor went upon the premises and induced the tenant, without the vendee's knowledge or consent, to accept a lease from him, the vendor, for said premises. The vendee forcibly entered and removed part of the crops grown by his tenant, and threatened to enter and remove the remainder, and the vendor applied to the district court for a perpetual injunction to restrain the vendee's entrance upon the premises. *Held*, That the application was properly denied.

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

*Warren Pratt*, for appellant.

*Dryden & Main, contra.*

RAGAN, C.

This case is submitted under rule 2, and from the printed abstract we ascertain the following undisputed facts: On the 1st day of November, 1887, the appellant was the owner of a tract of land in Buffalo county, Nebraska, and on said date entered into a written contract with one Killgore, in and by which the appellant agreed to sell and Killgore agreed to purchase said land. Killgore was to pay for said land the sum of $2,240 on the 1st day of November, 1897, and until said date was to pay eight per cent interest annually in advance on said purchase price, such payments due on the 1st day of November each year from the date of the contract until and including the 1st of November, 1896. In pursuance of the contract Killgore entered into possession of the real estate, made some improvements thereon, paid the taxes thereon, and the annual interest payments, including the payment due the 1st of November, 1892. On the 7th of January, 1893, Killgore sold and assigned her interest in the contract to one Hibbs and he made the annual interest payment due the 1st of November, 1893, and paid the taxes on the premises for said year. Default was made by Hibbs in the payment of the 1894 and 1895 taxes, and default in the payment of the annual interest due on the first days of November, 1894 and 1895. On the 10th of December, 1895, Hibbs sold and assigned all his interest in the contract to the appellee. The appellee took possession of the real estate and leased it to a tenant by a lease which expired on the 1st day of March, 1897. The contract between the appellant and Killgore provided that time should be of the essence thereof; that in case

default was made in the payment of any of the annual interest payments, or in the payment of the taxes promised to be paid on said land by said Killgore, that the appellant should have the right to declare the contract at an end; that all rights of the vendee in said contract upon such election and declaration of the vendor should cease; that in case of the termination of said contract by such election of the vendor all payments which had been made thereon, and all improvements put upon said premises, should be retained by the vendor as full compensation for the use and occupation of the premises by the vendee, and that in case the vendor should elect and cancel said contract he might treat the purchaser of the premises in possession thereof as a tenant holding over. The contract further provided that no assignment of the vendee's rights therein should be valid unless such assignment should be endorsed on the contract or permanently attached thereto and countersigned by the vendor. The assignment from Killgore to Hibbs was duly endorsed upon the contract, or at least it was formally ratified and approved by the vendor. The assignment made by Hibbs to appellee does not appear to have been either endorsed upon the contract or ratified by the appellant. On the 30th of December, 1895, the appellant declared the contract forfeited, notified Hibbs of such forfeiture and demanded of him possession of said premises. On the 30th of January, 1896, one Knox, the appellee's tenant, was in the actual possession of the premises, holding under the lease already mentioned from appellee, which expired by its terms on the 1st day of March, 1897. On said 30th day of January, 1896, the agent of appellant went upon the premises and induced Knox to take a lease of the premises from the appellant for the year 1896. Appellee had no notice of this transaction between Knox and appellant until some thirty days after it occurred. Knox remained upon the premises for the year 1896 and grew a crop thereon. After part of the crop matured appellee went upon the premises and removed therefrom

some one hundred and twenty bushels of oats grown thereon; these oats appellant at once replevied. This replevin suit was pending when the present action was begun. Thereupon, in the district court of Buffalo county, this action was brought against the appellee by the appellant, the latter alleging in his petition that he was the owner of the fee and in the possession of the real estate described in said contract already mentioned and the owner of the crops grown thereon in the year 1896, and that the appellee, with force and arms, had entered upon the said premises and removed therefrom the oats already mentioned; that appellant had replevied said oats, and that the replevin action was still pending; that appellee threatened, and would unless restrained by the court, to again enter upon said premises and remove therefrom all the crops grown thereon in the year 1896, and that the appellee was wholly insolvent, and the appellant prayed for a perpetual injunction restraining the appellee from entering upon said premises, interfering with the appellant's possession thereof, or with any of the crops thereon, or crops that might thereafter be grown thereon. On the final hearing the court dismissed the petition for an injunction and from this the plaintiff below appeals.

If the appellant was in the rightful and peaceable possession of the premises at the time appellee entered thereupon and removed therefrom the oats afterwards replevied, then we think the appellant was entitled to the perpetual injunction prayed to restrain the commission of the trespasses threatened by the appellee, since because of the appellee's insolvency the ordinary remedies at law would not have afforded the appellant adequate relief. If the appellant had by force evicted the vendee, or his assignee or grantee, and thus held possession of the premises, we do not think any court would have been justified, on the appellant's application, in granting a perpetual injunction to restrain the vendee of said real estate, his grantee or assignee, from a re-entry. From the evidence

already quoted it will be seen that while the appellant, after declaring the forfeiture of the real estate contract, did not by force evict from the premises the vendee of such real estate, his grantee or assignee, yet he induced the tenant of such vendee in the actual possession of the premises to attorn to him, the appellant. Is the appellant, then, in any better position to invoke the aid of the extraordinary remedy by injunction than he would have been in had he evicted the vendee from the premises by force? We think not.

It is elementary law that a tenant cannot question his landlord's title; that he who takes possession of real estate as the tenant of another cannot hold said real estate adversely to his lessor without first having actually or constructively surrendered the premises to him. We know of no exception to this rule. There are cases which hold that a tenant in possession may attorn to the assignee or grantee of the landlord, or to one in whom the estate has become vested by operation of law, such as a sale on execution or decree foreclosing a mortgage or sale under some other judicial proceeding, but these cases are not exceptions to the rule; they are in harmony with it, since the interest of the tenant is carved out of the estate of the landlord, and when that estate passes by grant or operation of law to a third party the tenant, by attorning to such third party, carries out his contract with his original landlord to hold the premises in subordination to the owner of the legal title. The rule is thus stated in *Flanagan v. Pearson*, 61 Tex., 302: "One who receives possession of land from another as his landlord must openly repudiate the tenancy thus begun and give his landlord notice thereof before an attornment by him to a stranger will have the effect to constitute his possession adverse to his original landlord's, and thus make it operate as a disseizin." In *Schultz v. Lindell*, 33 Mo., 172, it was said: "The attornment of a tenant to a stranger is void and does not affect the possession of his landlord." To the same effect see *Merchants Bank of St. Louis v.*

*Clavin*, 60 Mo., 559, and *Daush v. Crane*, 19 S. W. Rep. [Mo.], 61. In *Bailey v. Moore*, 21 Ill., 165, it was held that a tenant had a right to attorn to one who had acquired his landlord's title, but not to one who had acquired a title hostile to his landlord's, although such title might be the better one. To the same effect see *Williams v. Vanderbilt*, 34 N. E. Rep. [Ill.], 476. The doctrine of this court also is that a tenant, by surrendering possession to an adverse party, cannot deprive his landlord of his right to the possession of the leased premises. (*Galligher v. Connell*, 23 Neb., 391; *Mattis v. Robinson*, 1 Neb., 3; *Thrall v. Omaha Hotel Co.*, 5 Neb., 295; *Mosher v. Cole*, 50 Neb., 636, and cases there cited.)

By virtue of the contract of sale for this real estate existing between the appellant and the vendee, the latter's assignee was in possession thereof. He had not voluntarily surrendered such possession to the appellant, nor had his right to such possession been cut off by a judgment pronounced in any legal proceeding. If the vendee, after having made default in the performance of his agreements in the contract of purchase, had abandoned the premises and the appellant had forfeited the contract and peaceably re-entered possession we do not doubt but that he would have been entitled to an injunction to restrain the vendee from re-entering, at least until such time as the rights and equities of the parties in the real estate could have been determined. But that is not this case. The vendee has never abandoned this real estate and the appellant has not seen fit to resort to any of the ordinary remedies afforded by the law to regain possession of the real estate or to extinguish the interest—if he has any—of the vendee therein. We think, therefore, that the transaction between the agent of the appellant and the vendee's tenant which resulted in the latter's attorning to the appellant was void and the appellant acquired no rights whatever thereby; that the appellant is in the same position, with reference to the right to the possession of this real estate, that he would

have been in had he, on the vendee's default, entered into possession and forcibly evicted the vendee, in which case he certainly would not have been entitled as a matter of right to call upon the courts to perpetually enjoin the vendee from interfering with the possession. The decree of the district court is right and is

AFFIRMED.

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## ROSCOE HARSHMAN V. LILLIAN INGWERSON.

FILED JUNE 15, 1897. No. 8474.

1. **Bastardy: EVIDENCE.** On the hearing of a bastardy proceeding it is error for the district court to admit evidence of the value of the services rendered by the attorneys of the prosecutrix.
2. **———: MAINTENANCE.** The word "maintenance," found in section 6, chapter 37, Compiled Statutes, should not be so construed as to include the value of the services of the prosecutrix's attorneys.

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

*Matthew Gering*, for plaintiff in error.

*A. N. Sullivan, contra.*

RAGAN, C.

This is a suit instituted by Lillian Ingwerson against Roscoe Harshman to charge the latter with the maintenance of her illegitimate child, of which she alleged Harshman was the father. To review the judgment rendered in the proceeding by the district court of Cass county Harshman prosecutes here a petition in error.

On the trial of the case the district court permitted Miss Ingwerson, over the objection of Harshman, to put in evidence the reasonable value of the services of the attorneys employed by her to conduct the prosecution. The court found the value of these services to be $75, and

by its judgment charged Harshman with the payment of that sum in addition to the payment of the sum of $—— for the maintenance of said child and the costs of such prosecution. The admission in evidence of the value of the services of Miss Ingwerson's counsel and the charging of Harshman with the value of said services were erroneous. By section 6, chapter 37, Compiled Statutes, the court was invested with jurisdiction to charge Harshman with the maintenance of this illegitimate child. In *Hanisky v. Kennedy*, 37 Neb., 618, the word "maintenance" in this statute was construed, and it was there held to include the reasonable costs of supporting the child and the necessary expenses incident to its birth and its burial. But we do not think that this term "maintenance" should be so construed as to include the value of services rendered by an attorney for the prosecutrix. The defendant in error may within forty days from this date remit from the judgment rendered as of its date the sum of $75. In case she does so, the judgment of the district court will be affirmed, otherwise it will stand reversed.

JUDGMENT ACCORDINGLY.

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## ROBERT F. KLOKE ET AL. V. AUGUST GARDELS.

FILED JUNE 15, 1897. NO. 7354.

1. **Res Judicata**: LAND CONTRACTS: FORECLOSURE: DEFICIENCY JUDGMENT. Where suit is brought to foreclose as a mortgage an executory contract for the sale of real estate, decree rendered, real estate sold, and the proceeds applied on the amount found due, then, on the hearing of an application for personal judgment for deficiency against the vendee neither party can relitigate any material issue determined by such decree.

2. ——: ——: ——: ISSUES. In such foreclosure proceeding the execution of the contract, the identity of the real estate described therein, the breach of the same, and the amount remaining due thereon, are material issues determined by the decree.

3. ———: ———: ———. When such a decree is rendered upon the default of the vendee its effect is the same as if he had personally appeared and litigated the issues tendered by the petition.

4. ———: ———: ———: DEFICIENCY JUDGMENT. Whether a district court in such foreclosure action, sitting as a court of equity, without further pleadings may render a personal judgment against the parties liable for such deficiency not decided.

5. ———: ———: ———: ———. But when a formal petition is filed in such case for a deficiency judgment, the party liable therefor files an answer to such petition, the district court then has jurisdiction; and, unless a jury be demanded, may itself try and determine the issues presented by such pleadings.

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

*M. McLaughlin*, for plaintiffs in error.

*J. C. Crawford* and *C. C. McNish, contra.*

RAGAN, C.

A brief statement of facts is essential to a clear understanding of the points presented and decided in this case. In the district court of Cuming county Robert F. Kloke and Otto Bauman brought suit against August Gardels, alleging in their petition that on a date named they were the owners of certain described real estate, and on said date they sold the same to Gardels for a stated sum, a certain amount of which purchase money Gardels then paid, and agreed to pay the remainder of said purchase money on the 1st day of May, 1890; that on the date of said sale, and after the making of such payment, they executed and delivered to Gardels a memorandum, or receipt, in writing, reciting the receipt of part of the purchase money for said land from Gardels, the sale of the land to him, the purchase price, when the balance of the purchase price was to be paid, and on which date possession was to be given and a conveyance of the real estate delivered to the purchaser. The petition further alleged that the plaintiffs therein had duly performed all the conditions of the contract on their part and ten-

dered Gardels a deed of conveyance for the real estate, but he had refused to accept the same and pay the balance of the purchase money, or any part thereof. There was a prayer that Gardels be required to perform his part of the agreement, or, in case of his refusal, the real estate might be sold and the proceeds of such sale applied to the payment of the amount the court should find due the plaintiffs, and in case of a deficiency, Gardels might be decreed liable therefor. Gardels was personally served with summons, but failed to appear and was defaulted. The court thereupon found that the plaintiffs had entered into a contract with Gardels for the sale of the land described in the petition; that Gardels had paid a part of the purchase price and promised to pay the remainder at a certain date, and that he had not made such payment; that there was due to the plaintiffs from Gardels on such contract the sum of $——, and that the title to such real estate was held by plaintiffs to secure the payment of the sum found due them. And thereupon the court entered a decree that, in case Gardels should fail to pay the sum found due by a day stated, his interest in such real estate should be appraised, advertised, and sold by the sheriff of the county to make and raise the sum found due; and if there was not realized from the proceeds of such sale a sufficient sum to pay the amount found due by the decree, Gardels should be liable to the plaintiffs for such deficiency. After the rendition of this decree Gardels moved the court to set it aside. This motion the district court overruled, and Gardels perfected an appeal to this court. The ground upon which Gardels assailed the refusal of the court to open the decree and let him in to defend was that the petition of the plaintiffs did not state a cause of action, in that the memorandum, or receipt, for the sale of the land set out in the petition did not amount to an agreement for the sale and conveyance of the land which would take it out of the statute of frauds. This court, however, sustained the petition, and affirmed the judgment of the district court.

(See *Gardels v. Kloke*, 36 Neb., 493.) In pursuance of the decree of the district court a sale of the real estate was duly made, reported to the court, and affirmed, and the proceeds of such sale applied towards the discharge of the amount found due Kloke and others from Gardels by the decree, and there still remains a deficiency. Thereupon Kloke and others instituted a proceeding in the case in the district court for personal judgment against Gardels for the amount of such deficiency. Gardels resisted this motion upon the grounds that the real estate described in the petition of the plaintiffs filed in the district court was not the real estate which he had contracted to purchase of them, and that the district court was without jurisdiction to render a deficiency judgment in the case. The district court denied the motion of the plaintiffs below for a deficiency judgment, and to reverse this action Kloke and others have prosecuted a petition in error.

1. On the hearing of the proceeding for deficiency judgment the court permitted Gardels to offer testimony which tended to show that the real estate which he contracted to purchase of Kloke and others was not the real estate described by them in their petition in the suit brought to foreclose the real estate contract. This action of the district court was erroneous. Gardels had had his day in court as to that question. In the suit to foreclose the real estate contract the court had found and decreed that Gardels had entered into the contract with Kloke and others to purchase the identical real estate described in that decree. This decree remains in full force, and on the hearing of this proceeding for deficiency judgment neither of the parties were entitled to relitigate any material issue settled by that decree. The decree in that case finally determined that a contract existed between the parties here for the sale and purchase of the real estate described in that decree. It determined the amount Gardels promised to pay therefor and the amount due to Kloke and others from him on such contract of purchase. If this decree was wrong, Gardels' remedy was to seek, in

a proceeding brought for that purpose, a modification or correction of the decree. In *Stover v. Tompkins*, 34 Neb., 465, a mortgagor conveyed his real estate to one Spanogle, and the latter conveyed it to one Stark, who, in consideration of the conveyance, assumed the payment of the mortgage debt. In a suit to foreclose the mortgage all these facts were alleged in the petition, and Stark demurred thereto. The district court overruled his demurrer. He refused to plead further and the court entered a decree finding the facts stated, and adjudging that after the sale of the mortgaged premises, if there should be a deficiency, Stark was personally liable therefor. After the sale of the mortgaged premises, and the confirmation thereof, the court rendered a personal judgment against Stark for such deficiency and he prosecuted error to this court to reverse that judgment. The court held that so long as the decree remained unreversed and unmodified Stark could not be heard in resistance of the motion for a deficiency judgment to set up any fact in defense thereto which existed when the original decree was obtained, and which fact could have been pleaded as a defense to the foreclosure action. In the case at bar the petition filed to foreclose the real estate contract charged that Gardels had entered into a contract with the plaintiffs in that case to purchase the real estate described in that petition; that he had refused to accept a conveyance therefor and make the payment promised and there was a certain sum due the plaintiffs therein from Gardels on such contract of purchase. Gardels, having been personally served with summons in the action, had an opportunity to appear in that case and traverse these material allegations of the petition. He did not appear and the court found the allegations to be true, and he cannot now in this proceeding again litigate the issues tendered by the petition in the foreclosure action, which issues were determined against him by the decree rendered therein. (*Slater v. Skirving*, 51 Neb., 108.) The effect upon Gardels of the decree rendered

against him by default is precisely the same as if he had appeared in the action and litigated the issues tendered by the petition therein. (*Northern Trust Co. v. Crystal Lake Cemetery Ass'n*, 69 N. W. Rep. [Minn.], 708.)

2. It is insisted by the defendant in error in support of the judgment of the district court that the latter was without jurisdiction to render a deficiency judgment, as the action out of which the alleged deficiency arose was one for the foreclosure of an executory contract for the sale of real estate. If the action of Kloke and others had been one at law for the recovery from Gardels of the unpaid purchase money on his contract it would never have occurred to any lawyer to question the jurisdiction of the district court. If Kloke and others had conveyed the real estate to Gardels at the time of making the executory contract and had taken back from him a formal real estate mortgage to secure the payment of the purchase money, no one would have ever successfully questioned the authority of the district court to enter a decree forclosing the mortgage and to render a personal judgment against Gardels for a deficiency, had there been one. It is probably true that an executory contract for the sale of real estate is not a mortgage within the meaning of section 847 of the Code, which confers authority upon the district courts to render a personal judgment against the parties liable therefor for the amount remaining due the mortgagee after the sale of the mortgaged premises. But there is in this state but one form of action, namely, a civil action; and the differences between actions at law and actions in equity, so far as the form of such actions is concerned, are abolished by the Code, and the district courts, both by statute and the constitution, are invested with general legal and equitable jurisdiction. The district court, then, was not without jurisdiction to render the deficiency judgment asked for in this case simply because the deficiency grew out of an executory contract for the sale of real estate which had been foreclosed as a mortgage. It may be that

Kloke and others were under the necessity of filing a petition as in a suit at law for the recovery of the deficiency which they claim to be due them. It may be that Gardels should have been given an opportunity to answer as in other actions at law; that issues should have been framed and tried to a jury; and had all this been done certainly it would not be claimed that the district court was without jurisdiction to enter a judgment for the deficiency found by such jury. Now in the case at bar, in addition to a motion for a deficiency judgment and a notice served upon Gardels to show cause why such deficiency judgment should not be rendered, it appears from the record that Kloke and others filed a formal petition reciting the proceedings to foreclose the land contract, the decree rendered therein, the sale of the premises, and the application of the proceeds to the amount found due by the decree, and the amount remaining due them after such application of the proceeds of sale, and prayed for judgment against Gardels for such deficiency. To this petition Gardels appeared and filed an answer, and then an amended answer. To this a reply was filed by Kloke and others and a trial had to the court without a jury, neither party demanding one. How, then, can it be said that the district court was without jurisdiction of the subject-matter of this proceeding for deficiency judgment? It was held by the supreme court of Kentucky in *January v. January*, 18 Am. Dec., 211, that the district court sitting in equity was invested with jurisdiction to enter a personal judgment for the amount that remained unpaid to the vendor after foreclosing an executory contract for the sale of real estate as a mortgage. We do not decide in this case whether a district court which has foreclosed an executory contract for the sale of real estate as a mortgage, and caused the premises to be sold and the proceeds applied towards the payment of the amount found due, may in that action and as a court of equity, without further pleadings, render a personal judgment against the parties liable for the

deficiency. But we do decide in this case that the district court had unquestioned jurisdiction to entertain the proceeding as instituted herein for the deficiency judgment and itself try the issues and render the judgment for deficiency without a jury, as neither party demanded one; and we further hold that in such a proceeding no material issue determined by the decree in the original action can be relitigated. The judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

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HENRY WESTERMAN V. GEORGE W. SHEPPARD ET AL.

FILED JUNE 15, 1897. No. 7371.

1. **Evidence:** ATTESTATION OF RECORD OF JUDICIAL SALE. Where a material issue on trial is whether certain real estate situate in a sister state has been sold at judicial sale therein, a copy of the return of the sheriff to the execution, showing such sale, is incompetent to prove such issue, unless such return is attested by the clerk and seal of the court to which the return was made, and accompanied by the certificate of a judge, chief justice, or presiding magistrate of said court that such attestation is in due form of law. (Code of Civil Procedure, sec. 414.)
2. **Directing Verdict.** Pleadings and evidence reviewed, and *held* that the district court correctly directed a verdict for the defendant.

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

*E. A. Fletcher*, for plaintiff in error.

*James McNeny, contra.*

RAGAN, C.

This is a proceeding in error brought here by Henry Westerman to review a judgment of the district court of Franklin county dismissing an action brought therein

by him against George W. Sheppard and James P. A. Black.

The substance of Westerman's petition in the district court is that one H. C. Floniers had brought suit in the district court of Smith county, Kansas, to foreclose a first mortgage which he held upon certain real estate in that county; that Westerman had a mortgage upon said land which was a second lien thereon; that said land was of the value of both said mortgage liens; that Sheppard & Black were attorneys and counselors at law; that they entered into a contract with him, Westerman, in and by which they agreed to obtain for him a decree establishing his mortgage as a second lien upon said land by appearing in the said foreclosure action brought by Floniers and filing an answer or cross-petition therein; and that as a part of such employment Sheppard & Black agreed to notify him, Westerman, on what date such real estate should be sold to satisfy the decree which Floniers might obtain against said land; and that Sheppard & Black neglected to notify him of the date of said sale; that the real estate on which he held a mortgage was sold at judicial sale to satisfy the decree finally obtained by Floniers against the same, and the proceeds of such sale were only sufficient to satisfy the lien of Floniers thereon, and that he, Westerman, was by the said failure of Sheppard & Black deprived of an opportunity to be present at said sale and bid on said real estate, and had lost his lien thereon, to his damage in the amount of his said lien. To this petition Sheppard & Black answered admitting that they were attorneys and counselors at law and denied every other allegation in the petition. The evidence on behalf of Westerman tended to show that Sheppard & Black entered into the contract pleaded and neglected to notify Westerman of the date of the judicial sale on which he held the second mortgage. For the purpose of showing that his second mortgage had been reduced to a decree and declared to be a second lien upon the land in Kansas, Westerman

offered in evidence what purports to be a duly attested copy of a decree of the district court of Smith county, Kansas. This decree purports to be one rendered in a case wherein Adelaide E. Griswold was plaintiff and Amos G. Emery and others were defendants, and it finds and adjudges that said Griswold had a first lien upon the real estate described therein for the sum of $480, and that Westerman had a second lien upon that real estate. It is obvious that this decree was irrelevant under the issues. The petition of Westerman did not describe the real estate upon which he claimed to have a second mortgage, but he alleged that his mortgage was a second lien upon the land involved in the suit pending in Smith county, Kansas, wherein H. C. Floniers was plaintiff. No application was made by Westerman for leave to amend his petition, nor did he make any attempt on the trial to show that the lien which Sheppard & Black were employed to foreclose was the lien established in the decree of Griswold against Emery.

For the purpose of proving that the land on which he had a second mortgage lien had been sold at judicial sale, and for a sum only sufficient to discharge the first lien thereon, and that he had been thereby deprived of his second lien upon said land, Westerman offered in evidence a paper marked "Sheriff's Return," and signed by one McElhone, "Sheriff, Smith county, Kansas." This paper recites: "Received this writ this 5th day of April, '92." The officer then recites that, according to the command of the writ, he proceeded to appraise, advertise, and sell certain real estate, being the property of Amos G. Emery, and that he sold the real estate to one Scott Rice for the sum of $590. This paper was not offered as a part of the authenticated judgment from the district court of Smith county, Kansas, hereinbefore alluded to. The court excluded this paper from evidence, and correctly so, because section 414 of the Code of Civil Procedure provides that the judicial record of a sister state may be proved by the attestation of the clerk and the

seal of the court annexed, if there be a seal, together with a certificate of a judge, chief justice, or presiding magistrate that the attestation is in due form of law. The paper alluded to is attested by the clerk of the court of Smith county, Kansas, under the seal of said court, but there is no certificate of a judge, chief justice, or presiding magistrate that the attestation of the clerk to said paper is in due form of law. This paper was the only evidence offered by Westerman for the purpose of showing that the land upon which he had a second lien had been sold at judicial sale and a sum realized therefrom sufficient only to discharge the lien upon said land. To entitle Westerman to recover in this action it was not sufficient for him to prove the contract of Sheppard & Black to notify him of the date of the judicial sale and that they had failed to do so, but it was incumbent upon him to prove, under the issues made by the petition and answer, that the land upon which he had a second lien had been sold at a judicial sale. Since the only evidence he offered to prove that was incompetent as well as irrelevant the court did not err in directing the jury to return a verdict for the defendants, and its judgment is

AFFIRMED.

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## NEW KENTUCKY COAL COMPANY V. UNION PACIFIC RAILWAY COMPANY.

FILED JUNE 15, 1897. No. 7382.

1. **Depositions:** AUTHENTICATION. Unless the annexed certificate of the officer before whom the deposition of a witness has been taken affirmatively shows that the deposition of such witness was written in the presence of such officer it is incompetent evidence. (Code of Civil Procedure, secs. 380, 385.)

2. ———: ———: REVIEW. It is reversible error to overrule a motion to suppress such a deposition and permit it to be read to the jury when it tends to support the contention of the party offering it as to a material issue.

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

*Smith & Sheehan*, for plaintiff in error.

*Rich & Sears, contra.*

RAGAN, C.

In the district court of Douglas county the Union Pacific Railway Company, hereinafter called the Railway Company, sued the New Kentucky Coal Company, hereinafter called the Coal Company, to recover a sum of money which the Railway Company alleged the Coal Company had received for its, the Railway Company's, use. The Railway Company had a verdict and judgment, and the Coal Company prosecutes to this court a petition in error.

The only assignments of error which we find it necessary to notice are based on the action of the district court in refusing to suppress the deposition of one M. H. Walker and permitting said deposition, over the objection of the Coal Company, to be read in evidence to the jury in behalf of the Railway Company. The theory of the Railway Company's case is that in the autumn of 1890 there existed in the state of Illinois a corporation known as the New Kentucky Coal and Dock Company, hereinafter called the Dock Company, having a managing agent in Omaha, Nebraska; that at said time the Dock Company caused to be shipped from St. Louis, Missouri, to the firm of Havens & Co., in the city of Omaha, two cars of coal; that the Railway Company transported these two cars of coal from Council Bluffs, Iowa, to the city of Omaha, there tendered them to Havens & Co., and they refused to accept the coal; that thereupon the Dock Company sold the coal to a firm doing business under the name of Moneack & Co., in Omaha, and instructed the Railway Company to deliver the coal to that firm, and that it, the Dock Company, would pay the Railway Com-

pany's freight charges; that subsequently the Dock Company collected the freight charges from Moneack & Co., and then failed or went out of business, and the Coal Company succeeded the Dock Company, took its assets, and assumed its liabilities, among which were the freight charges on the coal transported by the Railway Company from Council Bluffs to Omaha and delivered to Moneack & Co. under the orders of the Dock Company. The Railway Company served a notice upon the Coal Company and took the deposition of M. H. Walker, who was vice president of the Coal Company, and resided in the city of Chicago. This is the deposition which the Coal Company claims the district court erred in not suppressing. Section 380 of the Code of Civil Procedure provides: "The deposition shall be written in the presence of the officer taking the same, either by the officer, the witness, or some disinterested person, and subscribed by the witness;" and section 385 of said Code provides that the officer taking the deposition shall annex thereto his certificate showing "that the deposition was reduced to writing by some proper person [naming him], and that the deposition was written and subscribed in the presence of the officer certifying thereto." The deposition of Walker was taken before one Wilber, a notary public, and he certified that the deposition subscribed by Walker "was reduced to writing by Flo E. Philbrick, stenographer, and in the presence of the witness, and was subscribed by the said witness in my presence, and * * * that I am not counsel, attorney, or relative of either party, or otherwise interested in the event of this suit." It will be observed that it does not appear from the certificate of the notary public that the deposition of Walker was reduced to writing by Philbrick in the presence of the notary public. It follows that the court erred in not suppressing the deposition. Was this action of the court prejudicial? The testimony of Walker tended to show—and was practically the only testimony to that point—that the Coal Company was the successor of the

Dock Company, and had taken the assets and assumed the liabilities of the latter. Without this testimony the finding of the jury would be unsupported by the evidence. We conclude, therefore, that the court erred in not suppressing the deposition, and that its action in the premises was prejudicial, erroneous, and that its judgment must be and is accordingly reversed.

REVERSED AND REMANDED.

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## ALEXANDER MCCLINTOCK ET AL. V. STATE BANK OF TABLE ROCK.

FILED JUNE 15, 1897. No. 7353.

1. **Depositions: CAPTIONS.** The caption of a deposition may be read in connection with the certificate at the end thereof for the purpose of determining whether the deposition discloses that it was taken at the time and place and before the officer mentioned in the notice.
2. **Alteration of Instruments: BURDEN OF PROOF.** Where the defense to a suit on a promissory note is that the same had been materially altered after its execution and delivery,—the note itself not disclosing any evidence of such alteration,—the burden of proof is upon the party alleging such alteration to establish the same by a preponderance of the evidence.

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

*Lindsay & Raper*, for plaintiffs in error.

*Story & Story, contra.*

RAGAN, C.

Suit by an indorsee of a promissory note against the makers. Defense that the note, after execution and delivery, without the knowledge and consent of the makers, was materially altered by inserting in blanks therein the

figures "10" and the word "date," making the note, which drew no interest when executed, draw interest at the rate of ten per cent per annum from date. Verdict and judgment for the indorsee, and the makers prosecute error.

1. The first assignment is that the court erred in not suppressing certain depositions taken and read on the trial in behalf of the plaintiff below. By the notice to take depositions served on the defendants below they were informed that, at a certain time and place, the depositions of certain named witnesses would be taken before A. M. Keyes, a notary public of Furnas county, Nebraska. It is now insisted that the certificate of Keyes attached to the depositions taken does not disclose that he was a notary public of said county and state, and that the certificate does not show in what county or state he was holding and exercising the office of notary public. This assignment of error is entirely without merit. At the end of the depositions is the following:

"I, A. M. Keyes, a notary public, duly appointed, * * do hereby certify * * * that the depositions * * subscribed as above set forth * * * were reduced to writing by me, and in the presence of the witnesses respectively, and were respectively subscribed by the said witnesses in my presence, and were taken at the office of A. M. Keyes, attorney at law, in the city of Cambridge, Furnas county, Nebraska, at the time and the place and annexed notice specified. * * *

"In testimony whereof, I have hereunto set my hand and official seal, at Cambridge, Furnas county, Nebraska, this 24th day of October, 1893.

"[SEAL.] A. M. KEYES, *Notary Public.*

"A. M. Keyes' notarial seal. Commission expires November 15th, 1899. Furnas county, Nebraska."

We think this certificate shows that the depositions objected to were taken before A. M. Keyes, a notary public in and for Furnas county, Nebraska; and in addition to this recital at the end of the depositions, the caption to the depositions, after setting out the title of the

case in which the depositions were to be read, recites: "Depositions taken of sundry witnesses before me, a notary public duly appointed * * * and residing in the county of Furnas, state of Nebraska, etc." We think this caption should be read in connection with what is denominated "certificate," at the end of the depositions for the purpose of determining whether the depositions disclosed that they were taken at the time and place and before the officer mentioned in the notice served.

2. Another objection urged against the depositions is that, while they disclose when the taking of testimony began, they do not disclose when, if ever, the taking of the depositions was finished. This objection is also without merit. The defendants below were notified that the depositions would be taken on Tuesday, the 24th day of October, 1893. The officer who took the depositions certifies that on that day, at the place mentioned in the notice, and before the officer mentioned in the notice, and between the hours specified in the notice, he took the depositions of the witnesses named. It is true that he does not certify at what hour in the day he began taking the testimony, nor at what hour he closed, but it was not necessary that he should so certify, and it does not appear that any of the depositions were taken at any other time than on the said 24th of October.

3. The third assignment of error is that the court erred in instructing the jury as follows: "The court instructs the jury that if the note in controversy on its face does not show any evidence of having been altered as charged by defendants in their answer, then the burden of proof is upon the defendants to show such alteration by a preponderance of the testimony." The court did not err in giving this instruction. The note in suit did not bear upon its face any evidence whatever of having ever been altered. The defense, and the only defense interposed by the defendants to the action, was the alleged alteration of the note. Whether such alteration had been made, when, and by whom, and with what motive, were

questions of fact for the jury, and the burden of showing that the alteration had been made as alleged was upon the defendants. (*Odell v. Gallup*, 17 N. W. Rep. [Ia.], 502; *Dorsey v. Conrad*, 49 Neb., 443.)

There are no other errors assigned which require consideration. The judgment of the district court is right and is

AFFIRMED.

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ALEXANDER LEDERER ET AL., APPELLEES, V. UNION SAVINGS BANK OF LINCOLN, APPELLANT.

FILED JUNE 15, 1897. No. 7338.

1. **Ruling on Demurrer:** WAIVER OF ERROR. A defendant by answering over waives error in overruling his demurrer to a petition for defect of parties.

2. **Pleading:** LAW AND EQUITY. The Code recognizing no distinction of form between actions at law and suits in equity, the objection that a petition praying equitable relief states a case for a legal remedy, cannot be raised by general demurrer.

3. ———: ———: TRUSTS. A petition which states facts showing that plaintiff is the equitable owner of a judgment in favor of another, and asking that a trust be declared, states a case for equitable relief.

4. **Negotiable Instruments:** INDORSEMENT: PRINCIPAL AND AGENT: RES JUDICATA: TRUSTS. The plaintiffs held two notes made by W., who died. On learning of his death they sent to M. one of the notes indorsed to M. "for collection and account" of plaintiffs. They sent a copy of the other note without indorsement. M.'s instructions were to present the notes for allowance as claims against W.'s estate. M., however, presented a claim in his own name, including these two notes, with several other items. The claim had attached thereto a copy of the note bearing the restrictive indorsement. It did not describe the other note in terms. M. then represented to a bank that he had paid a number of claims against W.'s estate which he did not wish longer to carry, and asked the bank to carry them. The bank investigated far enough to learn that M. had presented a claim to the amount he stated, but did not examine the claim itself. It then took a note for the amount of the claims made by the administratrix to M. and indorsed by M. to the bank, and advanced M. the money, none of

which was paid to the plaintiffs. Thereafter M.'s claim was allowed and M. assigned the judgment therefor to the bank. In an action by the plaintiffs to declare a trust in their favor to that portion of the judgment representing their notes, *held* (1) that the bank was charged with notice of the want of ownership in M.; (2) that M.'s acts and representations in dealing with the bank were not within the scope of his real or apparent authority as agent of plaintiffs; (3) that the allowance of the claim to M. was not an adjudication binding on plaintiffs that M. owned the claims; (4) that plaintiffs were entitled to have a trust declared in their favor as against the bank.

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

*Brown & Leese*, for appellant.

*Pound & Burr, contra.*

IRVINE, C.

This was an action brought by Lederer & Strauss, a copartnership doing business in Des Moines, Iowa, and the State Savings Bank of Des Moines, against the Union Savings Bank of Lincoln, Nebraska, the object being to declare a trust on behalf of the plaintiffs as against the defendant for a portion of a judgment in favor of one Louie Meyer, and by Meyer assigned to the defendant. There was a decree for the plaintiffs, and the defendant appeals. The defendant demurred to the petition on the grounds, first, that there was a defect of parties defendant, and second, that the petition did not state facts sufficient to constitute a cause of action. The first ground of demurrer was based on the fact that Louie Meyer was not made a party defendant. It is provided by the Code that the defendant may demur to the petition when it appears on its face "that there is a defect of parties plaintiff or defendant." (Code of Civil Procedure, sec. 94.) Also, that "When any of the defects enumerated in section 94 do not appear upon the face of the petition, the objection may be taken by answer; and if no objection be taken either by demurrer or answer, the defendant shall

be deemed to have waived the same, except only the objection to the jurisdiction of the court, and that the petition does not state facts sufficient to constitute a cause of action." (Sec. 96.) It has frequently been held that in order to preserve the right to have a ruling on demurrer reviewed, the party seeking the review must stand on his pleading or demurrer, and if he pleads over by amendment, answer, or reply, the error, if any, is waived. (*Mills v. Miller*, 2 Neb., 299; *Pottinger v. Garrison*, 3 Neb., 221; *Harral v. Gray*, 10 Neb., 186; *Dorrington v. Minnick*, 15 Neb., 397; *Buck v. Reed*, 27 Neb., 67.) While the objection that the petition does not state a cause of action may be interposed at any time, and the judgment of the district court thereon reviewed, this is because section 96 of the Code provides that that defect is not waived by failure to demur. The ruling in such case which is subject to review is that on the objection subsequently interposed, and not merely the ruling on the demurrer. The defect complained of was that Louie Meyer was not a party to the action. If he were a necessary party this fact was disclosed by the petition itself, and the defect was waived by answering over. The ground of the general demurrer was that it did not appear from the face of the petition that plaintiffs had not an adequate remedy in an action at law. Under the Code this objection goes at most to the form of the prayer of the petition. The plain object of the suit was to declare a trust, a subject of equitable cognizance. But aside from this, if the petition stated a cause of action a demurrer would not lie merely because the prayer sought equitable relief instead of a judgment at law. That question would arise on the application for a jury trial, and no such application was made.

The remaining questions go to the merits of the case. One John H. Witte executed two notes,—one for $200, payable to the order of Lederer & Strauss; the other for $400, payable to the order of Louie Meyer. The latter note was sold by Louie Meyer to the plaintiff, the State

Savings Bank of Des Moines. Witte died. The plaintiffs being informed of the fact, Lederer & Strauss sent a copy of the note they held to Louie Meyer with instructions to present a claim against the estate therefor. The State Savings Bank indorsed its note "Pay L. Meyer, or order, for collection, account of State Savings Bank, Des Moines, Iowa," and sent the original note, so indorsed, to Meyer. Meyer, instead of presenting the claims on behalf of the owners of the paper, presented a claim in his own name embracing several other notes, and items of another character. The account presented did not describe the notes except by amount and date; but attached to the claim were copies of several notes, including the $400 note, and disclosing its indorsement to the State Savings Bank, and the restrictive indorsement to Meyer for collection. Thereafter Meyer represented to Mr. Imhoff, the cashier of the defendant bank, that claims existed against the estate of Witte, that he had paid them, that he had presented them for allowance, and asked the bank to advance money to reimburse him. The bank thereupon took a note made by the administratrix of the estate, for the amount of the claims, payable to the order of Meyer, and indorsed by Meyer to the bank, and advanced to Meyer the amount of the note upon his promise to assign to the bank the judgment for the claims as soon as it should be procured. Prior to doing so Mr. Imhoff examined the records of the county court far enough to ascertain that Meyer had presented such claims. But he did not examine the claim itself, or the documents attached thereto. He was presented, however, with a statement of the items of claims, accompanied by a certificate by the administratrix that they were just and correct. Judgment was thereafter rendered by the county court allowing Meyer's claims, including the two notes in controversy, and some months thereafter Meyer assigned this judgment to the bank.

On the facts presented we think the findings and decree of the district court in favor of plaintiffs were correct. If

Imhoff had examined the claim itself, he would have found that it set forth a copy of the $400 note, together with the indorsement disclosing that no title thereto had passed to Meyer, but that it had come into his possession under a restrictive indorsement authorizing him merely to collect the note on account of the State Savings Bank. He would not have found the note to Lederer & Strauss, or any copy thereof; but having found the $400 note included in the claim, and on its face not belonging to Meyer, he would at least be put on inquiry to ascertain what that note was, to whom payable, and by whom owned. Furthermore, the testimony shows, and the court finds, that before advancing the money Meyer stated to Imhoff that he, Meyer, did not claim as the original owner, but by some means of subrogation. An inquiry as to the $200 note, based on this information, would have disclosed that it had never been indorsed to Meyer, or any other person, and was still held by Lederer & Strauss, the payees. It is contended that the plaintiffs had constituted Meyer their agent, and that they are bound by his acts and representations. But his agency was a limited agency for the purpose of collecting the notes, or at least of presenting them for allowance as claims against the estate. He had no agency, real or apparent, to sell them, to sue them in his own name, or to assign the claim. His acts in procuring the loan, or making the attempted sale to the defendant, were wholly beyond the scope of his authority, and either on his own account or on that of the administratrix. They were not performed as agent for the plaintiffs, and he did not, in his transactions with Mr. Imhoff, pretend to represent the plaintiffs, so that in no event can an estoppel arise on that ground.

It is also contended that the allowance of the claim by the county court constituted an adjudication in favor of Meyer's ownership. This may be true as between Meyer and the administratrix, the parties to the proceeding, but the plaintiffs were not parties. If Meyer had not assigned the judgment there can be no doubt that the

plaintiffs could hold him as trustee to the extent of their claim; and holding as we do, that the defendant was charged with notice of Meyer's relations to the plaintiffs and of his want of ownership, it becomes unnecessary to consider whether, under other circumstances, the assignee might obtain a better right than Meyer himself possessed.

AFFIRMED.

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JENNIE T. SHEWELL, APPELLEE, V. CITY OF NEBRASKA CITY ET AL., APPELLANTS.

FILED JUNE 15, 1897. No. 8180.

Review: ABSTRACT. In a case submitted on an agreed printed abstract under rule 2, the court will not look beyond the abstract, and if it appears from that abstract that evidence was introduced, the nature of which is not disclosed, it will be presumed to have been of such a character as to sustain the finding of the district court.

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

*C. W. Seymour*, for appellants.

*John C. Watson, contra.*

IRVINE, C.

This was an action by Mrs. Shewell against the city of Nebraska City to restrain the latter from grading a sidewalk abutting the premises of plaintiff. The case is submitted on an agreed printed abstract under rule No. 2. The district court found generally for the plaintiff and granted the injunction. The plaintiff in her petition alleged, among other things, that there had been no appraisement of damages prior to the attempted action of the city in actually lowering the grade of the sidewalk. The answer pleads an appraisement and an award by the

appraisers confirmed by the council, that no damages were sustained. In a case submitted in this manner we cannot look beyond the printed abstract. (*Closson v. Rohman*, 50 Neb., 323.) The abstract discloses that on the issue referred to certain documents with relation to an appraisement were offered in evidence; but the documents themselves do not appear. There is, also, certain parol testimony to the effect that there was an appraisement, but this was certainly incompetent for the purpose of showing the validity of such appraisement. The power to grade streets is conferred on cities of the class of Nebraska City by chapter 13*a*, article 2, section 68, Compiled Statutes, which contains the following proviso: "That no street, avenue, alley, or lane shall be so graded until the damages to property owners, if any, shall be ascertained by three disinterested freeholders, to be appointed by the mayor and council, and the proceedings to be the same in all respects as in this act provided for in cases of change of grade." The general power of the city to grade or change the grade of a street, including the sidewalk space, on so ascertaining and paying the damages to property owners cannot be questioned, but the want of power to do so until such damages are ascertained and paid is equally clear. The fact of the appraisement being in issue, and the abstract not disclosing the evidence on that issue, we must presume that it was of such a character as to warrant the finding and judgment of the district court; that is, that it disclosed that the attempted appraisement was void.

AFFIRMED.

## L. B. DENMAN V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY.

FILED JUNE 15, 1897. No. 7395.

1. **Limitation of Actions:** CONTRACTS. The period of limitations for an action on a written contract is five years.
2. **Carriers of Goods:** CONTRACTS OF SHIPMENT: BREACH: REMEDIES. One with whom a carrier has made a contract for transporting his goods, may, in case of breach, elect to sue for damages for failure to perform the public duties of a carrier, or he may waive the tort and sue for breach of the special contract.
3. ———: ———: TIME. A contract of carriage which contains no specified time for performance, implies, as one of its terms, performance within a reasonable time, and an action may be maintained on the contract for unreasonable delay in performance.
4. ———: ———: ———: PLEADING. A petition which alleges what is the reasonable and usual time for transporting goods and that the goods were not transported in that time but were unreasonably delayed, states in that respect a cause of action. Justifiable delay beyond the usual and ordinarily reasonable time is matter of defense.
5. ———: ———: ACTION FOR BREACH. An action to recover for breach of contract of carriage is not for a liability created by statute within the meaning of section 11, Code of Civil Procedure, because of the duties imposed on railroad companies by chapter 16, section 111, Compiled Statutes.

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

*Clark & Allen* and *Good & Good*, for plaintiff in error.

*J. W. Dewcese*, *A. G. Greenlee*, and *F. E. Bishop*, *contra.*

IRVINE, C.

This was an action by Denman against the railroad company to recover for loss suffered by reason of delay in the transportation of certain cattle for the plaintiff. The suit was originally brought in the county court, apparently against the Burlington & Missouri River Railroad in Nebraska. An amended petition was filed against

the defendant company, which appeared to the action. This amended petition was filed December 9, 1892, which date we must accept as that of the commencement of the action against this defendant. The cause was appealed to the district court, and the petition there filed discloses on its face that the cause of action accrued in April, 1888. At the commencement of the trial the defendant objected to the introduction of any evidence because the petition did not state a cause of action, because it disclosed that the cause of action did not accrue within four years, and for another reason going solely to the measure of damages and clearly not available as defeating the action altogether. The court sustained the objection and directed a verdict for the defendant. The question presented is whether the action, as stated in the petition, is for breach of a written contract or whether it is for a statutory liability or in tort. If the former, the period of limitations is five years, and the action was not barred. (Code of Civil Procedure, sec. 10.) If the latter, the period is four years, and the action was barred. (Code of Civil Procedure, sec. 11.)

The petition alleges that on the 31st day of March, 1888, the plaintiff made a contract in writing with the defendant wherein the defendant agreed to transport 100 cattle for plaintiff from South Omaha to Chicago; that the defendant received the cattle on that date for transportation; that the usual, ordinary, and reasonable time required for transportation was from twenty-four to thirty-six hours; that the defendant, in violation of its contract, "unreasonably and negligently delayed the transportation of said cattle * * * and did not deliver said cattle at Chicago until the 4th day of April, 1888, and more than forty-eight hours after the time when said cattle should have been delivered at Chicago in the usual and customary course of transportation." This is followed by allegations of special damages. The written contract referred to is attached to and made a part of the petition and contains the following: "And in con-

sideration of free transportation for —— persons given by the railroad, such persons to accompany the stock, it is agreed that the cars containing the stock are in sole charge of such person or his agents, for the purpose of attention and protection to the stock while in transit, and the company assumes no responsibility for safety of stock in charge of the shippers or his agents, whether from theft or cold, jumping from car, injury in loading or unloading, injury which stock may do to themselves, or which may arise from the reasonable delay of trains, or from any other cause except those occurring by reason of gross negligence of the company." This was signed by both parties. Certainly, so far as it is in the power of the pleader under the Code to select his form of action, this petition counts in contract and not in tort. But it is said that the question must be determined by the substance of the petition and not by the form of words employed. True; but one with whom a carrier has made a contract to transport his goods has his election in case of breach to sue either for damages for failure to observe the public duty enjoined on the carrier, or to waive the tort and sue for breach of the special contract. The plaintiff clearly elected to pursue the latter course, and if there should prove to be any difference in the liability of the carrier in the two cases, in the rules of evidence or in the measure of damages, the plaintiff would be bound by his election and confined to those rules governing cases *ex contractu.* The case was pleaded as one of breach of a written contract and did not appear on the face of the petition to be barred.

It is contended, however, that, viewed as an action *ex contractu,* the contract alleged does not specify any time for performance, and the petition therefore states no cause of action. The law of the state is a part of every contract, and a contract for the transportation of chattels, especially live stock, implies an agreement to transport within a reasonable time. A citation of cases would be futile. (See, however, those cited in 2 Am. & Eng.

Ency. of Law, 841, and 3 Am. & Eng. Ency. of Law, 16e.) Moreover, the special contract expressly provided that the carrier should not be liable for damages arising from "reasonable delay of trains." This implies as strongly as if expressed in words a liability for unreasonable delay. The petition alleges that the reasonable time for transportation was from twenty-four to thirty-six hours; that these cattle were "unreasonably and negligently" delayed, and that they were shipped March 31st and not delivered until April 4th. Perhaps there might be a reasonable delay from storms, floods, or similar causes beyond the ordinary time, but this would be a matter of defense. Plaintiff was not compelled to anticipate and negative all such defenses in his petition.

Finally, it is urged that the action is on a liability created by statute and must, therefore, be brought within four years. The statute invoked is chapter 16, section 111, Compiled Statutes, providing that "any railroad company receiving freight for transportation shall be entitled to the same rights and be subject to the same liabilities as common carriers." We take it that section 11 of the Code, fixing the period of limitations for actions "upon a liability created by statute other than a forfeiture or a penalty," does not apply to every case where a party invokes a statutory provision to establish his right. The statute in question creates no specific liability. It merely declares the common law and fixes the status of a railroad as a common carrier. If it provided a special remedy, non-existent in the absence of statute, section 11 of the Code might apply.

REVERSED AND REMANDED.

# BENNETT HIER V. ANHEUSER-BUSCH BREWING ASSOCIATION.

FILED JUNE 15, 1897. No. 7366.

1. **Appeal from County Court: BOND.** The statutes requiring one who appeals from a judgment of the county court to give an undertaking as an essential prerequisite to the appeal, are valid and not in conflict with the constitution.
2. ———: ———. The requirements that such undertaking shall be filed within 10 days from the rendition of judgment and shall be approved by the county judge are mandatory, and the statutes are not satisfied by the tender of a bond in the district court at a later time.

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

*Fayette I. Foss*, for plaintiff in error.

*Abbott & Abbott, contra.*

IRVINE, C.

The Anheuser-Busch Brewing Association recovered a judgment against Hier in the county court of Saline county. Hier lodged a transcript in the district court, but gave no appeal bond. The brewing association filed a motion to strike the case from the docket because no appeal had been taken. This motion was sustained. Hier, by this proceeding, seeks to review the action of the district court in striking his appeal from the docket.

It is provided by chapter 20, section 26, Compiled Statutes, that in civil actions either party may appeal from the judgment of the county court "in the same manner as provided by law in cases tried and determined by justices of the peace. The amount of the bond or undertaking taken shall be double the amount of the judgment and costs, and shall be approved by the probate judge." By section 1006 *et seq.* of the Code of Civil Procedure

appeals are provided for from judgments of justices of the peace to the district court, and by those sections it is required that an undertaking shall be filed within ten days from the rendition of judgment. It is contended by the plaintiff in error that these statutes are void in so far as they require an undertaking as a condition of an appeal. The particular constitutional provision which is invoked is section 17 of article 6, whereby it is provided that appeals to the district court from the judgments of county courts shall be allowed in all criminal cases on application of the defendant, and in all civil cases on application of either party. This does not mean, however, that the constitution in itself operates as an appeal from every judgment of the county court. It is left to the legislature to provide the manner of taking an appeal, and the legislature has undoubtedly the power to provide such requirements and attach such conditions as are necessary to protect the adverse party. At the time the constitution was adopted the same statutes were in force, and in other states a bond was quite frequently required as a condition of perfecting an appeal. Such a requirement does not restrict the right or deny it. It merely regulates the manner of exercising the right. By section 24 of the Bill of Rights the right to be heard in all civil cases in the court of last resort by appeal, error, or otherwise is secured to litigants, and as the only method of reaching the court of last resort to review a judgment of a justice of the peace is through the district court, the right to appeal from the judgment of a justice is as fully secured by the constitution as the right to appeal from the judgment of the county court. Yet, in many cases, this court has sustained the statute requiring an undertaking as a condition precedent to an appeal from the judgment of a justice of the peace. (See, for instance, *Bell v. White Lake Lumber Co.*, 21 Neb., 525, *Johnson v. Van Cleve*, 23 Neb., 559, and *School District v. Traver*, 43 Neb., 524.) In the last case it is said: "The giving of the appeal bond is essen-

tial to confer jurisdiction of the cause upon the appellate tribunal."

It is also contended that the statute offends that provision of the constitution, section 19, article 6, which provides that all laws relating to courts shall be general and of uniform operation. This objection has no merit. The statute applies to all county courts and to all judgments thereof, and is general and of uniform operation. Nor does the statute violate section 13 of article 1, providing that all courts shall be open, and every person for any injury done him in his lands, goods, person, or reputation shall have a remedy by due course of law and justice administered without denial or delay. The county courts are open to all citizens on the same terms, and the right of appeal is conferred on all alike, subject to the same method of perfecting that appeal.

The further objection that the statute is vicious, being in the nature of class legislation, is equally devoid of merit. As we have said before, it applies to all persons without distinction. The mere fact that some litigants may be so unfortunate as to be unable to procure sureties upon a bond does not, as is contended, render the statute objectionable as being in the interest of the wealthy classes. One who, through poverty, is unable to pay costs or attorney's fees is equally precluded from his remedies. But this is not by virtue of the statute; it is by virtue of his own unfortunate circumstances, which neither the legislature nor the constitution can control.

When the motion was made to strike the case from the docket the plaintiff tendered an appeal bond in the district court and asked to have it there approved. The ten days within which he was permitted to file the bond had expired. He did not present it to the county judge, who is the only officer with authority to approve it. The cases already cited establish the principle that the statute requiring the giving of a bond is jurisdictional, both as regards the time of tendering the same and its approval. In *Bell v. White Lake Lumber Co., supra*, MAXWELL, J.,

said: "The justice has no discretion in the matter, and it is his duty to refuse to approve such undertaking unless filed within the ten days."

AFFIRMED.

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ESTERLY HARVESTING MACHINE COMPANY V. JOHN BERG.

FILED JUNE 15, 1897. No. 7303.

1. **Allegata et Probata:** REVIEW. A verdict will be set aside when not based on any evidence directed to the issues presented by the pleadings and submitted to the jury by the instructions. *Allegata et probata* must agree.
2. **Trial:** ISSUES: EVIDENCE. The rule that parties who voluntarily submit to the introduction of irrelevant testimony and accept a verdict thereon, are precluded from thereafter urging that the evidence was irrelevant, does not apply to a case where the pleadings and the instructions of the court confined the jury to a consideration of one issue when there was no evidence to support the verdict on that issue, although there was evidence which might have sustained a similar verdict had other questions or different issues been submitted to the jury.
3. **Deceit:** FALSE REPRESENTATIONS: SALES. False representations, in order to found an action in the nature of deceit, must not consist merely of promises to be performed in the future, and generally not merely of expressions of opinion by a vendor as to the quality of his goods. They must be representations of known existing facts.

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

*Pound & Burr*, for plaintiff in error.

*Boehmer & Rummons, contra.*

IRVINE, C.

Berg recovered, in the district court of Lancaster county, a judgment against the Esterly Harvesting Machine Company, which the latter brings here for review by petition in error. The only question presented by the

briefs is the sufficiency of the evidence to sustain the verdict under the issues framed and the instructions of the court. A consideration of this question calls for an examination of the pleadings.

The petition alleges that the Harvesting Machine Company, which we shall hereafter style the defendant, as it appeared in the district court, was engaged in selling a machine called the "Esterly Self-Binder," and in 1891 it attempted to sell such a machine to the plaintiff, and for that purpose "fraudulently represented, led and caused this plaintiff to believe that said machine was a good and new machine and would do good work in its line, and that the machine was equal to do, and would do, as good work as any ordinary machine of a similar kind;" that in truth and in fact the machine was of inferior quality, and was of no value in that it would not perform the work that it was designed to do; that, relying on said false representations, the plaintiff received the machine, and, finding it would not work, agents of the defendant represented that they would put the machine in good order, guaranteed that it would be of the best kind and would do good work, and that if it did not do so plaintiff need not pay therefor; and thereby procured the plaintiff to sign two promissory notes for the sum of $62.50 each, which, together with an old machine surrendered to the defendant, constituted the purchase price. The petition then avers that the defendant transferred said notes before maturity to an innocent holder, and that plaintiff was compelled to pay the same. It then pleads certain items of special damage, the consideration of which was by the court excluded from the jury, so that they need not be further mentioned. The answer contains two counts: The first is a general denial; the second count pleads a written contract for the sale of the machine, followed by a special contract of warranty not necessary to here set out, but in its general character similar to contracts for agricultural machinery which have frequently been described in the reports of

this court. It then pleads a full performance of the contract on defendant's part and a breach by the plaintiff of the requirements for the enforcement of the warranty. The reply admitted the warranty and denied the contract. The court, by its instructions, treated the case entirely on the theory of the petition as an action for damages for false representations, and instructed the jury affirmatively that it was not an action for breach of warranty; that it was immaterial whether or not the contract of warranty had been complied with, and that the attention of the jury must be confined to the issue in regard to the representations.

The evidence tends to show that the plaintiff called at the place of business of Koller & Newton, in Pleasantdale, who seem to have been sales agents for the defendant, and there had some conversation about purchasing a machine. The following day a Mr. Lynch, an agent of the defendant, called at plaintiff's farm, and it would seem that the contract of sale was there entered into, but the notes and old machine were not then delivered. Thereafter the plaintiff obtained the machine from Koller & Newton, and took it to his farm. Mr. Hess, another agent of the defendant, came to the farm with Mr. Koller, and the machine was tried. It did not work properly. Some adjustments were made, but the defect was not remedied. Mr. Hess ascribed the failure of the machine to work to the undue moisture of the soil. Then followed the only representation, aside from the contract of warranty, which appears at all in the evidence prior to the execution of the contract. The plaintiff narrates it as follows: "Then Hess took out his pocketbook and drawed the notes, and says I, Mr. Hess, I ain't going to sign those notes, I want to see how the binder works first. Well, he says, I am perfectly satisfied that binder will give satisfaction when the ground is dry, and you will save us the trouble of coming back again if you will sign them notes, and if the binder don't give satisfaction, we will make it give satisfaction, he says." Twice again the

plaintiff testifies to this conversation, ascribing to Mr. Hess in each instance the same language, and the plaintiff's son gives precisely the same account of the transaction. There were subsequent conversations with agents of the defendant, but they were after the notes and old machine had been delivered, and therefore did not operate as an inducement to the contract.

Two principles are elementary: First, that a false representation to be actionable must not be a promise to be performed in the future, but the representation of an existing fact; and secondly, that in the absence of special peculiar circumstances one is not warranted in relying on an expression of opinion by a vendor with regard to the quality of his goods. The representation must be a statement of known fact, and generally not merely the expression of an opinion. (*Cohn v. Brodhead*, 51 Neb., 834.) It will be observed that Hess merely said that he was satisfied that the machine would give satisfaction. He did not represent, as charged in the petition, that it was a new machine; that it was a good machine; that it was equal to and capable of doing as good work as any ordinary machine of a similar kind. He confined himself to expressing his opinion that it would give satisfaction, —presumably satisfaction to the plaintiff,—and this was followed by a promise to make it give satisfaction. In other words, we have here the vendor's opinion as to the future operation of the machine and his promise to, in the future, make the machine conform to the opinion then expressed. There can be no recovery in an action of deceit on such testimony. The plaintiff contends that the defendant having pleaded the warranty, and the evidence being of such a character as to show a breach of warranty, the verdict ought not to be set aside, defendant having voluntarily tendered that issue. But the warranty was pleaded as a defense, probably unnecessarily, but certainly not in such a way as to transform the plaintiff's cause of action from one in the nature of deceit to one on a contract which the plaintiff denied. The plaintiff's

theory was that the contract was avoided; that he had surrendered the machine, and he was claiming no rights upon the contract. It is also contended that the facts justifying a recovery, and having been litigated without objection on the trial, it is now too late to insist that they were irrelevant to the issues. It is true that a great deal of testimony was received without objection tending to show a breach of warranty; but whether or not that evidence having gone in without objection, the case might have been determined thereon, the court did not take that view of it, and neither did either party. Neither party requested instructions on the theory of a breach of warranty. The court, in the clearest terms, excluded that whole question from the jury, and the case is therefore not one where the parties have without objection litigated and obtained a verdict upon issues not presented by the pleadings. The verdict was not upon those issues. It responded, under the instructions of the court, solely to the question of false representations. So considered, it was not supported by the evidence and was contrary to law.

REVERSED AND REMANDED.

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## N. T. JONES ET AL. V. BERT A. DUNBAR.

FILED JUNE 15, 1897. No. 7294.

1. Fraudulent Conveyances: KNOWLEDGE OF BUYER: EVIDENCE. Evidence examined, and *held* to sustain a verdict that chattels had been purchased in good faith without notice by the vendee of an intent on the part of the vendors to defraud creditors.

2. ———: CONSIDERATION. In a contest between a vendee and creditors of the vendor, the adequacy of the consideration, if it be a valuable consideration, will not be inquired into except for the purpose of throwing light on the intention of the parties.

3. ———: ———. The relinquishment of a valid entry of land under the timber culture act of congress constitutes a valuable consideration and is not void as against public policy.

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

*John P. Maule* and *L. W. Blackledge*, for plaintiffs in error.

*Kinkead, Mentzer & Granger, contra.*

IRVINE, C.

This case is one of that familiar class where a vendee of chattels replevies them from a sheriff who has seized them under a writ of attachment in an action against the vendor. The issue presented is the *bona fides* of the transfer to the plaintiff. The verdict and judgment in the district court were in favor of the plaintiff, and this proceeding is prosecuted by the defendants.

From the very lucid and fair statement contained in the brief of the plaintiff in error we obtain the evidence as follows: J. D. Douglas and George H. Underhill lived in Lincoln. The daughter of Douglas and Charles Underhill, son of George H. Underhill, were engaged to be married. The younger Underhill was a druggist. For the purpose of establishing him in business, his father and his sister, Mrs. Swartz, conveyed certain real estate to Douglas. Douglas, with funds of his own and with the proceeds of the real estate, purchased a drug store which was operated in the name of J. D. Douglas & Co., the firm being composed of Douglas and wife, and the younger Underhill was installed as manager of the business under an agreement for the division of profits. To secure the elder Underhill and Mrs. Swartz for their contribution to the enterprise, a mortgage was executed upon the stock and fixtures, which was not filed for record until shortly before the occurrence of facts out of which this controversy arises. After some time the drug store was removed to Stratton, in Hitchcock county. The firm of J. D. Douglas & Co. became indebted to David Wise & Co.

in the sum of $272, and to the H. T. Clarke Drug Company in the sum of $136.72. The business not proving prosperous, Douglas and Underhill desired to sell out. Douglas & Co. had in their employ Bert A. Dunbar. After some negotiations with him, a sale was effected whereby Douglas & Co. transferred the store to Dunbar. Dunbar executed his notes, secured by mortgage, to the elder Underhill and to Mrs. Swartz for $400, and they released their mortgage. He also executed a relinquishment of a "tree claim," or timber culture entry, on certain land in Hitchcock county, and delivered this relinquishment to the younger Underhill, who presented the relinquishment at the land office and entered the land as a homestead in his own name. Thereupon Wise & Co. and the Clarke Drug Company instituted actions on their debts and procured attachments to be issued and levied on the stock and fixtures of the drug store. Dunbar replevied. In addition to the foregoing facts it appears that in the trade the drug store, in pursuance of an inventory, was valued at $2,000; that Dunbar had "broken" about forty acres of the land, and that the value of his right to the land was placed at $1,600.

It is quite correctly contended by the plaintiff in error that in order to protect Dunbar's title three facts must exist: First, the purchase must have been made without notice of an intent on the part of the vendors to defraud their creditors; second, the purchase must be for a valuable consideration; and third, the consideration must be executed. On the assignment of error that the evidence is not sufficient to sustain the verdict we shall not inquire whether a fraudulent intent on the part of Douglas & Co. was established, because we think the evidence sufficient to sustain the verdict on the ground that Dunbar was not a party to the fraud, if any existed, and was a *bona fide* purchaser. In such cases, by the express terms of the statute, the question of fraudulent intent is a question of fact and not of law. (Compiled Statutes, ch. 32, sec. 20.) The evidence tends to show that Dunbar knew

of the indebtedness of the elder Underhill and Mrs. Swartz, and took pains that they should be satisfied before making the purchase, and that he knew of no other indebtedness. It is contended that his occupation as a clerk in the store apprised him of the existence of such indebtedness; but we cannot hold that any such confidential relation exists between a proprietor of a mercantile establishment and his clerks or salesmen that the latter are charged as a matter of law with notice that goods purchased have not been paid for. We are quite satisfied with the verdict of the jury in so far as it tends to establish that the transaction was made as a *bona fide* business venture on Dunbar's part, and that he had no suspicion even that Douglas & Co. made the same for the purpose of defeating their creditors, if such was the fact.

It is contended that the consideration was inadequate. But if it was, in the terms of the law, a valuable consideration, it matters not whether it was adequate. The question of its adequacy may be properly litigated in order to ascertain the intent of the parties. But on the evidence before us we could not hold contrary to the verdict that it was of such known and gross inadequacy as to conclusively establish a fraudulent intent. While the so-called "tree claim" was valued at $1,600, and may have been overestimated, the appraisement for the purpose of the writ of replevin of the drug store was $988. It is quite frequent for parties in making an exchange to overvalue their respective holdings, and this without any intent to defraud. The question of value in dollars and cents is not scrutinized so closely in the case of an exchange as when money is to be paid.

Did Dunbar pay a valuable consideration? It is contended that he did not, because his right to the land was not transferable, and he had not paid the notes at the time this action was brought. Our conclusion on the first point renders a consideration of the second unnecessary. We are cited to cases construing the act of congress forbidding transfers of inchoate or imperfect rights

to the public lands, but these cases are not applicable. They are all cases of attempted conveyances. It was expressly provided by act of congress (21 Statutes at Large, 2d sess., ch. 89): "That when a pre-emption, homestead, or timber-culture claimant shall file a written relinquishment of his claim in the local land office, the land covered by such claim shall be held as open to settlement and entry without further action on the part of the commissioner of the general land office." Dunbar had a possessory interest in the land under a timber-culture entry. It was a valuable right. He was not compelled to relinquish it, but he had the power to do so merely by filing a written instrument to that effect, free from any discretion or action by the federal authorities. He parted with his right by executing such a relinquishment. We know nothing in the statutes or the policy with relation to public lands which forbids a person from contracting with another to release such a right. It is true that by such a transaction as the present the one who makes such a contract, providing he keeps silent, may have an advantage over other persons in making a new entry. But the essence of the contract was merely the relinquishment of the right, and this a valuable right, which the holder thereof might relinquish if he chose, and which did not operate as a transfer or conveyance of the right itself. (*Palmer v. March*, 34 Minn., 127.) A consideration is valuable, not only where the party to whom it moves receives something of value, but also where the party from whom it moves parts with something of value.

It is contended that the court erred in allowing a witness to testify to the value of the land covered by the timber-culture entry. As we have before intimated, the adequacy of the consideration was a fact pertinent to the issues as tending to establish the intent of the parties, and the inducement to the vendors in obtaining the relinquishment was undoubtedly the expectation of obtaining the land for themselves by re-entry. Therefore, the value of that land entered directly into the controversy as

throwing light upon the opinions and expectations of the parties and thereby in ascertaining what to them seemed an adequate consideration. There was no error in admitting the evidence.

Complaint is made of the giving and refusal of certain instructions. In the petition in error these are grouped in a single assignment without distributive words. Most of the instructions given were clearly right. One, at least, of those refused was properly refused because substantially covered by instructions already given. We cannot, therefore, further review this assignment.

AFFIRMED.

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GEORGE W. BOYER ET AL. V. RICHARD RICHARDSON ET AL.

FILED JUNE 15, 1897. No. 7190.

1. **Election as to Counts:** HARMLESS ERROR. The error, if any existed, in requiring a plaintiff to elect between two counts in his petition evidently referring to the same cause of action, is harmless and not a ground for reversal when the evidence on the trial affirmatively discloses that the count abandoned by the election could not under the facts lead to a recovery.

2. **Negotiable Instruments:** INDORSEMENT: PRINCIPAL AND AGENT. The indorsement of a negotiable instrument "for collection and account," of the indorser, merely constitutes the indorsee the agent of the indorser for the purpose of collecting and remitting the proceeds. It passes no title to the indorsee and confers no authority on him to transfer the instrument by sale or indorsement to another so as to charge former indorsers under the law merchant.

3. **Voluntary Payment:** REPAYMENT. Money paid to a third person in discharge of the debt of another cannot be recovered back when the payment was made voluntarily, without any legal obligation on the payor, without any duress, compulsion, or deceit, without any previous request from the debtor, and without any subsequent promise of repayment.

4. ———: EVIDENCE. Evidence *held* to sustain a finding that the payment in this case was such a voluntary payment.

5. **Judgment:** FINDINGS: REVIEW. A judgment will not be reversed for want of findings on all the issues, when the findings made required, independently of the result on other issues, the judgment rendered.

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

*McCoy & Olmsted*, for plaintiffs in error.

*Good & Good, contra.*

IRVINE, C.

The plaintiffs constitute the firm of George Boyer, McCoy & Co., engaged in the live stock commission business in South Omaha. They are the successors of the Boyer-Shelly Company, which was the style of the firm at the time of the events in controversy. The defendants constituted the firm of Richardson, Hughes & Co., which conducted, it would seem in connection with other business, a stock ranch in Saunders county. They, or some of them, resided in Franklin, Pennsylvania. Richardson, Hughes & Co. had sold a number of cattle to four persons named Wilson. In payment for these cattle they took a note signed by the Wilsons, payable to the firm of Richardson, Hughes & Co., for $3,200, dated October 30, 1890, and payable twelve months after date. This note was secured by chattel mortgage on the cattle, the mortgage containing a covenant by the Wilsons that when said cattle should be removed or shipped for sale they should be consigned to the Boyer-Shelly Company for sale on commission. The Boyer-Shelly Company had negotiated the sale to the Wilsons, and it would seem that the object of the covenant was two-fold,—to secure the Boyer-Shelly Company commissions for reselling the cattle, and to enable them to protect Richardson, Hughes & Co. in their security. In August, 1891, the Wilsons shipped a number of the cattle to South Omaha, but consigned them to Gasman & Dudley instead of to the Boyer-Shelly

Company. The ranch in Saunders county was then under the management of one Harry Hughes, who was not a member of the firm of Richardson, Hughes & Co., and whose precise authority is in dispute. Gasman & Dudley notified Harry Hughes by letter that they had the proceeds of the cattle and held them to apply on the note. About the same time the Boyer-Shelly Company learned of the shipment and notified Hughes thereof by wire. Hughes went to South Omaha, but was unable to get possession of the proceeds of the sale of the cattle because the note was not there. Richardson, Hughes & Co. had discounted the note with the International Bank of Franklin, Pennsylvania, indorsing the same with a waiver of demand, notice, and certain other rights, and the International Bank then held the note. In a manner not made very clear by the evidence, Harry Hughes communicated the facts to Richardson, Hughes & Co. in Franklin, and the result was that the International Bank sent the note to the Union Stock Yards National Bank, at South Omaha, indorsed as follows: "For collection. Account of International Bank, Franklin, Penna. H. Bleakley, Cashier." Thereupon Gasman & Dudley paid to the Union Stock Yards Bank $1,533.29, being the proceeds of the sale of the cattle, and this payment was indorsed on the note. Then the Boyer-Shelly Company paid the remainder of the note to the Stock Yards Bank, which surrendered the note and mortgage to them. Several months later $800 was realized by the Boyer-Shelly Company on another shipment of cattle by the Wilsons, and this amount was credited on the note. The present suit was then brought to recover the amount paid by the Boyer-Shelly Company, less the $800. The original petition was in one count, alleging the note and indorsements; alleging a sale of the note by Richardson, Hughes & Co. to Bleakley, cashier, and a sale by Bleakley, cashier, to the Boyer-Shelly Company, and praying to recover on the indorsement of Richardson, Hughes & Co. An amended petition was filed containing this count, with

the added averment that the restrictive indorsement by Bleakley was made by mistake and was intended for a general indorsement. This count was followed by another conforming to the old action for money paid to the use of another, and alleging that the payment was made by the Boyer-Shelly Company to the International Bank at the special instance and request of Richardson, Hughes & Co. The court, on motion of the defendants, required the plaintiffs to elect between the two counts. The plaintiffs elected to proceed on the second count,—that for money paid. To this count a general denial was filed. The case was tried to the court without a jury. Special findings were made and judgment entered for the defendants. The plaintiffs prosecute this proceeding to reverse that judgment.

The first question argued in the briefs relates to the propriety of the court's action in requiring an election between the two counts of the petition. It is quite evident from the petition itself, especially from the prayer, that both counts relate to the same transaction. The Code contemplates a plain, direct statement of facts constituting a cause of action, and it is unnecessary to frame pleadings so as to conform the case to any of the old common-law writs. A resort to double counts on the same cause of action is therefore unusual under the Code. Whether or not it is permissible, whether or not these two counts were inconsistent, and, if so, whether the proper remedy was by motion to require an election, are points argued at length, but which we do not think it necessary to consider, because the evidence introduced on the trial affirmatively disclosed such a state of facts as would preclude a recovery on the first count. This was the one which the plaintiff abandoned, and inasmuch as it is so affirmatively disclosed that there cannot be any recovery upon it, if it was error to require the plaintiffs to elect, their election to proceed under the second count rendered the error harmless. As before stated, the indorsement by the International Bank to the Union Stock

Yards Bank was special and restricted,—for collection only. This passed no title to the note, and merely constituted the Union Stock Yards Bank the agent of the International Bank to collect the note and remit the proceeds. The evidence shows that the indorsement was not made through any mistake, but was made deliberately for the purpose expressed. There could be no reformation, therefore, and standing as a restrictive indorsement, it conferred no authority on the Union Stock Yards Bank to sell the note or to deal with it in any way except by collecting it and remitting the proceeds to the International Bank. The Boyer-Shelly Company had notice of the want of ownership of the Stock Yards Bank when they paid the money and took the note. They were bound to know that they were not purchasing it and were getting no title by virtue of the law merchant, so that no cause of action accrued to them under the law merchant upon the indorsement of Richardson, Hughes & Co.

The next question presented is the sufficiency of the evidence. The decision of the case on its merits must turn on the precise nature of the transaction of August 26, when the Boyer-Shelly Company paid the money to the Union Stock Yards Bank on behalf of the plaintiffs. The evidence tends to show that Harry Hughes was the general manager of the plaintiffs' business in this state; that he had frequently made notes for the firm and discounted them; that he had had such transactions with the plaintiffs; that he accepted payments, discharged mortgages, and in general exercised a sufficiently wide authority, with the consent of the defendants, to at least estop the latter from alleging his want of authority in this matter; that it was at his request, and in pursuance of a distinct agreement that Richardson, Hughes & Co. should remain liable to the plaintiffs, that the plaintiffs advanced the money to pay the note. On the other hand, the evidence on behalf of defendants tends to show that Hughes' authority in such matters was specially conferred in each instance, and that he had no special au-

thority in this transaction. Were the only question that of Harry Hughes' authority, however, we would not hesitate to say that his ostensible authority was such that these special restrictions not communicated to the plaintiffs could not now be urged against them. But assuming that his authority was general, the defendants' evidence is to the effect that while Hughes knew of the payment by the Boyer-Shelly Company, still it was not made at his request, but was made voluntarily by the Boyer-Shelly Company for the purpose of securing to themselves the commissions to be realized from the sale of the remaining cattle, the shipment to Gasman & Dudley having warned the plaintiffs that they were likely to lose these sales and the possession of the note and mortgage giving the plaintiffs the means of enforcing shipments to them. In this view of the evidence, which was that taken by the district court, the inference is warranted that the plaintiffs were looking to the proceeds of the sale of the remaining cattle for reimbursement, and not to Richardson, Hughes & Co. It is elementary law that in order to recover money paid to the use of another, where the party paying was under no obligation so to do, the payment must have been moved by a previous request from the party to whose use the money was paid. In some cases a previous request will be implied, as where the money was obtained by duress either of person or property, or by deceit, or where there has been a subsequent express promise to repay the money, as was the case in *Stuht v. Sweesy*, 48 Neb., 767. But where the payment is entirely voluntary,—where there is no subsequent promise to repay,—a previous request must be proved. In the very elaborate briefs a large number of cases involving different phases of this doctrine are reviewed, but the general principles above stated are so well settled that it would be useless to comment on the numerous cases cited. The plaintiff, however, places so much stress on the case of *White v. National Bank*, 102 U. S., 658, that it deserves more than passing attention. In that case

the Miners National Bank of Georgetown, Colorado, was the holder of certain accepted drafts, and by a restrictive indorsement, held to be equivalent to an indorsement for collection, the drafts were transferred to White, who placed to the credit of the bank the full value of the drafts, and the bank availed itself of this credit by checking against it. The court held that White, by the terms of the indorsement, became merely the agent of the bank to collect the drafts, and there being no liability upon the indorsement, there could be a recovery by White for money paid or money lent. But the case is very different from that we are considering. Both parties understood that a sale of the drafts was being effected. The money was advanced in pursuance of that understanding, which was equivalent to a request by the bank, and the bank thereafter availed itself of the advancement. In this case, taking the evidence in the light most favorable to the defendants, which the finding requires us to do, there was no previous request, express or implied. The money was paid, not for the accommodation of the defendants, but for the benefit of the plaintiffs themselves. It was paid to the International Bank, and not to the defendants, so that the defendants were without power to refuse it or return it. The writer confesses that he would be better satisfied with the result had the court found in accordance with the plaintiffs' testimony. But there is sufficient evidence to sustain the finding as made.

Complaint is made that the judgment is not supported by findings which the plaintiffs conceive to be essential to a determination of the case in favor of the defendants. We think, however, that the findings are ample to sustain the judgment. They cover quite at large the salient facts as we have stated them, and find that the plaintiffs, "to secure their commission on the remainder of the cattle and require the defendants Wilsons to ship the same to them, these plaintiffs, Boyer-Shelly Company, without any authority from either of these defendants or the holder of the note, voluntarily paid the remainder due on

said note and took the same into their possession; but at their request the same was not canceled or marked paid by the cashier of the South Omaha National Bank, to whom the same was made;" and further: "That the defendants, Richardson, Hughes & Co., have at no time obligated themselves or promised to pay said note, except by their indorsement to the International Bank of Franklin, Pennsylvania." There are, therefore, distinct findings that the payment was voluntary,—not moved by the previous request of the defendants,—and that they have not since promised to repay the money. These are all the findings, in connection with the general facts of the case, which are necessary to require a judgment for the defendants, and the court was not compellable to proceed to determine and make findings of other issues, which become immaterial in view of the findings already made.

AFFIRMED.

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## CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY V. GEORGE W. RINGO.

FILED JUNE 16, 1897. No. 7344.

**Record for Review:** BILL OF EXCEPTIONS. Documents accompanying the transcript, required upon appeal or proceedings in error, will be disregarded by this court unless authenticated by certificate of the clerk of the district court.

ERROR from the district court of Sarpy county. Tried below before KEYSOR, J. *Affirmed.*

*Montgomery, Charlton & Hall, W. F. Evans,* and *Billingsley & Greene,* for plaintiff in error.

*H. C. Lefler, contra.*

POST, C. J.

It is, by means of the petition in error in this case, sought to secure a reversal of the judgment below upon two grounds, viz.: (1.) The evidence is insufficient to support the verdict in favor of the plaintiff. (2.) The court erred in refusing to require the jury to find specially upon certain controverted questions. There is, accompanying the record hereof, a paper entitled "Special Questions of Fact," also a document purporting to be a bill of exceptions, neither of which is in any manner authenticated by the certificate of the clerk of the district court. It follows, from the nature of the assignments relied upon, that there is presented no question to be determined in this proceeding, and that the judgment of the district court should be affirmed. The rule which governs this case has been so often asserted that a reference to the decisions bearing upon the subject is deemed unnecessary.

JUDGMENT AFFIRMED.

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FRANK E. BOSLOW v. WILLIAM W. SHENBERGER.

FILED JUNE 16, 1897. No. 7385.

1. **Levy of Execution.** A manual interference with chattels is not essential to a valid levy thereon. It is sufficient if the property is present and subject for the time being to the control of the officer holding the writ, and that he in express terms asserts his dominion over it by virtue of such writ.
2. **Waiver of Jury.** When the record shows that a jury was waived at a preceding term, such waiver will be presumed to be general and not for the particular term at which it was made.

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

*Hainer & Smith*, for plaintiff in error.

*Kellogg & Graybill, contra.*

POST, C. J.

This action of replevin originated before a justice of the peace for Hamilton county, where the defendant in error as plaintiff alleged as his cause of action the levy by him, as sheriff for said county, upon the property in controversy, to-wit, a team of horses, to satisfy an execution against Joseph Gion, and the subsequent wrongful and unlawful seizure of said property by the plaintiff in error, as constable, under and by virtue of an execution against said Gion. There was, on appeal to the district court, a judgment for the plaintiff, from which the defendant prosecutes error.

Both writs were regular in form, although that held by the plaintiff in error was issued without authority of law, there being no judgment against Gion in favor of the plaintiff named therein, the Kalamazoo Wagon Company. Such a writ, being fair upon its face, may, it is conceded, be sufficient to protect an officer against personal liability for acts done in the execution thereof, although it cannot be made the foundation of any right in the property taken thereunder. (Freeman, Executions, sec. 20, and cases cited.) It follows that plaintiff in error's levy was void and invested him with no right of possession as against the defendant in error, and that the latter should recover, provided his levy was regular and sufficient in form, a question to which attention will now be directed. The return of the last named officer shows a levy in due form at the hour of 4 o'clock P. M. of June 20, 1889, and is presumptively correct. (Freeman, Executions, sec. 366.) In addition thereto he testified that he found the team in controversy on the day named at Engel's livery stable, in the village of Hampton; that said property was pointed out to him by Mr. Thayer, then in charge of the stable; that he immediately notified him, Thayer, that he had levied upon said team as the property of Gion, and thereupon

indorsed said levy upon the execution. He testified, also, that he arranged with Thayer to keep the team and allow no one to remove it while he was engaged in the transaction of some other business preparatory to his return to the county seat, but that upon his return shortly thereafter to the stable he found the plaintiff in error standing between the horses, claiming possession by virtue of a levy under the execution above mentioned, and refusing to surrender said team upon demand. Was there, in view of the facts stated, a levy by defendant in error which clothed him with a special ownership of the property in controversy? That question must, we think, be resolved in the affirmative. It has uniformly been held sufficient to constitute a valid levy if the property is for the time being under the control of the officer, and if he openly and in express terms asserts his dominion over it by virtue of the writ. (*Barker v. Binninger*, 14 N. Y., 270; *Roth v. Wells*, 29 N. Y., 471; *Bond v. Willet*, 31 N. Y., 102; *Lloyd v. Wykoff*, 11 N. J. Law, 218; *Johnson v. Walker*, 23 Neb., 736; 7 Am. & Eng. Ency. of Law, 149, and cases cited in note.) That the property was, in this instance, within the control of the officer cannot, upon the facts, be doubted, and his act in entrusting it to the custody of Thayer with direction to allow no one to remove it was a sufficient assertion of his title under the writ.

Plaintiff in error, on the trial, relied also upon a subsequent levy by virtue of an order of attachment against Gion. It follows, however, from the conclusion reached respecting the sufficiency of defendant in error's levy, that there exists no foundation for that contention and it may accordingly be dismissed without further comment.

It is alleged that the district court erred in denying plaintiff in error a trial by jury upon demand by him. We observe from the transcript that the cause came on for trial on the 29th day of March, 1894, that being one of the days of the regular March term, whereupon the defendant demanded a jury, but that a jury having been

waived by both parties at a previous term, said demand was denied, to which the defendant excepted. A jury may be waived by agreement of parties in open court (*Gregory v. Lincoln*, 13 Neb., 352); and in the absence of a more complete record, we must presume that the waiver in this case was general, and not confined to the term at which it was made. There is no error in the record and the judgment is

AFFIRMED.

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GEORGE W. LOSEY, SHERIFF, V. FRANK NEIDIG.

FILED JUNE 16, 1897. No. 7355.

**Judgment:** ENFORCEMENT: INJUNCTION. A party cannot have relief in equity against the enforcement of a law judgment, unless he has matter of defense which was not available in the law action, or had a good defense at law which by fraud or accident, without negligence on his part, he did not present in the law action.

ERROR from the district court of Madison county. Tried below before JACKSON, J. *Reversed.*

*Campbell & Wallis*, for plaintiff in error.

*Robertson & Wigton, contra.*

HARRISON, J.

On November 14, 1892, the defendant in error commenced this action in the district court of Madison county against George W. Losey, then the sheriff of said county, and the National Bank of St. Joseph, Missouri, the object and purpose of the suit being to restrain by injunction the enforcement by levy of execution then in the hands of the sheriff on the property of defendant in error, of the judgment in favor of the bank and against William Neidig, C. Neidig, Frank Neidig (defendant in error), and certain other parties constituting a partnership, doing

business in St. Joseph under the name and style of I. Weil & Co. A temporary injunction was granted, which, after issues joined and trial thereof, was made perpetual. No service of summons was had on the bank, and the action proceeded to decree against the sheriff, in whose behalf error proceedings have been prosecuted to this court. The petition filed was as follows:

"The plaintiff complains of the defendants and as cause therefor states that the defendant George W. Losey is sheriff of Madison county, Nebraska, duly elected and qualified and acting as such; that on the 6th day of August, 1887, the said defendant, the National Bank of St. Joseph, Missouri, commenced an action in this court against one William Neidig, C. Neidig, Frank Neidig, hereinafter named, Isaac Weil, Isadore Weil, and Adolphus Steinacher; the last three named being partners, doing business at St. Joseph, Missouri, in the name of I. Weil & Co., and not incorporated.

"2. Said defendant, by its petition filed in said action, sought to recover judgment against several persons above named, who were defendants in said action upon a certain promissory note purporting to have been executed at Madison, Nebraska, on the 15th day of March, 1886, for $323.15, due ninety days after date, payable to the order of said I. Weil & Co., and bearing interest at the rate of ten per cent per annum from date until paid, and purporting to be signed by William Neidig, C. Neidig, and Frank Neidig. And on the same day a summons was issued in said cause and on the 15th day of August, 1887, a copy of said summons was erroneously and by mistake of the sheriff delivered to this plaintiff in said Madison county, Nebraska.

"3. Plaintiff further says that this plaintiff did not execute or sign the promissory note sued upon in said action, but that the name Frank Neidig, signed to said note as one of the makers thereof, is the signature of another person, and not the signature of this plaintiff, the real name of said other person being Frank Neidig, and he

having resided at said Madison, Nebraska, at the time of the execution of the said promissory note. The said Frank Neidig was the real defendant in said action, and the one on whom the plaintiff therein intended summons to be served.

"4. Plaintiff further says that immediately after the delivery of the copy of the summons to this plaintiff, and prior to the 5th day of September, 1887, this plaintiff saw C. Neidig, whose name appears signed to said note as one of the makers of said note, and for whose sole use and benefit said note was made; and this plaintiff at that time advised said C. Neidig that a copy of said summons had been left with this plaintiff in said case, and that a mistake had been made, as this plaintiff was not the Frank Neidig who executed said note. And thereupon said C. Neidig said to this affiant that he, the said C. Neidig, would settle said lawsuit with plaintiff therein, the National Bank of St. Joseph, Missouri, and that this plaintiff need give the matter no attention, as arrangements for the settlement of said case had been fully completed and no judgment would be entered therein.

"5. Plaintiff, relying upon the statements and representations of C. Neidig, and believing the same to be true, and believing that said matter had been, or would be, fully settled and adjusted, gave said matter no further attention, and did not file an answer in said case and did not appear in any manner whatever.

"6. Plaintiff further says that afterwards, and on the 20th day of September, 1887, no appearance having been made in said district court in said case, judgment was entered therein against C. Neidig and Frank Neidig, by default, for the amount then due upon said note; that the same day a motion was filed in said case by Messrs. Allen & Robinson, attorneys of this court, purporting to appear in said case for the several defendants therein, and seeking to set aside the default and vacate judgment therein entered, which motion coming on to be heard, was on the same day, by the consideration of the court,

sustained and the judgment vacated, and defendants given sixty days to answer and plaintiff ten days thereafter to reply. And afterward, and on the 28th day of November, 1887, by the consideration of said court in said case, judgment was entered against defendants William Neidig, C. Neidig, and Frank Neidig, by default, for the sum of $380.60, and costs taxed at $6.18.

"7. And this plaintiff avers and charges the fact to be that he had no knowledge of the rendition of said judgment on the 28th day of November, 1887, and no knowledge of the filing of said motion on behalf of the several defendants, and said appearance was wholly without the knowledge or consent of this plaintiff in any manner whatever, and this plaintiff never authorized any one to appear for him in said action; nor did this plaintiff have any knowledge of any of the several proceedings had in the court in the said case hereinbefore referred to, except the delivery of the copy of the summons to this plaintiff as hereinbefore recited; nor the rendition of final judgment in said case on the said 28th day of November, 1887, until long after the final adjournment of the court at which such proceedings were had and said final judgment rendered. Plaintiff further says that by reason of the aforesaid statements and representations of the said C. Neidig at the time of leaving of the copy of said summons with plaintiff in said case, and prior to the time within which the answer was required to be filed in said case, this plaintiff was prevented from making known to the court the facts as above alleged, which he otherwise would have done.

"9. Plaintiff says that the defendant, the National Bank of St. Joseph, Missouri, had been, before the commencement of the aforesaid action, repeatedly notified that the note sued upon in the aforesaid action was not signed by this plaintiff, but by another person bearing the same name, and they have at all times known that to be the fact, and when the officer left the copy of the summons with this plaintiff in the aforesaid action he in-

formed said officer then and there that he was not the person upon whom service should be made, and that he was not indebted to the National Bank of St. Joseph, Missouri, in any sum of money whatever, and the said plaintiff in the aforesaid action, well knowing these facts and that this plaintiff was not a defendant in said action, and knowing that in equity and good conscience the judgment should not be enforced against this plaintiff, has never attempted to enforce the collection thereof from this plaintiff.

"10. On the 25th day of October, 1892, an execution was issued out of the office of the clerk of the district court of Madison county, Nebraska, in the above entitled action, in favor of the National Bank of St. Joseph, Missouri, and against William Neidig, C. Neidig, Frank Neidig, Isaac Weil, and Isadore and Adolphus Steinacker, which was placed in the hands of the sheriff, defendant herein, who now holds the same and threatens to, and will, if not restrained by the order of this court, levy upon the property of this plaintiff to satisfy the same; that this plaintiff has been at all times since the date of the giving of the note aforesaid the owner of a large amount of property in Madison county, both real and personal, out of either of which the aforesaid judgment could have been made, but, as before stated, the said defendant, the National Bank of St. Joseph, Missouri, knowing all the facts aforesaid, have never attempted to compel this plaintiff to pay the same, but the sheriff, believing this plaintiff to be one of the real defendants in said action, is about to do so."

It is argued that the petition does not contain statements of facts sufficient to constitute a cause of action; also that the evidence was insufficient to sustain the findings and decree of the court. The evidence as to all the material points in issue, especially as to whether the defendant in error had signed the promissory note on which judgment had been obtained against him in a law action, was conflicting, from which it

appears that there would probably have been a contest on these questions of fact had they been presented as a defense in the suit at law on the note; from which it follows that to try the issues in this equity action was trying the matters which should have been offered for settlement and adjudicated in the suit on the note. Both petition and evidence establish that an action was commenced on a promissory note, in a court of law of competent jurisdiction, and its process or summons was duly served on all the parties defendant, including the defendant in error, who was made a party defendant in the suit and who apparently had signed the instrument in suit. The court thus obtained jurisdiction of the subject-matter and of the persons of the defendants. The defendant in error in the case at bar had a defense to the law action which, if established, would have entitled him to relief in that action, and the remedy there would have been adequate and full. It also clearly appears that he failed to avail himself of his defense in the law action, but allowed it to proceed to judgment against him through his own negligence or want of attention, and not because of wrongful, fraudulent, or acts of any nature of the plaintiff in the suit. Under such circumstances the defendant in error was not entitled to equitable relief, was not entitled to an injunction to restrain the enforcement of the judgment in the action at law, having a defense which he failed to make in the suit on the note through his own neglect or default, and not because of any wrong or fraud on the part of the plaintiff. In such case equity could afford him no relief. (*Langley v. Ashe*, 38 Neb., 53; *Janes v. Howell*, 37 Neb., 320; *Scofield v. State Bank of Lincoln*, 9 Neb., 316; *Pope v. Hooper*, 6 Neb., 178.) "To entitle the defendant to relief he must have an equitable defense which is not available at law, or a good defense at law which, by reason of fraud or accident, without any negligence on his part, he was prevented from using." (10 Am. & Eng. Ency. of Law, 792, and see authorities in support of the rule cited in note. See, also, *Erickson v. First*

*Nat. Bank of Oakland*, 44 Neb., 622.) "The extraordinary remedy of injunction cannot be employed * * * to enjoin the enforcement of a judgment where the rights of the parties complaining might have been protected in the original action." (*Howard v. Eddy*, 43 Pac. Rep. [Kan.], 1133.) The decree of the district court was erroneous; hence it must be reversed and the cause remanded.

REVERSED AND REMANDED.

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## S. H. ATWOOD ET AL. V. W. J. MARSHALL ET AL.

FILED JUNE 16, 1897. No. 7396.

1. **Instructions:** ASSIGNMENTS OF ERROR. Where alleged errors in regard to the giving or refusal to give a series of consecutively numbered instructions are assigned in gross in the motion for a new trial, the assignments will on review be examined no further when it is ascertained that the action of the trial court was proper as to one instruction of either group.

2. **Motion for New Trial:** REVIEW. A motion for a new trial is indivisible, and if jointly made by two or more of the parties to a suit, and an assignment of error therein cannot be sustained as to all, it must be overruled.

3. **Mortgages:** PRESUMPTION OF ACCEPTANCE: EVIDENCE. If a mortgage beneficial to the grantee therein is voluntarily executed and placed of record by the grantor, the grantee's acceptance thereof will be presumed, but such presumption may be rebutted by proof that the mortgagee never accepted the instrument; but if no such proof is made the presumption must prevail.

4. **Cross-Examination of Witnesses.** In this state the strict rule of cross-examination has been approved. "The cross-examination of a witness should be restricted to the facts and circumstances drawn out on his direct examination. If it is desired to examine the witness upon other matters the party desiring such examination must make the witness his own and call him as such. *Davis v. Neligh*, 7 Neb., 84, adhered to." (*Boggs v. Thompson*, 13 Neb., 403.)

5. ———: LIMITATION: REVIEW. In cases where the issue is of fraud in the matters involved, a wide latitude will generally be allowed

to the cross-examination of witnesses, especially if they were parties to the transactions in question, but the extent of the cross-examination in such a case is subject to limitation within the sound discretion of the trial judge, and unless an abuse of such discretion to the prejudice of a complaining party appears, the restriction of the cross-examination will not furnish sufficient cause for the reversal of a judgment.

6. Trial: REJECTION OF TESTIMONY: HARMLESS ERROR. Alleged error in the rejection of testimony cannot avail if the same, or substantially the same, testimony had been, or was afterwards, allowed to be obtained from the witness. (*Union P. R. Co. v. Evans*, 52 Neb., 50.)

7. ———: ———: REVIEW. Certain testimony which had a bearing on the question of the value of property, the alleged conversion of which was in litigation, was offered and excluded. The question of value of the property was one as to which the testimony was conflicting and variant. The testimony *held* material and its exclusion prejudicial error.

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

*J. B. Strode, R. D. Stearns,* and *E. C. Strode,* for plaintiffs in error.

*Charles O. Whedon, contra.*

HARRISON, J.

In the petition in this case it was alleged that on September 10, 1888, "Charles C. Bullock and W. E. Keys, doing business at Lincoln, Nebraska, under the firm name of Keys & Bullock, were indebted" to certain named parties in various stated sums evidenced as to each indebtedness by a promissory note or notes; "that to secure such indebtedness said Keys & Bullock did, on the 10th day of September, 1888, make, execute, and deliver to the parties" creditors a chattel mortgage upon and covering, with other property, certain enumerated articles of personal property, including a stone crusher or breaker, all of the property of the value of $6,000; that the mortgage was filed in the proper office in Lancaster county on the same day, and "that on or about the 6th day of

April, 1891, the defendants, by themselves and their agents, without the knowledge or consent of the plaintiffs, and without regard to their rights, took said property aforesaid and herein described and converted the same to their own use and tore down said breaker and removed all of said property from the place where it was located, loaded it upon the cars, and removed it out of said Lancaster county, and deprived the plaintiffs of the same and of their said security and property to the damage of the plaintiffs in the sum of $10,000." Samuel H. Atwood, of defendants in the district court, now of plaintiffs in error, answered that he became the owner of the property described in the petition by virtue of purchase, at a sale of it, by the sheriff of Lancaster county, made under and pursuant to a levy of an execution issued for the enforcement of a judgment in favor of Murphy, Patterson & Co., and against the firm of Keys & Bullock, and levied on the property as that of said firm, and that it then belonged to said firm; and for further answer denied each and every allegation of the petition to which there had been in the answer no admission. The firm of Murphy, Patterson & Co. answered, stating the obtaining and existence of a judgment in its favor against Keys & Bullock, the issuance and levy of an execution for its enforcement and the sale of the property levied upon (that described in the petition) by the sheriff to Atwood, and pleaded by allegations of facts the fraudulent character of the mortgage executed by Keys & Bullock to defendants in error. The parties mortgagees secured a verdict and judgment in the trial court, and the unsuccessful parties have prosecuted error proceedings to this court.

It is one of the assignments of error argued in the brief that certain paragraphs of the charge of the court to the jury were objectionable and prejudicial; also, that it was an error to refuse to instruct the jury as requested by counsel for plaintiffs in error. With reference to each of these alleged errors, the assignment in the motion for a new trial was of a group of consecutively numbered series

of propositions. There were some of each in regard to which the action of the trial court was not erroneous. This being determined, according to an established rule, the assignment will not be further examined and will be overruled. (*Denise v. City of Omaha*, 49 Neb., 750.)

It is claimed that there was a fatal variance between the pleading on the part of the defendants in error and the proof in this: In the petition it was stated that Charles G. Bullock and W. E. Keys, doing business under the firm name of Keys & Bullock, executed the mortgage on which reliance was placed by defendants in error as establishing their ownership to the property to recover for the conversion of which this action was instituted; and that the mortgage herein introduced was executed by a firm composed of W. E. Keys, C. G. Bullock, and J. H. Bullock, and not the firm made up of two individual members as pleaded in the petition. It may be stated that this constituted a variance as claimed; but if so it could not affect the rights of Murphy, Patterson & Co., since in its answer it admitted the mortgage to defendants in error, which as to its rights rendered proof of the mortgage or of its introduction in evidence unnecessary; hence this portion of the record is without significance when received in connection with the rights of Murphy, Patterson & Co. in the suit, and the argument based thereon must be overruled; and this is effective in relation to all the plaintiffs in error, for they joined in the motion for a new trial, also in the petition in error; and the assignment having been proved without force as to one, is so as to all. (*Scott v. Chope*, 33 Neb., 41.)

It is urged that delivery of a mortgage and its acceptance by the mortgagee are necessary to constitute it valid as against the rights of attachment or execution creditors, where levies of the writs are made on the property, and that such acceptance must have occurred prior to levies; and further, that, prior to the levy of the execution in favor of Murphy, Patterson & Co. on the property, there had been no acceptance by the parties of the

instrument by the parties named in it as mortgagees of the mortgage on which the claim of defendants in error was predicated. On this subject it was stated in a decision of this court in the case of *Rogers v. Heads Iron Foundry*, 51 Neb., 39 (the instruments referred to in the opinion were chattel 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." The mortgage given to defendants in error was placed on file and passed from the control of the maker. All this appeared in evidence. It might have been shown, if such was the fact, that the designated mortgagees never accepted it; but this was not done and the presumption of acceptance must prevail.

On cross-examination of C. G. Bullock, a witness called to the stand on the part of defendants in error, he was interrogated in regard to the employment of counsel who appeared for defendants in error, and whether he (the witness) did not employ said attorney to appear and act in the case. These questions were objected to on the grounds of not being proper cross-examination and immaterial. It is argued that the plaintiffs in error should have been allowed to cross-examine this witness on the proposed subject, he being a member of the firm which gave the chattel mortgage and the main issue being the character of said instrument, whether fraudulent or *bona fide*. The witness, during his evidence in chief, had iden-

tified the mortgage as the one signed by himself for the firm of Keys & Bullock, of which he was a member; had stated who composed the firm when the mortgage was made; had also made a statement in detail in regard to the sums, the payments of which were secured by the instrument, giving the name of each party (there was quite a long list of them), the amount of the indebtedness to each, what the indebtedness was for, etc., and that the chattel mortgage was given to secure the creditors the payments of their claims. In regard to cross-examination the strict, or as it is sometimes called, the "American rule," as distinguished from what is denominated by some authors the "English rule," prevails in this state, and has been thus stated: "The cross-examination of a witness should be restricted to the facts and circumstances drawn out on his direct examination. If it is desired to examine the witness upon other matters, the party desiring such examination must make the witness his own and call him as such." *Davis v. Neligh*, 7 Neb., 84, adhered to. (*Boggs v. Thompson*, 13 Neb., 403.) But where an alleged fraudulent transaction is the subject of inquiry, it has been said in regard to the rule: "A wide latitude will generally be allowed in the cross-examination of witnesses when the issue is fraud, especially of witnesses who are parties to the alleged fraudulent transaction." (*Altschuler v. Coburn*, 38 Neb., 881.) Also: "While great latitude must of necessity be given in the cross-examination of witnesses charged with participation in fraudulent transactions which are the subject-matter of the defense pleaded, yet this latitude is subject to limitation in the sound judicial discretion of the trial judge, and unless it is made to appear in this court that such discretion has been exercised to the injury of the complaining party, the judgment will not be reversed merely because of such limitation." (*Omaha Nat. Bank v. Thompson*, 39 Neb., 269.) Applying the foregoing rules to the question in hand, we do not think the record discloses any abuse of discretion by the trial judge in the

limitation placed on the cross-examination in the particulars now under consideration; hence if it was error to limit the cross-examination it does not call for a reversal of the judgment. On cross-examination of this same witness this question was propounded: "Q. I will ask you if you didn't sell some of these tools yourself to Mr. Olsons?" the object being to show that the witness, a member of the firm of Keys & Bullock, remained in charge of the mortgaged property and disposed of some of it. To this question it was objected that it was not proper cross-examination and immaterial, and the objection was sustained. Of this action of the trial court complaint is now made. The question was one entirely without the line of an ordinary cross-examination; and, in view of the condition of the record of the evidence before us, under a fair enforcement of the rule which we have hereinbefore quoted in regard to cross-examination, we do not think there was any error in disallowing it, which was prejudicial or calls for a reversal of the judgment in the interests of fairness and justice.

What we have said in regard to the two assignments of error, the consideration of which we have just concluded, is equally pertinent and governing in relation to two or three others directed against alleged errors of the trial court in limiting the cross-examination. It would probably have not been error to allow them, in a case of the nature of the present one, in regard to a transaction claimed to have been fraudulent; but, on the other hand, the rejection of the evidence in cross-examination was not an abuse of discretion on the part of the trial court.

During the examination in chief of a witness called on the part of defendants in error he was asked a question in regard to a "derrick" being on the ground belonging to the Burlington & Missouri River Railway Company, which had been occupied by the firm of Keys & Bullock in the operation of the machinery included in the chattel mortgage to defendants in error. To this an objection

was interposed and sustained, after which there was an offer to prove that the derrick, some sheds, and other property covered by the mortgage remained on the said premises from September 10, 1888, the date of the mortgage, until within a short time prior to the trial of this suit, the mortgagees exercising no acts of possession or control over them. If any error in excluding this evidence it was without prejudice. The matter was sufficiently shown in the testimony of the witness, given before and after this particular question was asked, and although a motion was sustained by the court to strike out some of this evidence, there was a cross-examination which must have renewed the effect on the minds of the jury, if any impression it may have made had been to any extent destroyed.

During the course of the examination of S. H. Atwood he was testifying about a stone breaker or crusher, which was of the machinery included in the mortgage and which was purchased by him at the sheriff's sale. And he was interrogated as follows:

Q. State if you know what was the matter with it.

Q. Did you have any repairs put on that machine after you purchased it?

Q. What amount was expended for repairs immediately after the purchase of that machine and before it was fit for use?

To each of these questions an objection was interposed and the testimony excluded. Counsel for plaintiffs in error then made the following offer to prove: "The defendant offers to prove by this witness that immediately after purchasing this machine, and before it was fit for use or could be used, they sent to Chicago for one Conrad Nelson, who was an employe of the Gates Iron Works, manufacturers of that machine in question, and had about $200 worth of repairs put on the machine before it was fit for use."

Of another of the witnesses called for plaintiffs in error was asked:

Q. State whether or not you had to have that crusher repaired prior to doing anything with it or not.

Q. I will ask you to state whether or not as a matter of fact the eccentric sleeve was not entirely worn out, and you had to have it repaired, together with the boxing, and if it didn't cost you in the neighborhood of about $200 to get it repaired before you could use it.

These questions were objected to as immaterial and the objections sustained. There followed an offer to prove in words which we will quote: "I offer to prove by this witness that immediately after purchasing this machine, and before it was fit for use or could be used, they sent to Chicago for one Conrad Nelson, who was an employe of the Gates Iron Works, manufacturers of that machine in question, and had about $200 worth of repairs put on the machine before it was fit for use."

The condition of this crusher at the time it was sold by the sheriff and taken by Atwood, the purchaser, and its value, were closely contested points in the trial, and as to which there was a direct and irreconcilable conflict in the evidence; such a marked difference in the estimates of value, and especially of this crusher, that the testimony which would have tended to throw any light on this subject was material. Of such a nature was the testimony sought to be elicited by the questions which we have quoted, and its exclusion was error and well calculated to prejudice the rights of plaintiffs in error. It is said, *arguendo*, for defendants in error on this point that what plaintiffs in error sought to prove was the condition of the machinery after it had been taken to pieces, loaded on cars, shipped from Lincoln to some place in Cass county, and there unloaded and in process of readjustment. This may be applicable and of force in respect to some of the testimony which it was offered to introduce, but as to other portions it was without any pertinence. One, at least, of the questions referred to worn portions of the machinery, the conditions of which could not have been affected or changed by its being handled in taking the machinery apart and transporting it.

There are several other assignments of error argued in the briefs of counsel, but we do not deem their discussion necessary at this time. They are mainly in regard to the admission or exclusion of testimony, also to conduct of counsel in the alleged misstatements of evidence during argument to the jury. If error was committed in any of these particulars it will probably not occur again if another trial be had. The judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

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THOMAS W. FORBES V. WILLIAM MCCLATCHEY.

FILED JUNE 16, 1897. No. 7384.

**Breach of Contract of Sale.** Evidence examined, and *held* that the damages assessed by the jury are inadequate.

ERROR from the district court of Antelope county. Tried below before ROBINSON, J. *Reversed.*

*J. F. Boyd*, for plaintiff in error.

*M. B. Putney* and *N. D. Jackson, contra.*

NORVAL, J.

This suit originated in a justice's court, where, on a trial to a jury, plaintiff recovered the sum of $13.80. This verdict, on his motion, was set aside by the justice, on the ground that the same had been obtained by partiality and undue means, and the second trial in said court resulted in a verdict and judgment in plaintiff's favor for $17.30, besides costs. Defendant appealed to the district court, where plaintiff received a verdict in the sum of

$16.77, and from the judgment rendered thereon he prosecutes a petition in error.

The action was to recover damages for breach of contract in the purchase and sale of corn. Plaintiff, in his petition, sets up that in November, 1890, he entered into a contract with the defendant whereby he purchased from the defendant a hundred bushels of corn for the stipulated sum of $40, of which sum he paid $13.80 at the date of the contract, and the balance to be paid on delivery of the corn to plaintiff, and that defendant has wholly neglected and refused to comply with the terms of the contract, to plaintiff's damage in the sum of $23.80. The answer was a general denial. Whether the contract pleaded in the petition was ever entered into, the witnesses fail to agree; but as the evidence adduced by the plaintiff is sufficient to establish the contract and breach thereof as alleged, the only question we need to consider relates to the amount of damages. Both parties agree that defendant was indebted to plaintiff in the sum of $13.80, for cutting grain, at the time the alleged corn contract was entered into. Plaintiff's testimony was to the effect this sum of $13.80 was, by agreement of both parties, applied as payment on the corn, and that the market price of corn had advanced ten cents a bushel from the date of the contract to time for delivery. The measure of plaintiff's recovery was the difference between the contract price and the market value of the corn at the time and place it should have been delivered under the agreement, in addition to the $13.80 advanced, and seven per cent interest on both sums. It is evident that the damages are inadequate. Plaintiff was entitled to recover $23.80 and interest, or nothing.

It is said by counsel for defendant that there is no competent evidence in the record as to the value of corn. We do not so view the testimony. It was disclosed that plaintiff had bought corn of others about that time, and he testified that corn was worth 50 cents a bushel at the date fixed for delivery, and furthermore, that when

plaintiff went after the corn, eight days after the purchase, defendant refused delivery unless plaintiff would pay 50 cents a bushel, saying "he wouldn't be able to stand a loss of $10 on a hundred bushels of corn." Plaintiff's was the only testimony on the question of damages. The jury having disregarded the same, it follows that the judgment must be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

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## D. A. HALE v. D. J. SHEEHAN.

FILED JUNE 16, 1897. No. 7360.

1. **Bill of Exceptions.** An unauthenticated bill of exceptions will not be considered.
2. **Contracts:** CONSTRUCTION. A practical construction placed upon an ambiguous contract by the parties will generally be adopted by the courts.
3. ———: BREACH. One who refuses to perform his part of a contract cannot recover for a breach by the other party.

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

*Willis E. Reed*, for plaintiff in error.

*Powers & Hays, contra.*

NORVAL, J.

The petition filed in the court below alleges, substantially, that plaintiff and defendant, during the summer and fall of 1889, were partners engaged in the buying and selling of horses, under the firm name of Hale & Sheehan, plaintiff furnishing the capital for the enterprise and the defendant his services and skill, the profits and losses to be shared equally; that on the 15th day of

October there were sixty-one head of horses and sixteen sucking colts belonging to the firm on the ranch of the defendant, in Fremont county, Wyoming, and on said date the partnership was dissolved and a settlement between the partners was had, whereby defendant was to retain possession of the horses for a specified time and receive as his share of the profits from the venture the sum of $425; that an agreement was then entered into between plaintiff and defendant, of which the following is a copy:

"This agreement, made and entered into this 15th day of October, 1889, by and between D. J. Sheehan of the first part, and D. A. Hale, party of the second part, witnesseth: That the said D. J. Sheehan agrees to winter and care for thirty-nine head of horses and sixteen sucking colts, said horses being known as the Wilson horses, on the ranch of D. J. Sheehan and C. P. Sheehan, in Fremont county, Wyoming; and the said D. J. Sheehan further agrees to deliver said horses and colts to D. A. Hale, or his agent, at Casper, in stock-yards of F., E. & M. V. R. Co., in Carson county, Wyoming, on the 15th day of May, 1890, and the said D. J. Sheehan further agrees to load on the cars of the F., E. & M. V. R. Co. at Casper, Wyoming, twenty-two head of horses, being the largest of the horses known as the Wilson horses, now on the ranch of D. J. and C. P. Sheehan, in Fremont county, Wyoming, said twenty-two head of horses to be delivered on the cars on or before November 15, 1889, and shipped to D. A. Hale, at Humphrey, Nebraska; and the said D. A. Hale agrees to pay, or cause to be paid, to the said D. J. Sheehan, in consideration of his faithful performance of the conditions foregoing, the sum of ($425) four hundred and twenty-five dollars, payment to be made as follows: Four hundred and twenty-five dollars to be paid to the said Sheehan, or his order, on the delivery of the horses at Casper on the 15th day of May, 1890, and in case the said Sheehan shall draw an amount not exceeding $200 on the contract from Ottis & Murphey, bankers

at Humphrey, Nebraska, the said D. A. Hale pay to the discount charged by said bank, provided the said Sheehan shall not have the right to draw the said $200 before January 1, 1890. It is agreed and understood that the stock referred to in this contract is more fully described as follows: Branded on right shoulder thus (:); one bay horse branded on right shoulder 'C. H.;' one brown mare branded on right shoulder thus, 'T;' the sixteen sucking colts having no brand; said horses being all sizes and ages.

In witness whereof, we have hereunto set our hands, at Humphrey, Nebraska, this 15th day of October, 1889.

"D. J. SHEEHAN.
"D. A. HALE.

"Signed, sealed, and delivered in the presence of
"C. D. MURPHEY."

The petition further alleges, in effect, that in November the defendant converted to his own use a span of black Morgan mares belonging to plaintiff, of the agreed value of $200, and that it was mutually agreed that said sum should be applied by the defendant as part payment on said contract; that the time for the delivery of the horses was, by agreement of the parties, extended to June 15, 1890; that twenty-two head of horses defendant delivered to plaintiff as provided in said contract; that on said last named date plaintiff, at the expense of $35, went to Casper, Carson county, Wyoming, to receive from the defendant the remainder of plaintiff's stock of horses, and to perform all the conditions of said contract on his part to be kept. Yet defendant failed, neglected, and refused to deliver to plaintiff said horses, which were of the value of $2,000, but converted the same to his own use. The answer of the defendant admits the settlement and the execution of the contract as set forth in the petition; denies all the other averments in plaintiff's pleading, and alleges substantially that defendant entered immediately upon the performance of the contract by taking charge of, herding, feeding, and caring for said horses in

a good husband-like manner, and continued so to do for the period of time mentioned in the contract; that on or before November 15, 1889, defendant shipped to plaintiff twenty-two head of the largest and best of said horses; that in January, 1890, defendant demanded of plaintiff, and also of Ottis & Murphey, bankers at Humphrey, Nebraska, the $200 then due by the terms of said contract, but payment was refused, and no part thereof, nor of the balance, to-wit, $225, of the amount due on the said contract has been paid; that upon such refusal to pay plaintiff was notified that the stock would be retained and sold to pay the charges and expenses for keeping the same; that defendant kept, herded, and cared for said stock for four months after the expiration of the time provided in the agreement for keeping it, which was reasonably worth the sum of $180; that no part of which having been paid by the plaintiff, defendant filed a lien on said stock for herding and keeping, and proceeded to enforce said lien under the provisions of certain sections of the statute of Wyoming, which are pleaded in the answer. The reply was a general denial. The trial resulted in a verdict and judgment in favor of the defendant, to reverse which is the purpose of these proceedings.

The assignment in the petition in error relating to the insufficiency of the evidence to sustain the verdict, and those directed against the rulings of the court during the progress of the trial, are not available, since there is no authenticated bill of exceptions preserving the evidence adduced and the exceptions to the rulings of the court below. (*Andres v. Kridler*, 47 Neb., 585; *Reuther v. Zimbleman*, 50 Neb., 165.)

Complaint is made of the sixth and ninth paragraphs of the court's charge to the jury, which are as follows:

"6. You are instructed that the execution of the contract set out in the petition is admitted, and that under the provisions of the contract the defendant was entitled to have advanced to him by the plaintiff the sum of $200 on January 1, 1890, if he so desired."

"9. If you find from the evidence that the plaintiff has failed and refused to pay the defendant the sum of $200 due defendant on January 1, 1890, then defendant was released from any obligation to deliver said horses at Casper, Wyoming, and had the right to retain possession of the same until the amount so due was paid, and would be entitled to enforce his claims for such feed and care under the lien laws of the state of Wyoming, and if the defendant, in good faith, sold the horses in controversy under the lien laws of Wyoming to satisfy his claim for feed and care, then the plaintiff in this case cannot recover, and your verdict should be for the defendant, unless it appears that the property so sold was sold for more than enough to satisfy the amount due the defendant for care and feed, together with the reasonable, lawful costs of sale."

It is claimed that the construction placed upon the written contract by the parties and set out herein is erroneous, in that the jury were advised that it was incumbent upon plaintiff to pay defendant $200 on the contract on January 1, 1890, if the latter requested it. We cannot say that the construction adopted by the court was erroneous. Whether so or not might depend upon the evidence adduced on the trial, since if that disclosed the parties placed a particular construction upon their ambiguous agreement, it is entitled to consideration by the courts. (*School District v. Estes*, 13 Neb., 52; *Rathbun v. McConnell*, 27 Neb., 239; *Paxton v. Smith*, 41 Neb., 56; *Woodard v. Baird*, 43 Neb., 310; *Davis v. Ravenna Creamery Co.*, 48 Neb., 471.) The contract before us is somewhat vague and uncertain in its provisions as regards payments. In the briefs on either side it is asserted that the parties have, by their actions and conduct, placed a construction upon the controverted clause of the agreement, but they disagree as to what that interpretation was, and we are unable to determine the same for ourselves owing to the fact that it is not permissible for the court to look into the document pur-

porting to be the bill of exceptions in the case, since it is not certified by the clerk of that court to be either the original or a copy. We must, therefore, assume that the trial court adopted in its charge the construction placed upon the contract by the parties as to the terms of payment, and if it did the plaintiff has no right now to complain. The contention of plaintiff is that defendant was not to receive any part of the $425 until the stock was delivered, but this construction ignores and makes entirely meaningless the clause of the agreement that "said Sheehan shall draw an amount not exceeding $200 on this contract from Ottis & Murphey, bankers at Humphrey, Nebraska, the said D. A. Hale to pay the discount charged by the said bank, provided that said Sheehan shall not have the right to draw said $200 before January 1, 1890." If the evidence shows, and for the purposes of this case we must so assume, that the meaning placed upon the provision was that the defendant was so entitled, if he so desired, to have advanced to him $200 by drawing upon plaintiff for that amount through the bank of Ottis & Murphey, the criticism urged against the instructions must fall to the ground. (*Reynolds v. Burlington & M. R. R. Co.*, 11 Neb., 186; *Walter v. Reed*, 34 Neb., 544; *Lexington Mill & Elevator Co. v. Neuens*, 42 Neb., 649; *Chicago, B. & Q. R. Co. v. Cochran*, 42 Neb., 531.)

It is urged that the seventh and eighth instructions given by the court on its own motion are faulty, because not based upon the evidence. Whether erroneous in that respect we are unable to determine for want of authenticated bill of exceptions, and for the same reason the assignments based upon the refusal of instructions requested by plaintiff are unavailing.

No reversible error appearing in the record, the judgment is accordingly

AFFIRMED.

## UNION PACIFIC RAILWAY COMPANY V. ANNA YOUNG.

FILED JUNE 16, 1897. No. 7401.

**Transcript for Review:** DISMISSAL. A petition in error will be dismissed unless the transcript contains a copy of the judgment or final order sought to be reviewed, authenticated by the certificate of the clerk of the trial court.

ERROR from the district court of Kimball county. Tried below before NEVILLE, J. *Proceeding in error dismissed.*

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

*Fred'k Shepherd, contra.*

NORVAL, J.

Action by Anna Young against the Union Pacific Railway Company to recover damages for the death of plaintiff's mule, alleged to have been killed by one of defendant's engines at a place on its road where it ought to have been, but was not, fenced. Forty-one errors are assigned, but none of them can be considered, for the reason we have no jurisdiction of the cause, as we will now show. Attached to the transcript is the following certificate of the clerk of the trial court:

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

"I, S. Wooldridge, clerk of the district court of Kimball county, do hereby certify that the foregoing is the original bill of exceptions in said cause, and also a true and perfect transcript of the petition, answer, reply, and instructions given and refused in said action as the same are on file and of record in my office.

"Dated November 29, 1894.

"[SEAL.] S. WOOLDRIDGE,
"*Clerk of District Court,*
"By F. BELLOWS, *Deputy.*"

The foregoing is the only authentication of the transcript, and this certificate does not in any manner refer to or mention the journal entries, or even the final judgment in the cause, if one was ever rendered. The duly authenticated transcript of the trial court will alone be recognized by the supreme court as to all matters which are properly of record in the district court. (*Hoagland v. Van Etten*, 23 Neb., 462.) A transcript of the judgment or final order sought to be reviewed authenticated by the certificate of the clerk of the district court is essential to confer jurisdiction upon the appellate court. (*Moore v. Waterman*, 40 Neb., 498; *McDonald v. Grabow*, 46 Neb., 406; *Otis v. Butters*, 46 Neb., 492; *Romberg v. Fokken*, 47 Neb., 198.) It is true at one time plaintiff in error presented a motion for leave to withdraw the record for the purpose of having the same further authenticated by showing that the petition for a new trial contained in the transcript was a true copy of the one presented to, and ruled upon in, the court below. The cause was submitted generally without this motion being acted upon, and hence must be regarded as waived or withdrawn from consideration. Had the motion been sustained it would not have availed plaintiff in error to the extent of curing the omission of the certificate copied above, since, in the motion to withdraw, no complaint was made that the certificate of the clerk did not cover the journal entries. The petition in error is

DISMISSED.

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## DOUGLAS COUNTY V. THOMAS HAYES.

FILED JUNE 16, 1897. No. 7454.

Statutes: AMENDMENTS. A mere amendment of a section of a statute is void for want of compliance with section 11, article 3, of the constitution of this state, when there is in the amendatory act no mention of, or reference to, the amended section.

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

*J. L. Kaley* and *A. C. Troup*, for plaintiff in error.

*Mahoney, Minahan & Smyth, contra.*

RYAN, C.

The defendant in error, a policeman of the city of Omaha, filed his claim with the board of county commissioners of Douglas county on account of three days' attendance in the district court as a witness in as many criminal cases. There was a disallowance of this claim because the claimant was a policeman, and he appealed to the district court of said county, in which there was an answer by which was asserted his official position as a bar to his recovery. To this defense a general demurrer was sustained. From the judgment which followed this ruling the county has prosecuted error proceedings to this court.

On the 7th day of April, 1893, there was approved an act entitled "An act to amend sections 1, 2, 10, 16, 30, 41, 48, 49, 61, 64, 66, 70, 79, 90, 96, 99, 100, 104, 105, 107, 108, 109, 112, 113, 118, 123, 129, 144, 147, 158, 159, 161, 165, and 167 of an act entitled 'An act incorporating metropolitan cities and defining, regulating, and prescribing their duties, powers, and government,' approved March 30, 1887, or as subsequently amended, and to repeal said sections as heretofore existing." With any of these amended sections we have no concern, except with 167, under which there were twenty-one subdivisions, each of which fixed the compensation to be paid a distinct class of city officers within such subdivision described. The eighteenth subdivision was in this language: "Each policeman shall receive a sum not exceeding eighty-five ($85) dollars per month, nor less than seventy ($70) dollars per month, and each officer of police under the rank of chief shall receive a sum not exceeding one hundred ($100) dollars

per month, to be fixed by the board of fire and police commissioners. No policeman shall be allowed fees as a witness in any case tried in any court of the state." In 1867, and ever since, the general provision as to the compensation of witnesses existed in this language: "Witnesses before the district court and grand jury shall receive two dollars for each day actually employed in attendance on the court or grand jury, and, if the said witness shall reside more than one mile from the court house or place where the court is held, five cents for each mile necessarily traveled." (Compiled Statutes, ch. 28, sec. 23.) The provision that "No policeman shall be allowed fees in any criminal case tried in any court in this state" was clearly amendatory of the general provisions of law as to witness fees. The title of the act of 1893 above quoted in no way whatever gave an intimation of an intention to modify the general rule as to the compensation to be paid witnesses for their attendance upon the district court. The amendment, to this extent, was therefore void, because in contravention of section 11, article 3, of the constitution of this state, 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." (*State v. Moore*, 48 Neb., 870, and authorities therein cited.) The defendant in error was properly held entitled to receive payment for his attendance as a witness in the criminal cases wherein his attendance had been required by the district court, for the amendment by virtue of which his right was attempted to be denied was, to that extent, nugatory. The judgment of the district court is

AFFIRMED.

# TOLERTON & STETSON COMPANY ET AL. V. GERMAN-AMERICAN SAVINGS BANK OF LE MARS.

FILED JUNE 16, 1897. No. 7462.

**Review Without Bill of Exceptions.** In the absence of a bill of exceptions it will be assumed that the district court was fully justified by the proofs in so ruling on various motions as to require the enforcement of its judgment which previously had been affirmed and directed to be enforced by this court.

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

*Allen G. Fisher, Albert W. Crites, W. H. Fanning, E. W. Dailey,* and *E. S. Ricker,* for plaintiffs in error.

*D. B. Jenckes, C. H. Bane,* and *Barnes & Tyler, contra.*

RYAN, C.

There was in this case a judgment in the district court of Dawes county, from which an appeal was prosecuted to this court, wherein there was an affirmance of the judgment of the said district court. (*Tolerton & Stetson Co. v. McClain,* 35 Neb., 725.) After the cause was remanded to the district court there was a motion by the German-American Savings Bank, one of the parties, asking that the amount required to be paid it should be paid by the receiver in accordance with the terms of the affirmed decree. There was a motion by another party by which it was sought to decrease the amount to be paid said German-American Savings Bank by deducting the amount of certain notes, designated as the Howe Brothers' notes, and by deducting an amount equal to the amount of the interest which had accrued on the claim due the savings bank pending the litigation. The motion of the bank for an order requiring payment in accordance with the terms of the affirmed decree was sustained. The two motions to modify said decree were overruled.

These rulings are the alleged errors of which complaint is now made by a petition in error in this court.

There was preserved no evidence by bill of exceptions, and we must assume that the action of the district court, in ordering the enforcement of the judgment which had been appealed from and affirmed, and in refusing to modify it, was right. The orders on the several motions are therefore

AFFIRMED.

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REGINA MARROW V. WILLIAM O. GILBERT, ADMINISTRATOR.

FILED JUNE 16, 1897. No. 7811.

1. **Review: FINAL ORDERS.** This court's appellate jurisdiction in error proceedings is limited to final orders and judgments made by the district courts.
2. ——: ——. An order was made setting aside a verdict. After the term at which this was done a motion was filed to vacate said order. The record brought here recites: "The court finds that the order granting a new trial was made contrary to, and in violation of, the rules of this court, * * * was prejudicial error, and erroneously granted, * * * and the court would set aside said order granting said new trial had this court jurisdiction to do so." *Held*, Not a final order.

ERROR from the district court of Douglas county. Tried below before SCOTT, J. *Proceeding in error dismissed.*

*Byron G. Burbank* and *V. O. Strickler*, for plaintiff in error.

*O'Neill & Gilbert* and *Cowin & McHugh, contra.*

RAGAN, C.

In the district court of Douglas county, Regina Marrow sued Emily Hespler for damages for an assault and battery. The jury returned a verdict in favor of plaintiff.

On motion of Mrs. Hespler this verdict was by the district court set aside. After the adjournment of the term of court at which said verdict was set aside, Mrs. Marrow filed a motion to set aside the order of the district court setting aside the verdict of the jury. The printed abstract on which the case is submitted recites: "The court being fully advised in reference to the motion for leave to file a motion to set aside the order * * * granting a new trial, * * * and after hearing arguments by counsel for both parties, it is ordered that plaintiff be, and hereby is, given leave to file said motion and to argue and have a hearing on the same; * * * whereupon, by consent of both parties, came on to be heard said motion to set aside the said order. * * * After arguments of counsel the court finds that the order * * * granting a new trial was made contrary to, and in violation of, the rules of this court * * * then in force, * * * and was prejudicial error, and erroneously granted by the court and obtained by the defendant, and the court would set aside said order * * * granting said new trial had this court jurisdiction to do so." * * A petition in error has been filed here by Mrs. Marrow to review this action of the district court.

Section 581 of the Code of Civil Procedure provides: "An order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment, is a final order, which may be vacated, modified, or reversed as provided in this title." It will thus be seen that the Code authorizes this court to review final orders made by the district courts. But in the case at bar the district court made no order on the motion filed to set aside the order granting a new trial. All that can be claimed for the record is that the court heard arguments upon this motion, found that it was meritorious, and expressed the opinion that it had no jurisdiction to sustain the motion. But if the court sus-

tained this motion, or overruled it, the record before us does not disclose that fact; and until the district court has passed upon this motion by making an order sustaining it or overruling it, this court cannot review its action. So far as the record before us is concerned, the motion made by Mrs. Marrow is still pending and undetermined in the district court of Douglas county. The proceeding in error is

DISMISSED.

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## NORFOLK BEET-SUGAR COMPANY V. HERMAN KOCH.

FILED JUNE 16, 1897. No. 7376.

1. **Review:** DISREGARD OF INSTRUCTIONS. It clearly appearing that the verdict in this case was rendered in disregard of the instructions and evidence, the judgment is reversed.
2. **Personal Injuries:** VERDICT AGAINST MASTER: EVIDENCE: REVIEW. In a personal injury case by a servant against a master, the evidence without contradiction disclosing that the injury was sustained by reason of the negligence of another servant of the same master, there being no other evidence as to the relations existing between the two servants, and the jury having answered, "We don't know," to a special interrogatory as to whether they were fellow servants, *held*, that the general verdict in favor of the plaintiff was not sustained by the evidence.

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

*Powers & Hays*, for plaintiff in error.

*Beels & Schoregge* and *Koenigstein & Koenigstein, contra.*

IRVINE, C.

This was an action by Herman Koch, an infant, against the Norfolk Beet-Sugar Company, to recover damages for personal injuries sustained by him while in the employ of the defendant, and alleged to be due to the negligence of the defendant. The plaintiff had a judgment for $1,500. The defendant prosecutes error.

The evidence with regard to the manner in which the accident occurred is very meagre. The following is all that is material in the evidence on that point: Koch was sixteen years of age, had been employed in the factory the previous year, and had been employed there about a month in 1893, when, on Sunday, the 24th of September, the factory being for the most part closed for the purpose of cleaning it up, Koch was directed by the superintendent to enter a closed drain or sewer for the purpose of removing an obstruction. It seems that from certain machinery in the factory it was customary to discharge hot water and steam into this sewer. On the day in question only one machine was in operation from which such water and steam could be discharged. This was a machine styled in the evidence a "quadruple effect," and was in charge of one Peter Stirert. Prior to ordering Koch to enter the sewer the superintendent told Stirert what was about to be done, and commanded him not to let any water or steam into the sewer. When he directed Koch to enter the sewer he told him that there was no danger in doing so. Koch entered, and while he was within the sewer a volume of hot water and steam was permitted to enter and he was severely scalded. The only negligence alleged in the petition is the permitting of the water and steam to enter the sewer while Koch was there.

The court submitted to the jury certain questions for special findings. Among them were the following:

"Did the injury the plaintiff complains of result from any act of negligence of the defendant?"

A. "Yes."

Second: "If the jury answers the above question in the affirmative, state what act or acts of negligence on the part of the defendant caused said injury."

A. "By permitting a volume of hot water to flow through the sewer in which the plaintiff was at work."

It is thus evident, both from the petition and from the special verdict, that the verdict was found solely because

of negligence in permitting the water to enter the sewer, and not because a youth of tender years had been ordered into a place of exceptional danger. One defense was that the negligence, if any, was that of Koch's fellow servant. The only evidence as to the relations existing between these two servants is that neither occupied any position of control or direction over the other, and that they were both employed by the defendant,—Koch as a common laborer, and Stirert to operate the "quadruple effect." Whether or not their duties were of such a character as to bring them often together co-operating in any work does not appear. The court instructed the jury on the broad theory of fellow servants, as declared by Chief Justice Shaw in *Farwell v. Boston & W. R. Co.*, 4 Met. [Mass.], 49, to the effect that all persons working for the same master are fellow servants. Under the rule established in this state this instruction was prejudicially erroneous as to the plaintiff. (*Union P. R. Co. v. Erickson*, 41 Neb., 1; *Omaha & R. V. R. Co. v. Krayenbuhl*, 48 Neb., 553.) Nevertheless, under this instruction and the evidence there was not room for the slightest doubt that they were fellow servants. Notwithstanding the uncontradicted evidence that they were in the employ of a common master, and the instruction that this constituted them fellow servants, the question in the special verdict as to whether they were fellow servants and as to whose servant Stirert was, the jury answered, "We don't know." It is evident, therefore, that the jury deliberately disregarded the evidence and instructions in this respect. But had the instruction on this question been in accordance with the rule established in this state, to the effect that in order to exempt the master from responsibility to one servant for injuries caused by the negligence of another, there must be some consociation in the same department of duty or line of employment, the verdict would still not be sustained by the evidence. Where this commonly called "department rule" prevails it is a question of fact for the jury to determine under appropriate instructions

by the court whether the two persons are fellow servants. (*Indianapolis & St. L. R. Co. v. Daniel Morgenstern*, 106 Ill., 216; *Chicago & N. W. R. Co. v. Moranda*, 108 Ill., 576; *Devine v. Tarrytown & Irvington Union Gaslight Co.*, 22 Hun [N. Y.], 26; *Hass v. Philadelphia & Southern Mail Steamship Co.*, 88 Pa. St., 269.) A number of facts are admissible for the purpose of proving or disproving this relationship. Employment by a common master; a liability to discharge by the same master or officer; whether or not one of the persons has power to direct and control the operations of the other; whether they are subject to the orders of different superintendents or foremen; whether they habitually or frequently work together at the same particular task; whether, if their work is different, they are frequently brought together and co-operate generally to accomplish the same end; or whether, on the other hand, their lines of duty are entirely distinct, without any consociation, as was the case in *Union P. R. Co. v. Erickson*, *supra*. Perhaps other facts might be shown. But in this case a single fact appeared,—to-wit, that they were in the employ of a common master, and worked in and about the same factory. In the absence of other evidence, this tends to establish the relationship of fellow servants, and in the absence of other evidence, the jury should have so found. It is quite evident that the verdict was governed either by prejudice against the defendant or by sympathy for the plaintiff, and was rendered in reckless disregard of the evidence in the case.

After the verdict was returned the defendant objected to the discharge of the jury until the questions which the jury had answered "we don't know" had been properly answered. This objection was overruled and the jury discharged. These questions were of the very essence of the case. Whether it was error of itself, in view of the general verdict, to accept it without an answer to these questions,—the court having already determined that they should be submitted to the jury,—we do not determine. The failure of the jury, however, to answer the

questions, especially in the light of the instructions given, demonstrates conclusively the vice of the verdict.

REVERSED AND REMANDED.

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LYMAN F. PARDUE, APPELLEE, V. MISSOURI PACIFIC RAILWAY COMPANY, IMPLEADED WITH H. MCKEE, APPELLANT.

FILED JUNE 16, 1897. No. 7321.

1. **Damages for Breach of Contract: MECHANICS' LIENS.** In the case of a building contract, where the owner has wrongfully interrupted the contractor and prevented his completing the work, the contractor is entitled to a lien for the reasonable value of the labor he has performed and material he has furnished, but he cannot have a lien for the damages sustained from the breach of the contract.
2. **Mechanics' Liens: STATUTE OF LIMITATIONS.** One contracting directly with the owner may file his claim of lien at any time within four months of the time of the performance of the labor or furnishing of the material.
3. ——: ——. The statute of limitations begins to run against a mechanic's lien from the time of filing the claim of lien.

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

*F I. Foss* and *W. R. Matson*, for appellant.

*Milton M. Starr* and *Lamb, Adams & Scott, contra.*

IRVINE, C.

This was an action by Pardue to foreclose a mechanic's lien on an elevator situated on the right of way of the Missouri Pacific Railway Company. The elevator belonged to the defendant McKee. The district court rendered a decree finding due the plaintiff $450, and estab-

lishing a lien on the elevator, and such interest as McKee had in the land. McKee appeals.

It appears from the record that a contract was entered into between Pardue and McKee, whereby Pardue undertook to construct the elevator for $1,725. He performed certain work and furnished certain material, alleged to be of the value of $699.38, when McKee took possession and himself completed the work, claiming the right to do so because of unreasonable delay by Pardue. The petition, after pleading the performance of labor and furnishing material as above stated, and admitting the payment of $600, alleges that McKee's refusal to permit Pardue to proceed under his contract was wrongful, and that plaintiff was damaged thereby in the sum of $1,125. The answer alleges that Pardue failed to complete the work within a stipulated time or within a reasonable time, and counter-claims for several items of damages. It is somewhat difficult, from the briefs, to ascertain precisely what rulings McKee considers erroneous. The controversy turns almost entirely upon the question as to whether the exclusion of the contractor was rightful or wrongful, and as to what items of damages and counter-damages should be allowed. We do not see how, in this case, any of these questions can be considered. Our mechanic's lien law (Compiled Statutes, ch. 54, art. 1) confers a lien for labor performed or material furnished for the erection, reparation, or removal of certain structures; but it nowhere confers a lien upon such structures for damages arising from a breach of contract to erect them. Assuming, as plaintiff contended, and as the court below evidently found, that the owner's interruption of the contractor and refusal to permit him to proceed were wrongful, it is established that the contractor is entitled to a lien for the value of all labor which he has performed and material which he has furnished. (*Von Dorn v. Mengedoht*, 41 Neb., 525.) It is true that there is a statement in that opinion that had there been a finding, supported by evidence, that the contractors had sustained other damages,

they would have been entitled to the amount of such damages. But there was no such finding and the lien was in that case allowed only for the value of the labor and materials. So the court was not considering whether the damages referred to, had they existed, would form the basis of a mechanic's lien. On the other hand, it is at once apparent that the statute does not confer a lien for such damages. (*Denniston v. McAllister*, 4 E. D. Smith [N. Y.], 729.) In deciding this point we are perhaps transgressing the general rule that the court will not consider questions not presented by the briefs. But the question is so fundamental that we feel warranted if not compelled to consider it. It would seem absurd, and certainly very difficult, to proceed in an attempt to adjust conflicting claims for damages for a breach of a building contract, with a view to establishing a lien therefor, when no such lien can possibly exist. The $600 was applied, both by contract and act of the parties, to payment for labor and materials, so that the only portion of that claim remaining unpaid is $99.38. There is ample evidence to support the finding of the district court in favor of the plaintiff as to this item.

It is argued that as to the material, the law required the claim of lien to be filed within sixty days, and this was not done. Counsel, however, mistake the statute. The differing requirements as to the time when a claim of lien must be filed grow out of the distinction between principal contractor and subcontractors, and not between material-men and builders. It is also argued that the lien takes effect from the time when the first materials were furnished, and we understand the position of counsel to be that the action must be brought within two years from that time. The statutory provision, however, is that the lien shall operate "for two years after the filing of such lien." The statute of limitations begins to run from that time, and not from the time when the lien first attaches. The action was brought within the prescribed period.

The decree of the district court is reversed, and a decree will be entered here in all respects similar, except that the amount of the lien will be only $99.38, with seven per cent interest from the 8th day of January, 1889, the date when McKee excluded the plaintiff from the work.

JUDGMENT ACCORDINGLY.

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CLARK & LEONARD INVESTMENT COMPANY, APPELLEE, V. PALMER WAY ET AL., APPELLEES, AND J. A. HUDELSON ET AL., APPELLANTS.

FILED JUNE 16, 1897. No. 7389.

1. **Judicial Sales:** DISTRIBUTION OF PROCEEDS. A purchaser at a judicial sale who, instead of paying the amount of his bid to the officer making the sale, undertakes to himself disburse it in discharging liens, does so at his peril.
2. ———: TITLE OF PURCHASER: LIENS. The title of the purchaser, where there is an appeal from the order of confirmation, relates back on affirmance at least as far as that order, and he may not deduct from the amount of his bid sums which he has paid on account of taxes becoming liens on the property, and interest accruing on a senior mortgage subject to which he bought, between the time of confirmation and the time of affirmance or dismissal of appeal.
3. ———: DISTRIBUTION OF PROCEEDS: PARTIES. The holder of a lien not made a party to a foreclosure case has no standing by intervention on motion for distribution to ask to have the purchase money applied to the satisfaction of his lien.
4. ———: ———. A motion for distribution should properly be made after the fund comes into the hands of the officer making the sale or after it is paid into court, if such be the order. If made earlier the court may refuse to entertain it, but if overruled on the ground that it is premature, the order should be without prejudice to a later application.

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

*F. A. Boehmer* and *Nestor Rummons*, for appellants.

*Ricketts & Wilson, contra.*

IRVINE, C.

The record before us presents a very curious and complicated state of facts. The transcript contains some of the affidavits used in evidence. The bill of exceptions repeats most of the pleadings. From this mass of documents we gather a statement of facts from which we eliminate as far as practicable the minor and less material points, in the hope that the case may be so far simplified as to render its condition intelligible.

Palmer Way and Margaret Way, whom we shall hereafter style the Ways, were the owners of certain property in Lancaster county. On this there was a senior mortgage of $11,000, which had been executed to the Clark & Leonard Investment Company, hereinafter styled the Investment Company, and by it transferred to the president and directors of the Insurance Company of North America, hereinafter styled the Insurance Company, the Investment Company guarantying payment. There was a junior mortgage to Hudelson, which at the time of decree amounted to $1,999.15. It would seem that there was a judgment lien in favor of one Sheldon, junior to these mortgages, or at least to the Investment Company mortgage. The Ways failing to pay certain interest coupons on the first mortgage and taxes on the property, the Investment Company had paid these charges, and thereupon brought this action to foreclose for the sum so paid, the principal of the first mortgage not being due. The Ways and Hudelson were the only defendants to the action. The judgment creditor was not a party. It is said that he could not be made a party because an appeal was pending from the judgment in the supreme court. That the judgment had been superseded does not, however, appear. A decree of foreclosure was rendered ad-

judging the first lien to be in the Insurance Company, the second in the Investment Company, and the third in Hudelson, and the land was ordered sold subject to the first lien, to pay the two junior liens. No appeal was taken from this decree. It would seem, however, that a stay was taken, and on its expiration the land was sold to Hudelson for $5,400. The Ways made a motion to set aside this sale, which was overruled and the sale confirmed. The Ways appealed to this court, where, after the case had been pending nearly a year, they dismissed the appeal. Then they filed a motion to require Hudelson to pay his bid. About the same time the German National Bank, hereinafter styled the bank, appeared, apparently without any order of intervention, and filed what it calls a "petition and motion." In this it is alleged, among a great many other things, that it became the owner of the Sheldon judgment, and that it had also purchased from Hudelson his rights to the decree of foreclosure. It asked that if Hudelson should be required to pay his bid, he be directed to pay it to the bank to apply on the judgment and Hudelson mortgage. The court sustained the motion of the Ways in so far as to require Hudelson to pay $419.80, said amount remaining due on his bid, into court, and overruled the bank's motion. From these orders Hudelson and the bank appeal.

The reasons urged by Hudelson against paying any further money on his bid are, in brief, that between the decree and sale certain taxes accrued against the property, and interest accumulated on the Insurance Company's mortgage; that pending the appeal other taxes became liens on the property, and further interest accrued; that Hudelson, to protect the property, had paid these sums; that he had paid the Investment Company the amount found due it in the decree; that he had paid the costs of the case and had paid to the bank $1,036.25 upon the Hudelson mortgage, which the bank then owned by virtue of purchasing Hudelson's rights under the decree. He claimed that these amounts, in the aggregate,

were more than his bid, and that he was thereby discharged from further payment. Exactly on what basis the court made the accounting does not appear from the record; but from the amount found still due from Hudelson, it would seem that the court had at least given him credit on his bid for the amount paid the Investment Company, the amount paid the bank, and the taxes and interest accruing between the decree and order of confirmation. This was certainly all to which he was entitled. The purchaser at a judicial sale depends upon confirmation to perfect his title. Upon confirmation, for some purposes, the title relates back to the sale; but on the dismissal of Way's appeal it, for all purposes, related back at least to the time of confirmation. It was Hudelson's property from that time, and the interest thereafter accruing on the first mortgage, subject to which he purchased, and the taxes thereafter accruing, were charges for which he was responsible, and not the Ways. Undoubtedly the purchaser is entitled to an accounting for rents in such a case from the time of confirmation; and perhaps in case of insolvency, where a surplus remains of the purchase money after discharging the liens, the purchaser may, on an application for distribution, obtain an equitable set-off to protect himself. This we do not decide, because there is no allegation or proof of insolvency on the part of the Ways. Certain it is that it is the duty of the purchaser, except, at the most, as to such portion of the purchase money as may inure to himself in another capacity as an adjudged lien-holder, to pay the money to the officer making the sale. If, instead of doing so, he undertakes to disburse it himself in payment of adjudged liens, or liens which in his opinion exist against the property and have not been adjudicated, he does so at his peril. The court very properly required Hudelson to complete his bid, and Hudelson certainly has no just ground of complaint as to the amount found due or the credits allowed him.

The case of the bank is double. It certainly has no

right to ask an application of the purchase money to the payment of the Sheldon judgment. Whether this lien was junior or senior to the mortgages, as the holder thereof was not made a party to the proceeding, the judgment was not barred nor its lien upon the land removed. The bank, as its holder, has in one case, so far as this action is concerned, still the senior lien, with the right to levy on the property. In the other case it occupies the position of a junior lien-holder, with regard to an ineffectual foreclosure of a senior lien. It appears from the record that pending this action the Insurance Company obtained a decree foreclosing its mortgage, and to this action there seem to have been the proper parties. But that does not affect this case. So far as the bank asks to have the purchase money applied to the satisfaction of the decree foreclosing the Hudelson mortgage, it would seem that if the Investment Company's claim has been satisfied it would have this right, as more than the amount remaining due on the bid remains unpaid on the Hudelson mortgage. By its purchase of the decree it acquired Hudelson's position as junior lien-holder. Hudelson lost that position and remained in the case only in the attitude of the purchaser at the sale. The court was, however, justified in overruling the motion at the time it was made, on the ground that it was premature. It was in its essence a motion for distribution, and the court was justified in refusing to entertain it, at least until the sum due from the purchaser had been ascertained and the money paid into court in pursuance of the other order.

The order sustaining the Ways' motion is affirmed. The order overruling the bank's motion is modified in so far as to render it without prejudice to a later application for distribution of the remaining purchase money in payment of the sum remaining due on the decree in favor of Hudelson.

ORDER ACCORDINGLY.

# STATE OF NEBRASKA, EX REL. D. H. WHEELER ET AL., V. ERNEST STUHT ET AL.

FILED JUNE 26, 1897. No. 9240.

1. **Statutes:** INVALID PROVISIONS: ENFORCEMENT OF VALID PORTIONS. If a portion of a legislative act is unconstitutional and it can be separated from other portions of the act and the latter enforced independent of the former, and it further appears that the unconstitutional part did not constitute such an inducement to the passage of the other parts of the law that they would not have been passed without it, the former may be rejected and the latter upheld.

2. ———: ———: ———. The same rule obtains in relation to parts of the sections of a statute, and that which is unconstitutional may, under the operation of the foregoing rule, be rejected from a section or sections of a law and what remains be sustained, unless they are inseparably connected in substance.

3. **Municipal Corporations:** CREATION: DEFECTS. A legislature may create a municipality without providing in all particulars for its government, but that this has been done by a legislature is not alone sufficient to render such law of creation invalid. It will be presumed that a subsequent legislature will perform its duty and will remedy the defect.

4. **Statutes:** SPECIAL LAWS. In determining whether an act of the legislature is general or special in its character, the substance alone should be considered. Forms or particular words or turns of expression should be disregarded.

5. ———: CREATION OF MUNICIPAL CORPORATIONS: CONSTITUTIONAL LAW. "The classification of the cities of the state into classes and subclasses and the conferring upon them of corporate powers by acts of the legislature of a general nature, yet the provisions of which are applicable to but one of such classes or subclasses, is not repugnant to any provision of the constitution." *State v. Graham*, 16 Neb., 74, approved and followed.

6. ———: ———: GENERAL LAWS. If the provisions of a law establishing a class of cities on the basis of population are such that other cities may in the future, without additional legislation, enter the specified class, the law is general.

7. **Demurrer.** A demurrer searches the entire record and is applicable and fatal to the first defective pleading.

8. **Quo Warranto:** RIGHT TO MAINTAIN ACTION. Where relators, in an action of *quo warranto* to oust respondents from certain offices and obtain possession thereof, base their right to the relief on the

unconstitutionality of a statute under which respondents claim to occupy the offices, and the arguments and reasons for declaring such law unconstitutional would be equally forcible and effective as against the law under which relators assert title to the offices, the relators have no standing and cannot prevail in the litigation.

9. **Statutes**: TIME PROVISIONS BECOME EFFECTIVE. A law is not open to the criticism that separate provisions of it take effect at different dates if as an entirety it becomes of effect and operative on a fixed date, notwithstanding, as to some persons or matters affected by it, the law is of full operation immediately upon its passing into effect, and as to others its operation is not so full and complete until in the future on the happening of some stated contingency.

10. ———: TITLES. "The provision of section 11, article 3, of the constitution, viz., 'No bill shall contain more than one subject, and the same shall be clearly expressed in the title,' was intended to prevent surreptitious legislation and not to prohibit comprehensive titles. The test is not whether the title chosen by the legislature is the most appropriate, but whether it fairly indicates the scope and purpose of the act." *State v. Bemis*, 45 Neb., 724, approved and followed.

11. ———: VALIDITY: OBJECTIONS: ISSUES. Where the relief sought rests on the establishment of the unconstitutionality of an act of the legislature, objections to detached portions of the act which if declared unconstitutional would not affect the validity of the other portions and remainder of the act, raise questions which are but collateral to the main issue and which are not necessarily for discussion or definite determination.

ORIGINAL action in the nature of *quo warranto* to oust respondents from the offices of councilmen of the city of Omaha, and to instate relators therein. *Writ denied.*

The opinion contains a statement of the case.

*Wright & Thomas, J. B. Sheean*, and *A. S. Churchill*, for relators:

Relators' first position is that the office of police judge is a constitutional office, made elective, and for a fixed term of two years; that the provisions of the new charter, approved March 15, 1897, shorten the term of the incumbent and undertake to establish, instead of the constitutional term, a term of three years; that the act, in

so far as it relates to the election and term of office and salary of police judge, is unconstitutional and void; and that these invalid provisions are so interwoven with the other parts of the act, and form so essential a part of the whole scheme of legislation, that the entire act must be declared invalid. (Constitution, secs. 1, 18, 20, art. 6; sec. 16, art. 3; *Wenzler v. People*, 58 N. Y., 516; *McDermont v. Dinnie*, 69 N. W. Rep. [N. Dak.], 294; *State v. Thoman*, 10 Kan., 197; *Martin v. Tyler*, 60 N. W. Rep. [N. Dak.], 392; *Scagit County v. Stiles*, 10 Wash., 388; *State v. Perry County*, 5 O. St., 497; *Jones v. Robbins*, 8 Gray [Mass.], 329; *Warren v. Mayor*, 2 Gray [Mass.], 84; *Trumble v. Trumble*, 37 Neb., 340; *State v. Moore*, 48 Neb., 870; *Poindexter v. Greenhow*, 114 U. S., 270; *Trade Marks Case*, 100 U. S., 82; *Copeland v. City of St. Joe*, 126 Mo., 417; *Slausen v. City of Racine*, 13 Wis., 398; *Commonwealth v. Potts*, 79 Pa. St., 164; *Meshmeier v. State*, 11 Ind., 484; *Allen v. Louisiana*, 103 U. S., 80; *Eckhart v. State*, 5 W. Va., 515; *Johnson v. State*, 35 Atl. Rep. [N. J.], 787; *Lathrop v. Mills*, 19 Cal., 513; *State v. Sinks*, 42 O. St., 345; *State v. Blend*, 121 Ind., 514; *Dells v. Kennedy*, 49 Wis., 555; *Black v. Trower*, 79 Va., 123; *People v. Porter*, 90 N. Y., 68.)

The act in question is special, and therefore unconstitutional. (*Clegg v. School District*, 8 Neb., 178; *Dundy v. Richardson County*, 8 Neb., 518; *State v. Pugh*, 43 O. St., 98; *State v. City of Cincinnati*, 20 O. St., 18; *State v. Constantine*, 42 O. St., 437; *State v. Mitchell*, 31 O. St., 607; *Devine v. County Commissioners*, 84 Ill., 590; *State v. Smith*, 26 N. E. Rep. [O.], 1069; *Commonwealth v. Patton*, 88 Pa. St., 258; *State v. Hammer*, 42 N. J. Law, 435; *State v. Herrmann*, 75 Mo., 340; *City of Topeka v. Gillett*, 32 Kan., 431.)

The act is broader than the title, and includes subjects not within the title. It is therefore invalid. (*Blair v. State*, 90 Ga., 326; *City of Wahoo v. Dickinson*, 23 Neb., 426; *Village of Hartington v. Luge*, 33 Neb., 623; *City of Seward v. Conroy*, 33 Neb., 430; *Gottschalk v. Becher*, 32 Neb., 653; *County Commissioners v. Hiner*, 54 Kan., 334;

*Cherokee County v. Chew*, 44 Kan., 162; *Finnegan v. Sale*, 54 Kan., 420; *State v. Deets*, 54 Kan., 504; *Wheeler v. Chubbuck*, 16 Ill., 362; *Supervisors v. Keady*, 34 Ill., 293.)

The charter seeks to clothe the city council with judicial power. It seeks to give the council, or a committee thereof, all the power of courts of justice to compel the giving of testimony. This is a violation of the constitution. (*Langenberg v. Decker*, 31 N. E. Rep. [Ind.], 190; *Ex parte Doll*, 7 Phila. [Pa.], 595; *Kilbourn v. Thompson*, 103 U. S., 168; *In re Mason*, 43 Fed. Rep., 510.)

The act contravenes the 14th amendment to the constitution of the United States, which declares: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction equal protection of the laws." (*Missouri v. Lewis*, 101 U. S., 22; *People v. Hurlbut*, 24 Mich., 93; *Ward v. Maryland*, 12 Wall. [U. S.], 418; *Anderton v. City of Milwaukee*, 52 N. W. Rep. [Wis], 96; *Frorer v. People*, 31 N. E. Rep. [Ill.], 395; *State v. Seavey*, 22 Neb., 467; *Low v. Rees Printing Co.*, 41 Neb., 137.)

*W. J. Connell, contra:*

Where a statute contains provisions which are invalid or unconstitutional, if the valid and invalid portions are not so connected as to be incapable of separation, and the valid part is a complete act and not dependent upon the part that is void, the latter alone will be disregarded and the remainder upheld. (*Bailey v. State*, 30 Neb., 855; *Singer Mfg. Co. v. Fleming*, 39 Neb., 685; *State v. Moore*, 48 Neb., 870; *State v. Hardy*, 7 Neb., 377; *State v. Board of Commissioners of Lancaster County*, 7 Neb., 85; *State v. Hurds* 19 Neb., 316; *In re Groff*, 21 Neb., 647; *State v. Van Duyn*, 24 Neb., 586; *Muldoon v. Levi*, 25 Neb., 457; *Messenger v. State*, 25 Neb., 674; *Magneau v. Fremont*, 30

Neb., 843; *State v. Stout*, 33 Atl. Rep. [N. J.], 858; *Lewis v. Lewelling*, 36 Pac. Rep. [Kan.], 351; *State v. Bailey*, 42 Pac. Rep. [Kan.], 374; *Dunn v. City of Great Falls*, 31 Pac. Rep. [Mont.], 1017; *Irvin v. Gregory*, 13 S. E. Rep. [Ga.], 120; *City of St. Paul v. Chicago, M. & St. P. R. Co.*, 68 N. W. Rep. [Minn.], 458; *People v. Perry*, 21 Pac. Rep. [Cal.], 423; *State v. Stout*, 33 Atl. Rep. [N. J.], 858; *McPherson v. Blacker*, 13 Sup. Ct. Rep., 3; *Henderson v. State*, 36 N. E. Rep. [Ind.], 257; *State v. Blend*, 23 N. E. Rep. [Ind.], 511; *Hale v. McGettigan*, 45 Pac. Rep. [Cal.], 1049; *City of Westport v. McGee*, 30 S. W. Rep. [Mo.], 523.)

The relators have no standing in court upon the ground of special legislation. If the present councilmen were unconstitutionally elected, so were the relators. If the new charter is unconstitutional the old one was. (19 Am. & Eng. Ency. Law, 677; Maxwell, Pleading and Practice, 724; *State v. Stein*, 13 Neb., 529.)

The act is not special legislation. (*State v. Graham*, 16 Neb., 74; *State v. Berka*, 20 Neb., 375; *McClay v. City of Lincoln*, 32 Neb., 412; *State v. Robinson*, 35 Neb., 402; *Hunzinger v. State*, 39 Neb., 653; *State v. Hunter*, 17 Pac. Rep. [Kan.], 184; *State v. Bemis*, 45 Neb., 735.)

The act contains but one subject, and the same is clearly expressed in its title. (*City of Omaha v. City of South Omaha*, 31 Neb., 379; *State v. Bemis*, 45 Neb., 724.)

The act takes effect at one time. (*Hopkins v. Scott*, 38 Neb., 661; *State v. Newbold*, 42 Pac. Rep. [Kan.], 345.)

HARRISON, J.

In this, an original action in this court, an information in the nature of a *quo warranto* was filed by the relators, in which it was averred that they had been elected and assumed the duties of councilmen in and for the city of Omaha, under and by virtue of the provisions of the law then in force, which was an act entitled "An act incorporating metropolitan cities and defining, regulating, and prescribing their duties, powers, and government," which

was passed and became of effect March 30, 1887 (see Session Laws, 1887, ch. 10; Compiled Statutes, 1895, note ch. 12*a*); that their offices were being and had been unlawfully invaded and usurped, the powers and duties performed, and the emoluments and privileges thereof enjoyed by the respondents. The relief sought is the ouster of the respondents and the establishment of the title of relators to the offices involved. The respondents answered pleading the passage by the legislature of 1897 of an act entitled "An act incorporating metropolitan cities and defining, prescribing, and regulating their duties, powers, and government, and to repeal an act entitled 'An act incorporating metropolitan cities and defining, regulating, and prescribing their duties, powers, and government,' approved March 30, 1887, and all acts amendatory thereof, being chapter 12*a* of the seventh edition of the Compiled Statutes of the state of Nebraska (edition of 1895), entitled 'Cities of the Metropolitan Class'" (Session Laws, 1897, ch. 10, p. 54); that the act of 1897 was approved March 15, 1897; that at an election held pursuant to the provisions and requirements of the act of 1897, the respondents were elected as councilmen in and for the city of Omaha, and had taken possession of the offices and were performing the duties thereof. There were other and further allegations in the answer, which put in issue the rights of relators to the offices which they claimed. To the answer a general demurrer was interposed, the general or broad question presented and discussed under the issue thus made being the constitutionality of the act of 1897, the rights of relators to the offices being predicated on its unconstitutionality and the continued existence of the act of 1887, and the rights of respondents to the offices based on the validity of the act of 1897.

The first point discussed by counsel is in relation to the police judge, and the provisions of the new act fixing the time of the election of said officer and the duration of his term of office. The section of the act of 1897 to which

our attention is particularly directed in this connection is as follows:

"Section 13. The first city election in all cities governed by this act shall be held on the sixth Tuesday after this act goes into effect, and the next general city election on the first Tuesday in March, A. D. 1900, and all succeeding general city elections every three years thereafter. Such elections shall be held at the same place as was the general election for state and county officials last preceding such city election. The officers to be elected at such election shall be a mayor, police judge, city clerk, treasurer, comptroller, tax commissioner, and nine (9) councilmen; they shall each and all be elected by a plurality of all votes cast at said election for such officials, respectively, and shall, when properly qualified, hold their offices for the terms herein designated, viz.: The terms of the officers first elected shall commence on the third Monday succeeding their election, and they shall hold office until the third Monday in March, A. D. 1900, and until their successors shall be elected and qualified; and all subsequently elected officers shall hold office for the term of three years, commencing on the third Monday succeeding their election, and shall hold their office until their successors shall be elected and qualified, except as in this act otherwise provided." (Session Laws, 1897, ch. 10, p. 57, sec. 13.)

It will be noticed that by the provisions of the section quoted the terms of office of the police judge, after the first one, are fixed each at three years. Section 1 of article 6 of the constitution is as follows: "The judicial power of the state shall be vested in a supreme court, district courts, county courts, justices of the peace, police magistrates, and in such other courts inferior to the district courts as may be created by law for cities and incorporated towns." By section 4 the terms of office of judges of the supreme court are fixed at six years; by section 10, terms of judges of the district courts at four years; and by section 15, county judges' terms at two years. Section 20 provides:

"All officers provided for in this article shall hold their offices until their successors shall be qualified, and they shall, respectively, reside in the district, county, or precinct for which they shall be elected or appointed. The terms of office of all such officers, when not otherwise prescribed in this article, shall be two years. All officers, when not otherwise provided for in this article, shall perform such duties and receive such compensation as may be provided by law." From which it is disclosed that police magistrates are constitutional officers, with a term of office prescribed by that instrument at two years. The term as fixed by the constitution cannot be extended by legislative act; neither can the term of such an officer be shortened by legislative enactment.

Under the act or charter of 1887, which the act of 1897 by its terms repealed, there had been elected a police judge, whose term of office, fixed by the constitution, will expire in January, 1898; this term could not be abridged by a statute, hence the act of 1897, to the extent it purports to affect such term, is invalid; also such portion of it as makes the term of office of a police judge three years instead of the constitutional term of two years is of no effect. It being determined that the law is invalid or unconstitutional in the particulars just indicated, brings us to the consideration of another and a vital question, viz., does such invalidity necessitate a rejection of the whole act? One test to be applied in the solution of the foregoing question is, did the enactment of the invalid portions of the statute constitute such an inducement to the legislators to the passage of the further parts of the law that the latter would not have been passed without the former? It seems quite clear that the mere designation of the time at which the police judge should commence his term of office, and the fixing the length of his term of office at three years, did not possess such significance or importance that the determination of the exact time of the inception of the term or its duration could, separately or combined, have operated as an inducement

for the passage by the legislature of this act, containing, as it did, what was intended for a complete and entire scheme or plan for the organization and government of a class of cities; and further, it seems clear that had the legislators known that either the time of the commencement of the term stated in the law, or the exact length of the term as fixed, must be abandoned, they would not have felt constrained to withhold approval from the other and more important parts of the act. The invalid portions were but minor parts of the law, and not governing in their nature, when viewed in the light of the purpose of the law as an entirety. Another test to be applied here is, may the constitutional and unconstitutional portions of the law in question be separated, and is the former so complete within itself and independent of the latter that the former will be operative and can be enforced without the latter? If so, the former will be upheld and the latter disregarded or rejected. The foregoing is the rule announced and enforced by this court. (See *State v. Hardy*, 7 Neb., 377; *State v. County Commissioners*, 17 Neb., 85; *State v. Hurds*, 19 Neb., 316; *In re Groff*, 21 Neb., 647; *State v. Van Duyn*, 24 Neb., 586; *Muldoon v. Levi*, 25 Neb., 457; *Messenger v. State*, 25 Neb., 674; *Magneau v. City of Fremont*, 30 Neb., 843; *Bailey v. State*, 30 Neb., 855; *Singer Mf'g Co. v. Fleming*, 39 Neb., 685; *State v. Moore*, 48 Neb., 870.) It has been further stated as a rule on this subject: "The constitutional and unconstitutional provisions may even be contained in the same section, and yet be distinct and separable, so that the first may stand though the last fall. The point is not whether they are contained in the same section, for the distribution into sections is purely artificial; but whether they are essentially and inseparably connected in substance." (Cooley, Constitutional Limitations, 178*; 3 Am. & Eng. Ency. Law, 377; *State v. Hardy*, 7 Neb., 380.)

The law of 1897 provided for a police judge and prescribed fully his jurisdiction, powers, duties, etc. The only defects in the law were that his term of office could

not be for the length of time stated, and might not commence at the time fixed. The law of 1897 contained 194 sections, inclusive of the emergency clause and repealing section, in which there was legislation in relation to a complete set of city officers, their powers, duties, etc.; also legislation in regard to taxes, their assessment and levy, also in regard to public improvements and issuance of bonds; without further particularizing, the whole subject of a municipal organization, in its entire range and system, was intended to be and was quite effectually included in the legislative enactment. That almost every part of the law is wholly disconnected and independent of the portion in relation to the term of police judge, and does not need the last or its effect to render them complete and operative as integral portions of a system of city government, becomes apparent by a reading of the law. Turning our attention now directly to the enactment insomuch as it affects the police judgeship and the term thereof, it is clear that there is a police judge, whose term of office, being established by the constitution, cannot be interefered with or shortened by the legislature or its enactments, hence he will hold the office until January, 1898; and if it be said that there will then be a vacancy in the office, it may be suggested that possibly the charter of 1897 bears within itself the temporary relief or expedient wherein it states, section 184: "In case of a vacancy in the office of police judge by death, resignation, or otherwise, or in case of his absence, disability, or inability to perform his duty, it shall be the duty of any acting justice of the peace within the city, who shall be designated by the mayor, in writing, to act as police judge during such vacancy, absence, or inability in the trial of causes cognizable before the said judge." In relation to vacancies and when they exist we have section 20 of article 3 of the constitution, in which it is stated that offices created by the constitution shall become vacant on the happening of either of certain enumerated events. Of this it has been announced that it is not exclusive,

and vacancies in office may arise from other causes. In section 101 of chapter 26 of Compiled Statutes the legislature has provided that every civil office shall become or be vacant on the happening of either of certain specified events, and in the charter of 1897 the vacancies in the office of police judge which may occur are stated to be "by death, resignation, or otherwise." Whether the list of events contained in section 101, *supra*, the occurrence of any one of which will cause a vacancy in a civil office, is exclusive or not, and whether the "otherwise" contained in section 184 of the law of 1897 can have reference to or include none other, also whether the conditions existent by reason of the unconstitutional action of the legislature of 1897 in respect to the term of office of the police judge, will cause a vacancy in such office at the close of the term of the present incumbent, we will not now discuss or definitely determine or state. In this same connection we will further suggest that in section 20 of article 6 of the constitution, which we have hereinbefore quoted, it is stated: "All officers provided for in this article shall hold their offices until their successors shall be qualified. * * *" And in section 104 of chapter 26, Compiled Statutes, the same appears in substance; also in the law of 1897 under consideration, in section 13; and it has been said that where an incumbent of an office holds until his successor is elected and qualified, he continues not merely as a *de facto* officer, but as an officer *de jure*. (See *Richards v. McMillin*, 36 Neb., 355; also cases there cited, as follows: *State v. Howe*, 25 O. St., 588; *People v. Tilton*, 37 Cal., 614; *State v. Harrison*, 113 Ind., 434.) Without further suggesting or entering into details, we will say that we are satisfied that there is by the laws of the land a practical process for the enforcement of the laws and ordinances which will fall within the power and jurisdiction of the police judge in the cities of the class created by the law of 1897 now under discussion; but it is urged that any lawful method of meeting the difficulty which may be resorted to will be a makeshift,

and not to be tolerated or continued longer than the exigencies of the situation demand. This may be conceded. A legislature, in the absence of any extraordinary occurrences in human events, as now regulated by law in this state will convene in 1899, and to it must be relegated the labor of remedying the defect in the law of 1897 in regard to the term of office of a police judge in metropolitan cities. To do this will be of the bounden duties of such legislature, of its duties prescribed by the constitution, the law to which it will owe its creation and existence, and it will be presumed that it will do its duty and not that it will omit the performance of any.

It has been observed in the opinion in the case of *State v. Stout*, 33 Atl. Rep. [N. J.], 858: "The third reason for reversal is that the act of 1895 is inoperative and void, because it fails to provide a system of government for the proposed city. The seventh section provides that there shall be a mayor and city council, consisting of a councilman from each ward, and that all cities incorporated under said act shall be governed by the laws of this state 'relating to and regulating the government of cities,' passed April 24, 1894 (P. L. 75). The city may be legally constituted by one act, and the legislature, by another act, may give it the needed powers of government. (*Lakewood v. Township Committee*, 55 N. J. Law, 275, 26 Atl. Rep., 91.) The powers given in this case may be inadequate. If so, subsequent legislation will remedy the defect, or the city may accept the provisions of the act of 1894 above referred to. (*In re Cleveland*, 52 N. J. Law, 189, 19 Atl. Rep., 17.) The fact that the legislature has created a municipality without bestowing upon it all the powers necessary for its proper government will not authorize this court to declare that the municipality has not a legal existence." (See, also, *Lewis v. Lewelling*, 36 Pac. Rep. [Kan.], 351.)

It is argued that by the constitution the term of office of police judge is fixed at two years, and the office being an elective one, the right is reserved to or conferred on

the people to vote for and choose a person to fill the office at least once every two years. To this it must be said that the instrument, the fundamental law of the land, which fixed the term, also made a provision that the officer should hold until his successor was qualified; also the fact that vacancies in office will arise is contemplated by it. From which it follows that the right to elect to an office is inseparably connected with the constitutional and lawful regulations in regard to the term of the office to be filled, and that the fulfillment of the duties of the office as prescribed by such regulations is not and cannot be a violation or infringement of any inherent or vested or constitutional or statutory right of the electors. It is also urged that to say that an incumbent, under the circumstances developed in this case, may hold the office until the election and qualification of a successor is equivalent to saying that a legislature may fix a term of office of indefinite duration, by repealing the law providing for the election of a successor. The legislature could not do what has just been stated. It might attempt it, but it would have no force or effect in regard to an office created by the constitution. But we have no such conditions in the case at bar. Here we have not an intentional violation of duty, but a failure to perform in a constitutional manner a portion of the work. The intention was good, but the manner of its execution bad. The former would furnish in and of itself a reason for its non-enforcement, the latter would not. It may be true that there is more or less difficulty in assuming, or in the view that the legislature would have enacted the law of 1897 without the portion herein declared unconstitutional. Doubtless the legislature would have taken notice of the constitutional difficulties had its attention been directed thereto before or at the time of the passage of the law, and would have avoided them; but we think the law can be separated, and the unconstitutional portion in reference to the term of office of the police judge rejected, and the other portions of the law be operative and be enforced.

It is argued that the act of 1897 is a piece of special legislation, enacted in disregard of the provisions of section 1 of that portion of the constitution entitled "Miscellaneous Corporations," as contained in Compiled Statutes of 1895. The section referred to reads as follows: "No corporation shall be created by special law, nor its charter extended, changed, or amended, except those for charitable, educational, penal, or reformatory purposes, which are to be and remain under the patronage and control of the state, but the legislature shall provide by general laws for the organization of all corporations hereafter to be created. All general laws passed pursuant to this section may be altered from time to time or repealed." Also of section 15, article 3, of the constitution, which is as follows: "The legislature shall not pass local or special laws * * * incorporating cities, towns, and villages, or changing or amending the charter of any town, city, or village." It may well be doubted, from the general tenor of the article in which it is contained and other reasons, whether the section under the heading "Miscellaneous Corporations" has any application to municipal corporations or to cities, but it is unnecessary to determine the point at this time, and we will give it no further attention.

In an examination into the character of an act of the legislature to ascertain whether it is general or otherwise, the determination of the question must depend on the substance of the act, not its form. That the act contains expressions which might stamp it as general will not give it such character; nor will expressions or terms which might lead to a belief that it is special make it so; the substance alone must give character to the act. The contention here is that the act can refer and apply to but one city in the state, hence is special, unconstitutional, and void. A number of sections and parts of sections of the act are reproduced or quoted from in the printed argument to forcibly present and enforce this point.

This state has followed or joined with others in which similar constitutional provisions were in force, restrictive

in their character, in relation to municipal corporations, their charters, or legislation affecting them, and adopted the system of classification of cities. In the opinion in the case of *State v. Graham*, 16 Neb., 74, wherein the question of the classification of cities was considered, it was announced: "The classification of the cities of the state into classes and sub-classes, and the conferring upon them of corporate powers by acts of the legislature of a general nature, yet the provisions of which are applicable to but one of such classes or sub-classes, is not repugnant to any provision of the constitution." (See, also, *State v. Berka*, 20 Neb., 375; *McClay v. City of Lincoln*, 32 Neb., 412; *State v. Robinson*, 35 Neb., 402; *Hunzinger v. State*, 39 Neb., 653.) If, by a consideration of a law classifying cities on a basis of population, it be determined that another city or other cities may at a future time, without the aid of additional legislation, enter and become a member or members of this particular class, the classification is a general one, and so is the law establishing it. (*State v. Baker*, 44 N. E. Rep. [O.], 516.)

Examined and determined in the light of the foregoing rules, the status of this law as legislation is clearly general, and not special, and the same is true of the classification created by it. The enactment is not legislation special in character, and, as such, repugnant to the provisions of our constitution invoked in this connection in behalf of the relators. The ultimate object of this action is to establish the title of relators to the offices of councilmen of the city of Omaha, and to oust the respondents from the occupancy thereof. The settlement of these matters is, by demurrer to respondents' answer, made to hinge on the question of the validity of the law providing for cities of the metropolitan class passed in 1897. The relators base their claims to the offices on the provisions of a prior law of the same nature, which we may call, for identification, the law of 1887. A demurrer searches the entire record and goes to the first defective pleading.

(*Hower v. Aultman*, 27 Neb., 251; *Oakley v. Valley County*, 40 Neb., 901; *Hawthorne v. State*, 45 Neb., 871.)

In the main the arguments on the proposition that the act of 1897 is void for being special legislation, and for that reason inimical to certain portions of the constitution, are equally cogent and applicable to the act of 1887, which is pleaded in the petition of relators, and under which relators claim title to the offices, and if held of force as to the former, must also have been so determined as to the latter. This being true, the relators cannot be heard in this action to question or litigate the constitutionality of the act of 1897 on the ground of its special character as legislation. (*State v. Stein*, 13 Neb., 529; 19 Am. & Eng. Ency. Law, 677; Maxwell, Pleading & Practice, 724.)

In section 24, article 3, of our constitution, it is provided: "No act shall take effect until three calendar months after the adjournment of the session at which it passed unless in case of emergency (to be expressed in the preamble or body of the act), the legislature shall by a vote of two-thirds of all the members elected to each house otherwise direct. * * *" The act of 1897 was passed with what is known as an emergency clause attached, in which it was stated that "this act shall take effect and be in force from and after its date of approval." It is claimed that the act is objectionable and repugnant to the above mentioned section of the constitution in that different portions of it became operative at different times; that to fulfill the requirements of the constitution it must have become of force as a whole at the one date. We do not think the law is open to this attack. It did take effect and become operative as an entirety on the date prescribed by the legislature; that some officers were by its provisions, as it is stated, continued in office longer than others, or that the terms of some elective officers commenced at a designated date and some appointive ones at dates different from the elective ones, etc., did not change the taking effect of the law as

whole or its general operation as to all. (*Hopkins v. Scott*, 38 Neb., 661; *State v. Newborld*, 42 Pac. Rep. [Kan.], 345.)

It is asserted that the act is unconstitutional for that it is broader than its title, and includes subjects not within the title. It is stated in section 11, article 3, of the constitution, that "No bill shall contain more than one subject, and the same shall be clearly expressed in the title." The title of the act of 1897, omitting the repealing portion, was as follows: "An act incorporating metropolitan cities and defining, prescribing, and regulating their duties, powers, and government. * * *" The rule in this state on this subject is stated in the opinion in the case of *State v. Bemis*, 45 Neb., 724, as follows: "The provision of section 11, article 3, of the constitution, viz., 'No bill shall contain more than one subject, and the same shall be clearly expressed in the title,' was intended to prevent surreptitious legislation and not to prohibit comprehensive titles. The test is not whether the title chosen by the legislature is the most appropriate, but whether it fairly indicates the scope and purpose of the act." (See, also, citations on the same line of decisions of this court in the body of the opinion in the case to which we have just referred.) "When all the provisions of a statute fairly relate to the same subject, have a natural connection with it, are the incidents or means of accomplishing it, then the subject is single, and, if it is sufficiently expressed in the title, the statute is valid. (Sedgwick, Statutory Construction, 521, note; *Ewing v. Hoblitzelle*, 85 Mo., 64.)" Applying the test prescribed in *State v. Bemis, supra*, there is no question but the title of the act of 1897 fully expressed the general scope and purpose of such act. There may be, and no doubt are, detached and separate portions of the law or portions of sections of the law in relation to some details of the organization and government of the city, which may not have been outlined or foreshadowed in the title of the law, but they are distinct and separable, were not inducements to the enactment of the act as a whole, without

which it would not have been passed, and may be rejected without disturbing or interfering with its enforcement generally; and they were not attempts at surreptitious legislation, and do not affect the validity of the act as a whole. (*State v. Lancaster County*, 17 Neb., 85; *State v. Hurds, supra; Hopkins v. Scott, supra.*) Moreover, as to all but one of the sections of the act to which reference is made in the argument for relators on this point, the argument would be as effective against the act of 1887, under which relators claim title, as against the act of 1897; hence, for reasons hereinbefore set forth, the objections to these cannot avail relators in this litigation. There is nothing urged under this head of the argument which so affects the law as to render it invalid as a whole; hence it cannot assist the relators.

In regard to the appointment of fire and police commissioners the law provides for four, not more than two of whom shall be of the same political faith or allegiance; and further, in this connection, in section 168, as follows: "No person shall be appointed a police commissioner who is engaged in the sale of malt, spirituous or vinous liquors, or who is engaged in the business of dealing in tobacco or articles manufactured therefrom, or who is an agent for any fire insurance company or companies, or interested therein, or in the business of soliciting fire insurance, or who shall have been engaged in any of such callings or business within one year previous to the date of appointment. No person shall be qualified to hold the office of police commissioner while he holds any county, city or school district office." It is claimed that this last is class legislation and not permissible under our constitution. A question which might arise in regard to the political qualification was considered in *State v. Seavy*, 22 Neb., 454, *State v. Smith*, 35 Neb., 13, *State v. Bemis, supra*, and determined, and we have not been asked to re-examine it here. In regard to the portion of section 168 which we have quoted, speaking of it as a general

proposition and not in a legal sense, personally I should condemn it as opposed to the true genius and spirit of the republican principles of our government, both state and national; but we need not discuss or decide whether it is vicious and hence unconstitutional, for if so it would not affect the due enforcement of the other portions of the law, or of the parts of it in relation to fire and police commissioners, consequently the determination of such question does not enter into the decision of the ultimate issue herein.

There are some other and further objections made to the law and portions of it designated, which it is claimed are unconstitutional, but these are with reference to parts of the law which, if one or all should be determined invalid, it would not affect the validity and force of the other portions of the law, and, inasmuch as the relators cannot prevail in this litigation unless the whole act is declared unconstitutional, the questions under these objections are but collateral to the main issue and we need and prefer not to discuss or pass on their validity at this time or in this action.

Counsel for respondents opens the argument in his brief with some very forcible statements in regard to the importance of a decision in this case as affecting the credit of the largest city in our state and its business transactions, and quotes from the decision of the supreme court of Ohio in *State v. Baker, supra,* to enforce his views. Courts cannot be and are not unmindful of these things. As we understand it, it is from a consideration of these, combined with other reasons, the general rule has arisen that "all presumptions are in favor of legislative acts, and that no act will be declared invalid unless plainly and irreconcilably so." (*State v. Bemis, supra.*) By this it is not meant that courts will go beyond the rule quoted, for if laws are clearly unconstitutional there is and will be no hesitancy in so declaring, when the question is presented for adjudication.

It follows from the conclusions reached that the de-

murrer to the answer of respondents will be overruled, the writ applied for denied, and the action dismissed.

JUDGMENT ACCORDINGLY.

NORVAL, J., had no part in the final determination of this case.

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STATE OF NEBRASKA, EX REL. FRANK A. GRAHAM ET AL., V. ADDISON S. TIBBETS ET AL.

FILED JUNE 26, 1897. No. 9179.

1. Statutes: TITLES OF ACTS. Under the provisions of section 11, article 3, of the constitution, the title to an act must fairly express the subject of legislation.
2. ———: AMENDMENTS. Where the title to a bill is to amend an existing act, or a section thereof, no amendment is permissible which is not germane to the subject-matter of the original act or section indicated.
3. ———: ———. An act not complete in itself, but which is clearly amendatory in its nature and scope, must set forth the section or sections as amended, and repeal the original section or sections.
4. ———: ———: TITLES. The title to an act entitled "An act to amend sections 3, 8, 9, 11, 12, 13, * * * 91, and 115" of a prior act, is a restricted and limited one, which it is not the province of the courts to enlarge or amend. Under such a title the amendment of any section must be germane to the particular original section proposed to be changed.
5. ———: ———: ———. Section 31 of Senate File 176 of the legislature of 1897 (Session Laws, ch. 14, p. 175), purporting to amend section 91 of article 1, chapter 13*a*, Compiled Statutes, 1895, is unconstitutional and void because in conflict with section 11, article 3, of the constitution of this state, since it contains subject-matter not expressed in the title to the act, nor germane to the original section, and is amendatory of prior laws.

ORIGINAL action in the nature of *quo warranto* to oust respondents from the offices of members of the excise board of the city of Lincoln. *Writ allowed.*

*Hiland H. Wheeler*, *Burr & Burr*, and *M. B. Reese*, for relators.

*Tibbets Bros.*, *Morey & Ferris*, and *Morning & Berge*, *contra*.

NORVAL, J.

This was an original action of *quo warranto* brought by the state, on the relation of Frank A. Graham, Richard S. Grimes, and Harry B. Vaill, against Addison S. Tibbets, John H. McClay, and Fred A. Miller, to test the right of the respondents to discharge the duties of the office of the excise board of the city of Lincoln. The information alleges, in effect, that the relator Graham is now, and for more than two years last past has been, the duly elected, qualified, and acting mayor of said city, and by virtue of his office is a member, and chairman, of the excise board of the city of Lincoln; that the relators Grimes and Vaill are the other members of such board, each having been elected in April, 1895, for the term of two years, and until the election and qualification of his successor in office, and duly qualified and entered upon the discharge of the duties and functions of such office, and no successors ever have been elected and qualified; and that the respondents, since the 19th day of April, 1897, have usurped, used, and exercised the office of the excise board of the city of Lincoln, and excluded relators therefrom. The answer of the respondents substantially admits the averments contained in the information, and alleges, in effect, that the respondents, on the 23d day of March, 1897, were appointed and commissioned by Governor Holcomb as members of the board of fire and police commissioners in and for the city of Lincoln; that each respondent accepted such appointment and duly qualified as such commissioner, and that since the act of the legislature of 1897 went into force relators had no right or authority to perform the duties of members of the excise

board of the city of Lincoln. To the answer relators demurred, and the cause has been submitted for determination.

The state legislature of 1889 passed a law, which received executive approval, entitled "An act to incorporate cities of the first class, and regulating their duties, powers, government, and remedies." (Laws, 1889, ch. 14.) The provisions of this act, with the subsequent acts amendatory thereto, govern cities of the class to which the city of Lincoln belongs. Section 13 of said act was amended in 1891. (Laws, 1891, ch. 8; Compiled Statutes, 1895, ch. 13*a*, art. 1.) As thus amended, it provided: "A mayor, treasurer, clerk, water commissioner, city attorney, city engineer, and police judge shall be elected by a plurality of votes for the term of two years, and biennially thereafter. * * * There shall also be in each city governed by this act an excise board, consisting of the mayor, who shall be ex officio member and chairman thereof, and two members elected by the city at large, who shall hold their offices for two years. The terms of all elective officers shall commence on the Tuesday next after their election, and continue until their successors are elected and qualified," etc. It is under and by virtue of the foregoing piece of legislation that relators claim the right to discharge the duties and functions of the excise and police board of the city of Lincoln.

The respondents were appointed by the governor as members of the board of fire and police commissioners of said city, under the provisions of section 31 of the act of the legislature of 1897 known as Senate File 176 (Session Laws, 1897, ch. 14, p. 139), entitled "A bill for an act to amend sections three (3), eight (8), nine (9), eleven (11), twelve (12), thirteen (13), fourteen (14), fifteen (15), sixteen (16), seventeen (17), eighteen (18), twenty (20), twenty-one (21), twenty-six (26), twenty-eight (28), twenty-nine (29), thirty (30), thirty-one (31), thirty-three (33), thirty-seven (37), thirty-eight (38), fifty (50), sixty-four (64), sixty-five (65), sixty-seven (67), sixty-nine (69), seventy (70),

seventy-one (71), seventy-eight (78), eighty (80), eighty-three (83), ninety-one (91), and one hundred and fifteen (115), chapter 13*a* of article 1 of the Compiled Statutes of 1895, for the government of cities of the first class having more than twenty-five thousand and less than one hundred thousand inhabitants, and to repeal section ten (10) and repeal said original sections and all amendments thereto, and all acts and parts of acts inconsistent with this act." Section 31 of the act reads thus:

"Section 31. That section 91 shall be amended to read as follows: Sec. 91. In a city of the first class there shall be a board of fire and police commissioners, who shall consist of three residents and electors of such city, who shall be appointed by the governor of the state. The governor shall, within thirty days from and after the passage of this act, appoint as the commissioners above named three citizens, not more than two of whom shall be from one political party; one of them shall be designated in said appointment to serve until May 1, 1898, the second to serve until May 1, 1899, and the third to serve until May 1, 1900. And thereafter, at the expiration of said several terms, the governor shall appoint one member of said board for the term of three years. For official misconduct the governor may remove any of said commissioners; any person aggrieved by any act of said commissioners may file written charges against such commissioner or commissioners with the governor, who shall within a reasonable time investigate the same upon testimony produced before him, and shall make a finding as to the truth or falsity of such charges, and any and all vacancies of said board, by reason of death, resignation, or removal, shall be filled by said governor for the unexpired term, and all vacancies, from whatever cause, shall be so filled that not more than two of said board shall be of the same political party." (Session Laws, 1897, ch. 14, p. 175.) The remainder of the section is too lengthy to reproduce here. For present purposes it is sufficient to state that it provides substantially that a majority of the

board should constitute a quorum; that each commissioner, before entering upon his duties, should take and subscribe a prescribed oath of office, and give a bond in the sum of $1,000; that all the powers and duties connected with, and incident to, the appointment, removal, government, and discipline of the officers and members of the fire and police department of the city should be invested in, and exercised by, the board of fire and police commissioners, and that such board should have the exclusive control of the licensing and regulating of the sale of intoxicating liquors in such city, with a referendum clause reserving the right to have submitted, under certain conditions, the question of the licensing of the liquor traffic in such city to the qualified electors thereof.

It is under the foregoing section that respondents claim to be officers, and which section relators insist is invalid and void under section 11 of article 3 of the constitution, which declares that "No bill shall contain more than one subject, and the same shall be clearly expressed in its title. And no law shall be amended unless the new act contains the section or sections so amended, and the section or sections so amended shall be repealed." The constitutionality of said section 31 of the said act of 1897 is the important question presented for consideration. If said section is repugnant to the constitutional provision quoted, the demurrer to the answer of the respondents is well taken, and the writ prayed for in the relators' petition should be granted.

The eleventh section of article 3 of the state constitution has been often before the court for consideration, and the intent, scope, and object to be attained by its adoption as a part of the fundamental law has been so well and clearly stated in numerous decisions, in this and other states, as to render unnecessary a general discussion of the subject anew at this time. It has been uniformly decided that the provision of the constitution is mandatory, and that the courts will not declare a statute unconstitutional unless it is clearly so. Furthermore,

that the object of this provision concerning title to bills is to prevent obnoxious and surreptitious legislation, and not to prohibit comprehensive titles. (*White v. City of Lincoln*, 5 Neb., 505; *Paxton-Hershey Irrigating Co. v. Farmers & Merchants Irrigating Co.*, 45 Neb., 884; *Van Horn v. State*, 46 Neb., 62; *State v. Bemis*, 45 Neb., 724.) An act is unconstitutional and void if the "title is not broad enough to include the subject-matter of legislation." (*Smails v. White*, 4 Neb., 353; *White v. City of Lincoln*, 5 Neb., 516; *City of Tecumseh v. Phillips*, 5 Neb., 305; *State v. Lancaster County*, 6 Neb., 474; *Burlington & M. R. R. Co. v. Saunders County*, 9 Neb., 507; *Ives v. Norris*, 13 Neb., 252; *Holmberg v. Hauck*, 16 Neb., 337; *Weigel v. City of Hastings*, 29 Neb., 379; *Sheasley v. Keens*, 48 Neb., 57.) The purpose of the constitutional provision under consideration, as has been repeatedly declared to be, is to give notice, through the title of the bill, to the members of the legislature and the public, of the subject-matter of the projected law,—in other words, that the title should clearly indicate the legislation embraced in the bill. While the requirements of this clause of the constitution are mandatory, they are not to be exactingly enforced, or in such a manner as to hamper or cripple legislation. The title to a bill may be general, and it is not essential that it specify every clause in the proposed statute. It is sufficient if they are all referable and cognate to the subject expressed. When the subject is expressed in general terms, everything which is necessary to make a complete enactment in regard to it, or which results as a complement of the thought contained in the general expression, is embraced in and authorized by it. If the subject-matter is within the scope of the title, the constitutional requirement is met. (*State v. Lancaster County*, 6 Neb., 485; *State v. Ream*, 16 Neb., 683.)

The decisions are numerous which hold that the title is bad which is not broad enough to include the subject-matter of the bill. Thus, legislation is invalid which attempts to legalize bonds under a title authorizing their

issuance. (*Hamlin v. Meadville*, 6 Neb., 234.) The title, "An act regulating the herding and driving of stock," is not sufficiently broad and comprehensive to sustain a provision giving damages for the castration of animals in certain cases. (*Ives v. Norris*, 13 Neb., 252.) "An act to prevent the fraudulent transfer of personal property" is too restrictive to include legislation making it a crime to remove mortgaged property out of the county. (*Ex parte Thomason*, 16 Neb. 239.) In *Holmberg v. Hauck*, 16 Neb., 337, the same doctrine was recognized and applied, it being held that under the title of "An act to provide for the organization, government, and powers of certain cities," the legislature could not invest police courts with concurrent and co-extensive jurisdiction with county courts of all ordinary civil actions. In *Touzalin v. City of Omaha*, 25 Neb., 817, the title of the act being "An act to incorporate cities of the first class, and regulating their duties, powers and government," it was ruled that a provision in such act forbidding the granting of injunctions to restrain the levy and collection of a special tax or assessment to pay the cost of any city improvement was not within the title, and for that reason was invalid. Section 5, chapter 66, Session Laws, 1895, providing for the leasing of convict labor, was declared to be in conflict with that clause of the constitution requiring the subjects of acts to be clearly expressed in their titles. (*State v. Holcomb*, 46 Neb., 613.) Chapter 57, Session Laws of 1889, known as the "Decedents' Law," was under consideration in *Trumble v. Trumble*, 37 Neb., 340, and held void, in that its object was not expressed in the title, and because it was, in effect, amendatory of other acts, which it did not contain.

The course of judicial decisions in this state firmly establishes the doctrine that as to original legislation, or acts complete in themselves and not amendatory in their character, the scope and purpose of the bill must be fairly reflected in its title. And the same rule is equally as applicable to amendatory statutes, according to the de-

cisions of this and other courts. In *City of Tecumseh v. Phillips*, 5 Neb., 305, there was under consideration an act of the legislature of 1875, entitled "An act to amend an act to incorporate cities of the second class, and to define their powers, approved March 1, 1871, and to legalize certain taxes therein mentioned," and it was held that the third section of said act, which attempted to legalize the expenditures of moneys derived from licenses for the sale of intoxicating liquors, was not embraced within the title to the act, and therefore void by virtue of section 11, article 3, of the state constitution. In *Burlington & M. R. R. Co. v. Saunders County*, 9 Neb., 507, it was decided that the provision of the act of the legislature, approved February 25, 1875, entitled "An act to amend 'An act to provide for the registration of precinct or township or school district bonds,'" which declares it to be the duty of county boards to levy the necessary taxes to meet the principal and interest of such bonds, was within the inhibition of that portion of the constitution of 1867 which reads, "No bill shall contain more than one subject, which shall be clearly expressed in its title," because such provision was not germane to the act amended, and hence not within the title. A provision in an amendatory act repealing a statute not connected with the subject of the amendment was declared invalid in *State v. Lancaster County*, 17 Neb., 85.

It is well settled that under the title of a bill to amend an existing act, or a section thereof, no amendment is permissible which is not germane to the subject of the original legislation. (*Miller v. Hurford*, 11 Neb., 377; *State v. Pierce County*, 10 Neb., 476; *Trumble v. Trumble*, 37 Neb., 340.) In *Miller v. Hurford, supra*, this court said: "An amendment must be germane to the subject-matter of the act or section to be amended. Our constitutional provision that 'No bill shall contain more than one subject, which shall be clearly expressed in its title,' is but making inviolable the rule governing legislative bodies, that 'No proposition or subject different from that under con-

sideration shall be admitted under color of amendment.' * * * But if, under the pretext of amending a section, a subject entirely foreign to the subject-matter of the section to be amended can be introduced, this barrier will be entirely broken down and the constitutional guaranty in effect destroyed."

The legislature of Michigan, in 1891, passed an act entitled "An act to regulate the taking and catching of fish in the inland lakes of this state." This statute was amended in 1893, to extend its provisions so as to include other inland waters than lakes, under the title "An act to amend section 1 of act No. 159, Session Laws, 1891, 'An act to regulate the taking and catching of fish in the inland lakes of this state.'" It was held in *Fish v. Stockdale*, 69 N. W. Rep. [Mich.], 92, that the amendatory law was unconstitutional in that its object was not disclosed by the title.

Under the title of "An act entitled a supplement to an act entitled 'An act to authorize the formation of railroad corporations and regulate the same,'" the legislature of New Jersey in the body of the act imposed upon railroad corporations the duty of repairing bridges over public roads, and empowered the courts of chancery to decree a specific performance of this duty, while the act attempted to be amended provided for the reduction of the capital stock of railroad companies under certain conditions. It was held in *New York & G. L. R. Co v. Inhabitants of Township of Montclair*, 21 Atl. Rep. [N. J.], 493, that the title of the act did not express the subject of legislation, but was vague and misleading, and the act was therefore unconstitutional and void. To the same effect is *Adams v. San Angelo Water Works Co.*, 25 S. W. Rep. [Tex.], 605.

In *Harper v. State*, 19 So. Rep. [Ala.], 857, an act entitled "An act to amend an act for the trial of misdemeanors in Shelby county, approved February 12, 1891," was held to conflict with section 2, article 4, of the constitution of Alabama, which provides that "each law shall contain but one subject, which shall be clearly ex-

pressed in the title," in so far as the act attempted to provide for the trial of felonies, since such crimes were not included in the title.

Under the authorities the following propositions governing the enactment of laws are embraced in section 11, article 3, of the constitution: First: A plurality of subjects is prohibited. Second: The title of an act must fairly express the subject of legislation. Third: Matters can only be included in an amendatory bill which are germane to the original act. Fourth: An act not complete in itself, but which is clearly amendatory in its character and scope, must set forth the section or sections as amended, and repeal the original section or sections. (*Ryan v. State*, 5 Neb., 276; *Smails v. White*, 4 Neb., 357; *Sovereign v. State*, 7 Neb., 409; *Lancaster County v. Hoagland*, 8 Neb., 38; *City of South Omaha v. Taxpayers' League*, 42 Neb., 671; *State v. Cobb*, 44 Neb., 434.)

Tested by the principles just stated, is section 31 of said Senate File 176 (Session Laws, 1897, ch. 14, p. 175), adopted by the legislature of 1897, and which purports to amend section 91, of article 1, of chapter 13*a*, Compiled Statutes of 1895, repugnant to the provisions of section 11, of article 3, of the constitution? The answer must be in the affirmative. This senate file does not purport to be a complete law for the government of cities of the class to which Lincoln belongs, but the title and the body of the act alike indicate that it was intended by the framers to be amendatory alone in its scope and purpose. The title specifies the amendment of certain sections, among others, section 91, of article 1, chapter 13*a*, of the Compiled Statutes. And the body of the act provides "that section 91 shall be amended to read as follows: * * *." No person in reading this language would for an instant suspect that the new subject-matter of legislation proposed was foreign to the original section. Yet, what are the facts? Speaking generally, the original section 91, sought to be altered and changed by the legislature of 1897, related to the licensing and regu-

lating of the sale of intoxicating liquors by the excise board, and the appointment by such board of a chief of police and other police officers, but contained no provision whatever as regards the creation, by appointment or otherwise, of an excise or any other board. An excise board was provided for by section 13 of article 1 of said chapter 13*a*, in this unequivocal language: "There shall also be in each city governed by this act an excise board, consisting of the mayor, who shall be ex-officio member and chairman thereof, and two members elected by the city at large, who shall hold their offices for two years." Matter entirely separate and independent from any subject indicated by the title of the act of 1897, is included in the amendatory section 91, namely, a board of fire and police commissioners was created, and provision made for the appointment of the members thereof and their removal from office,—a subject-matter wholly foreign to the legislation embraced in the original section. By no reasonable interpretation can it be said that this new clause or provision injected into section 91 is a proper amendment of the subject-matter of the original section. On the contrary, it is as plain as anything can be that such new clause or provision is amendatory of said section 13 of article 1, chapter 13*a*, of the Compiled Statutes, which last named section, as already indicated, provided for an excise board in each city governed by the act. Moreover, said new section 91 is amendatory of the second proviso clause to section 25, chapter 50, Compiled Statutes, 1895, entitled "Liquors," which declares "that in cities of the first class having more than twenty-five thousand (25,000) and less than eighty thousand (80,000) inhabitants the power to license the selling or giving away of any intoxicating, malt, spirituous, vinous, mixed, or fermented liquors shall be vested exclusively in the excise board of such cities." The new act attempts to change this by confering the power to license and regulate the liquor traffic upon another body,—the board of fire and police commissioners; not exclusively, however,

since the new act reserves the right to have that question determined by a vote of the electors of the city under certain contingencies. No reference is made to said section 25, either in the title or body of the said act of 1897.

The title to Senate File 176 is not general and comprehensive, but limited. It does not express any purpose to amend generally article 1 of chapter 13*a* of the Compiled Statutes, but the amendment of certain sections is proposed. This title restricts the amendments to the particular sections mentioned in the title. To this all will agree. The object of an act cannot be broader than its title. Counsel for respondents concede that under the title in question the new matter engrafted on a section must be germane to the original section. In the brief they say: "The rule that an amended section must be germane to the original section amended is not a rule established by constitutional authority directly, but is one which necessarily arises from a compliance with the above named constitutional provision; and it simply arises from the fact that when a section is amended it is supposed to stand by itself in its amendment, to take unto itself a title which the subject-matter of this section will allow, and must be confined to a single object. That an amended section must be germane to the section amended does not mean that it must be confined to the same limits; that it cannot be enlarged and extended beyond the limits of the original section. It only means that it must be confined to the same subject-matter, or have the same object in view, and this subject-matter or object may be general in its nature. So long as the legislature fairly confines itself to the object of the original section it is sufficient." But it did not so confine itself in this case. The general object of the original section was not offices or boards, but the licensing of liquors. If the title to a bill must be a fair index to the contemplated legislation, the attempted amendment of said section 91 failed by reason of the constitutional provision invoked by the relators. If said section 31 of Senate File 176,

which attempts to alter or change section 91, article 1, of said chapter 13*a*, is upheld, the very object or purpose of the fundamental law is nullified and disregarded.

We have been cited to no authority precisely in point, although the views we have expressed are in harmony with the principles announced in the cases already referred to. The decisions now to be mentioned have more or less bearing upon the question under consideration.

The first clause of the syllabus in *Ex parte Hewlett*, 40 Pac. Rep. [Nev.], 96, is in this language: "Where the title states that the subject of an act is to amend one section of a former statute, the act cannot be extended to the amendment of other sections." Billow, C. J., in the course of his opinion, observes: "It is claimed, first, that it is invalid because the title of the act does not express its subject. Stripped of its verbiage, the title states that it is to amend section 2 of the act of 1893. Section 1 provides for the amendment of section 2 of that act, as stated in the title, but from its subject-matter, which is substantially, except as to dates, the same as section 1 of the act of 1893, it appears that section 1 is the section they really wished to amend. However, as the title states that it is an act to amend section 2 of the former act, and the body of the act repeats that statement, we are of the opinion that it must be taken just as it reads, although it would seem that a mistake has been made. But the most serious point is that, after stating in the title that the act is an act to amend but one section of the act of 1893, it goes on to amend sections 4 and 8 of that act, although, as just stated, there are but two sections to the act, and consequently no section 4 or 8 to be amended. Under these circumstances, it would seem that the last two sections of the act of 1895 are unconstitutional under the provisions of section 17 of article 4 of the constitution, which directs that 'each law enacted by the legislature shall embrace but one subject, * * * which shall be briefly expressed in the title.' Having seen fit to restrict the title of the act to amending but one section of the former

act, the legislature cannot go on in the body of the act to amend other sections. (*State v. Bankers & Merchants Mutual Benefit Ass'n*, 23 Kan., 499; Sutherland, Statutory Construction, sec. 87.)"

The legislature of Colorado, under an act entitled "An act to amend section 29 of chapter 95 of the General Statutes of the state of Colorado, entitled 'Roads and Highways,' and to repeal sections 30, 31, 32, and 33 thereof, and for other purposes," substituted a new section for section 29 of the original act, the four sections indicated in the title were repealed, and a new section was interpolated requiring persons and corporations having ten or more persons in their employ, liable to pay taxes, to furnish the overseer with their names, and prescribing penalties for their failure to comply therewith. In *Board of Commissioners v. Aspen Mining & Smelting Co.*, 32 Pac. Rep. [Colo.], 717, it was held that the subject-matter of the said interpolated section was not germane to the act it was intended to amend and could not be interpolated therein as an amendment without conflicting with the provision of the constitution of Colorado similar to our section 11, article 3, under consideration. Reed, J., in delivering the opinion of the court, says: "It will be observed that in the title the specific changes are designated,—the amendment of section 29, and the repeal of the four enumerated sections. Had the act been entitled, generally, as an act to amend chapter 95, any amendment germane and pertinent might have been made, but, being specifically limited to the sections designated, the interpolation of a new and different section was not permissible. Any further changes than those designated were precluded by the specific enumeration of those named." The opinion, after citing the cases in support of the doctrine, continues with the following quotation from Cooley, Constitutional Limitations (5th ed.), 179: "As the legislature may make the title to an act as restrictive as they please, it is obvious that they may sometimes so frame it as to preclude many matters being included in the act which might, with en-

tire propriety, have been embraced in one enactment with the matters indicated by the title, but which must now be excluded because the title has been unnecessarily restrictive. The courts cannot enlarge the scope of the title. They are vested with no dispensing power. The constitution has made the title a conclusive index to the legislative intent as to what shall have operation. It is no answer to say that the title might have been made more comprehensive, if in fact the legislature have not seen fit to make it so."

In *State v. Board of Commissioners*, 41 Pac. Rep. [Nev.], 145, a law entitled "An act to amend an act entitled 'An act for the purchase and preservation of public newspapers printed and published in the several counties of this state,' approved February 1, 1865," to the extent it attempts to regulate the matter of legal advertising and printing, was decided to be in conflict with the provision of the constitution of Nevada requiring that each law enacted by the legislature shall embrace but one subject, which shall be briefly expressed in the title. If the subject of legal advertisement and printing was not included in the title of the original act, and was not germane to the subject-matter, it is obvious that the clause embraced in the amendatory section 91 under review, relating to the creation of a board of fire and police commissioners, is not covered by the title to the act, and is not germane to the section proposed to be amended, but is amendatory of section 13 of article 1 of said chapter 13*a*. We are constrained to hold said amendatory section 91 to be unconstitutional for the reason stated. It follows that the demurrer to the answer must be sustained, and a peremptory writ awarded as prayed.

WRIT ALLOWED.

# STATE OF NEBRASKA, EX REL WILMER B. COMSTOCK ET AL., V. ALEXANDER STEWART ET AL.

FILED JUNE 26, 1897. No. 9180.

1. **Statutes:** AMENDMENTS: TITLES. It is competent for the legislature to amend a statute by a proper reference to its title, or the number of the chapter and section as published in the Compiled Statutes.

2. ———: ———: ———. The title to Senate File 176 (Session Laws, 1897, ch. 14, p. 139), with sufficient particularity designates article 1 of chapter 13*a* of the Compiled Statutes of 1895, as where the amendatory sections were intended to apply.

3. ———: ———. Where an amendatory act contains a clause plainly indicating the purpose of the legislature to repeal the original sections amended, it meets the requirements of section 11, article 3, of the constitution, which declares that an amendatory act shall "contain the section or sections so amended, and the section or sections so amended shall be repealed," though the intent to repeal may be inartistically and awkwardly expressed, and such repealing clause was drawn in the form of an amendment of the repealing clause of the act amended.

4. ———: INVALID PROVISIONS. The unconstitutionality of a portion of a statute does not invalidate the remainder when the different parts are separable and the void portion was not the consideration to the legislature to adopt the part that is valid.

5. ———: ———. When the invalid portion of an act is so interwoven with the rest that the act may not be operative with the void part eliminated, or where it is obvious, from an inspection of the act, that the invalid part formed the motive or inducement to the passage of the residue, the whole act fails.

6. ———: REPEAL: CITIES: WARDS. *Held*, That the repeal by the legislature of 1897, of section 10, article 1, chapter 13*a*, Compiled Statutes, 1895, which conferred upon city authorities the power to divide the municipality into wards, did not have the effect to abolish existing legally established wards.

7. ———: OFFICERS: LENGTH OF TERM. In the absence of any constitutional prohibition or affirmative provision fixing the term of a public officer, such term may be shortened by legislative enactment. *Douglas County v. Timme*, 32 Neb., 272, followed.

8. ———: AMENDMENTS: CONSTITUTIONAL LAW. Section 31 of Senate File 176 of the legislature of 1897 (Session Laws, ch. 14, p. 175), purporting to amend section 91 of article 1, chapter 13*a*, Compiled Statutes, 1895, contravenes section 11, article 3, of the state con-

stitution, since said amended section contains subject-matter not expressed in the title of the act, nor germane to the original section, and is amendatory of prior laws. *State v. Tibbets*, 52 Neb., 228, decided herewith, followed.

9. ———: ———: INVALID PROVISIONS. *Held*, That said amendatory section 91 was the consideration or inducement for the passage of the amended section 13 of the same act, and the unconstitutionality of the former section invalidates the latter also.

ORIGINAL action in the nature of *quo warranto* to oust respondents from the offices of councilmen of the city of Lincoln, and to instate relators therein. *Writ denied.*

*M. B. Reese*, for relators.

*Webster, Rose & Fisherdick* and *Clark & Allen, contra.*

NORVAL, J.

This is an original proceeding, in the nature of *quo warranto*, challenging the authority of the respondents to exercise the offices of councilmen of the city of Lincoln, and to oust them from said offices and to instate the relators therein. The relators, twelve in number, and the respondents Geisler and Guthrie, were councilmen of the city of Lincoln on and prior to April 1, 1897, seven of them,—Draper, Ewan, Geisler, Guthrie, Hutton, Young, and Jason D. Parker,—having been elected for a term of two years in April, 1895, and the remaining seven,—Comstock, Finley, Lawler, Spears, Webster, Woodward, and Barr Parker,—were elected for the period of two years in April, 1896. Respondents were regularly nominated prior to March 16, 1897, as candidates for election to the offices of councilmen of said city for their respective wards. After the nominations as aforesaid were made, and prior to the annual city election held on April 6, 1897, an act of the legislature was passed, known as Senate File 176 (Session Laws, 1897, ch. 14, p. 139), with an emergency clause attached, purporting to amend certain sections of the city charter of said city, whereby, among other things, the councilmen were reduced in numbers

from two to one from each of the wards. At the city election last aforesaid the respondents were elected as members of the city council, receiving a majority of all the votes cast in the city, as well as in their respective wards, in which they resided, save the respondent Barth, who failed to carry his own ward,—the second,—although he received a majority of the votes in the entire city. Respondents were duly found and declared elected, and each severally qualified according to law. Prior to the passage of Senate File 176 said city had been duly divided into seven wards, with boundaries defined by ordinance passed and published, which has not been repealed, nor in anywise annulled. The foregoing matters are either alleged in the answer of the respondents or admitted by them therein to be true. To the answer a demurrer has been interposed alleging that facts sufficient are not alleged to constitute a defense, and that the act under which respondents claim to exercise the functions of said offices is unconstitutional and void. The submission is upon the demurrer.

Although the controversy is over the title to the offices named, the important question presented for consideration is the constitutionality and validity of the said Senate File No. 176, approved March 20, 1897 (Session Laws, ch. 14, p. 139), and entitled "A bill for an act to amend sections three (3), eight (8), nine (9), eleven (11), twelve (12), thirteen (13), fourteen (14), * * * ninety-one (91), and one hundred and fifteen (115), chapter 13*a* of article 1 of the Compiled Statutes of 1895, for the government of cities of the first class having more than twenty-five thousand inhabitants, and to repeal section 10 and said original sections and all amendments thereto, and all acts and parts of acts inconsistent with this act." Relators argue that this act was passed by the legislature in violation of section 11, article 3, of the constitution, and void, and "the whole act is so contaminated and filled with the virus of unconstitutionality that it must all fall." We shall, as briefly as may be, notice some of the

most important objections brought forth in the briefs of counsel for relators against the validity of the law.

Both ends of the act are assailed, namely, the title and the repealing clause. The title to the act, it is claimed in argument, is vague and indefinite, because it does not with sufficient precision designate the chapter or the part of the chapter which it was the purpose of the legislature to alter or change. It will be observed the title specifies for the purpose of amendment thirty-three enumerated sections in "chapter 13*a* of article 1 of the Compiled Statutes of 1895," etc. The language just quoted is not technically accurate, and certainly is not the most apt or appropriate index which could have been selected by the law-makers for the purpose of indicating the subject-matter contained in the body of the bill, inasmuch as there is no "chapter 13*a* of article 1 of the Compiled Statutes of 1895." The compilation of the laws in that year contains numerous articles, but none of them embraces an entire chapter, while several chapters of the compilation mentioned,—among others, chapter 13*a*,—are subdivided into, or composed of, two or more articles. But this objection urged by counsel is technical merely, and without substantial merit. It is patent that the preposition "of" following "13*a*" and preceding the word "article" in the above quotation should be entirely disregarded or read "thereof,"—in either event, it would be plain to every one that the sections proposed to be amended would be found in article 1, chapter 13*a*, of the Compiled Statutes of 1895. That it should be so read, and this was the legislative intent, is manifest from the language of the entire title to the bill. It informs us that the chapter and article intended are devoted to "the government of cities of the first class having more than twenty-five thousand inhabitants." Turning to the Compiled Statutes for the year in question, it will be found that chapter 13*a* is designated "Cities of the First Class," and that article 1 thereof contains the charter, or law, governing cities of that class between 25,000 and 100,000

inhabitants. The title to the act before us, when considered as a whole, distinctly points out the article and chapter where the amendatory sections were intended to apply. It is suggested the title to this bill contains no reference to the title of the original act. To have done so was not essential to the validity of the law. This court has held, speaking through REESE, J., that "in amending an act it may be designated by its title or chapter in the Compiled Statutes." (*State v. Berka*, 20 Neb., 375; *Dogge v. State*, 17 Neb., 140; *Ballou v. Black*, 17 Neb., 392.)

The title to this Senate File 176, and some of the provisions of the act, were under consideration in *State v. Tibbets*, 52 Neb., 228, where it was ruled that the title selected by the legislature was not general and comprehensive, but restricted and limited, and that the courts have no power, by mere construction, to enlarge or amend it; that the title indicates a purpose to amend certain enumerated sections of a prior designated act, and that no amendment is allowable to a particular section which is not germane to the subject-matter of the original section proposed to be altered or changed; and that under such a limited title it will not meet the requirements of the constitution to engraft a new provision upon a section not germane thereto, although such new provision could properly have been proposed as an amendment of another section likewise mentioned in said title. Stated differently, the rule to be applied to the amendment of each particular section of the thirty-three designated in this act is precisely the same as where the amendatory act consists of a single section. With these general observations we pass to a consideration of some of the criticisms made upon this amendatory law.

Section 32 of said senate file is complained of. (Session Laws, 1897, ch. 14, p. 179.) It, in form, is amendatory of section 115 of the original act, which constituted the repealing clause of the old act, and provided "that an act entitled 'An act to incorporate cities of the first class

having less than 60,000 inhabitants, and more than 25,000 inhabitants, and regulating their duties, powers, and government,' approved March 25, 1887, and all acts amendatory thereof, and all acts and parts of acts or laws in conflict herewith, be and the same are hereby repealed." This section 32 was amended so as to read: "That said original sections three (3), eight (8), nine (9), ten (10), eleven (11), twelve (12), thirteen (13), * * * and ninety-one (91) of said act as now existing, and all acts and parts of acts inconsistent with this act, be and the same are hereby repealed." The amendment of the repealing clause of a prior law which is the subject of amendment, for the purpose of effecting a repeal of the original sections sought to be amended, is indeed novel, but it does not for that reason contravene any constitutional provision. The framers of this law had a perfect right to indulge in originality of expression, so long as the language employed reflected the intention of the lawgiver. As stated by counsel for respondents, "the form of expressing the legislative intent to repeal the original sections amended, in form of amendment of the repealing clause of the original act, may make a court or jurist smile, but does not obscure the legislative intent. That is clear enough, notwithstanding the unusual manner in which it is expressed. It is simply an instance of the inartistic methods of the ordinary layman when summoned by a constituency to sit in legislative halls and formulate results of legislative deliberation. Because the intent to repeal the sections amended is inartistically drawn in form of an amendment to the repealing clause of the amended act cannot, on any of the canons of statutory construction, be held to render it ineffective where the intent is clear." No other conclusion can be drawn from this section 32 than that the object and purpose of its adoption was to repeal the original sections therein mentioned, and not merely the amendment of the original section 115, the repealing clause to the original law. The sections amended are designated with particu-

larity, and they "and all acts and parts of acts inconsistent with this act be and the same are hereby repealed." This language is plain and free from ambiguity. It requires no interpolation of words in order to make the section operative as a repealing clause of the designated sections of the old act, and to be within the requirements of the constitution, which declares 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."

Section 12 of the original act fixed the date for the holding of the general city elections and the time of the opening and closing of the polls at such election. The new section 12 contains the same provision, followed with a proviso to the effect that if any city shall come within the scope or purview of the act after the date fixed for the annual city election, and not less than six months before the date of the next annual election in such city, the first election for city officers shall be held on the third Tuesday next after the time such city comes under the act, and the terms of city officers so elected shall commence on the first Tuesday following such first election. "Provided, also, that when any city previous to its coming within the operations of this act shall have been under the operation of the act to which this act is amendatory, that in such city the city government shall continue under the original act and the officers thereunder until the commencement of the terms of offices under this act, after which time the administration of the city government shall be under this act and the officers installed under its provisions." The first new provision added to the original section 12, fixing the time for holding the first city election in cities coming under the act after the date designated for the annual election is unquestionably germane to the subject-matter of the original section, which treated solely of city elections. We entertain some doubts whether the other new provision quoted above relating to official tenure is amendatory in its nature of

the original section 12. Possibly it would have been more appropriate as an amendment to another section of the charter governing cities of the class to which Lincoln belongs. Whether such is the case or not we will not now stop to investigate, but, for present purposes, will assume that the new legislation ingrafted onto said section 12 was not germane, and, therefore, improperly that the entire amendatory act is thereby invalidated and injected as an amendment. It does not, however, follow unenforceable, or that the respondents are not entitled to the offices in question. It is a familiar rule of constitutional law that where a law contains provisions which are constitutional, if the valid and invalid are not so connected or interwoven as to be incapable of separation, and the valid portion is not dependent upon the part that is void, the latter alone will be disregarded and the rest sustained, if it is manifest that the void part was not an inducement to the passage of the law. (*State v. Moore*, 48 Neb., 870, and cases there cited.) But if the valid portion of a statute is so connected with the rest that it would be inoperative with the invalid portion stricken out, or where it is obvious from an inspection of the law that the invalid portion formed an inducement to the passage of the law, then the whole law is invalid. (*Trumble v. Trumble*, 37 Neb., 340; *Low v. Reese Printing Co.*, 41 Neb., 127; *German-American Fire Ins. Co. v. City of Minden*, 51 Neb., 870.) The same principle has been held and applied by other courts. (See *State v. Commissioners of Perry County*, 5 O. St., 497; *Poindexter v. Greenhow*, 114 U. S., 270; *Slauson v. City of Racine*, 13 Wis., 398; *Dells v. Kennedy*, 49 Wis., 555; *Black v. Trowers*, 79 Va., 123; *State v. Blend*, 121 Ind., 514; *Johnson v. State*, 35 Atl. Rep. [N. J.], 787; *State v. Sinks*, 42 O. St., 345; *Copeland v. City of St. Joseph*, 126 Mo., 417; *Warren v. Mayor*, 2 Gray [Mass.], 84.) In the last case Chief Justice Shaw, after stating the rule that parts of an enactment may be sustained while other portions are held unconstitutional, says: "But this must be taken with this limitation, that

the parts so held respectively constitutional and unconstitutional must be wholly independent of each other. But if they are so mutually connected with and dependent upon each other, as conditions, considerations, and compensations for each other as to warrant a belief that the legislature intended them as a whole, and that, if all could not be carried into effect, the legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional, or connected must fall with them."

In passing upon the constitutionality of a statute we recognize the rule to be that it is the duty of the courts to reconcile the statute with the constitution, and sustain the law if possible to do so without doing violence to the fundamental law. All doubt must be resolved in favor of the validity of the statute. But the same rule does not obtain in all its force and vigor when passing upon a statute some parts of which have been declared unconstitutional. In such case there is no presumption in favor of the legality of the remaining portion. In *Martin v. Tyler*, 60 N. W. Rep. [N. Dak.], 392, Bartholomew, C. J., in considering the point, said: "It is our duty to sustain statutes in their entirety when possible, and to that end we must indulge all reasonable presumptions in favor of their constitutionality. But, when a statute has been once emasculated, these presumptions no longer obtain in support of the remainder. It should then be manifestly clear that the remaining portion can stand by itself, and that the legislature did not intend that such portion should be controlled and modified in its construction and effect by rejected part. * * * We cannot, in support of a fragmentary statute, indulge a presumption so unreasonable, and must, therefore, hold the entire statute nugatory." In *Skagit County v. Stiles*, 10 Wash., 388, the court used this language: "In determining whether a part of an act can stand where another part has been held unconstitutional, a different rule as to presumptions is recognized from that which obtains where the whole act

is being considered. The general rule that legislative acts are primarily presumed to be constitutional and that all intendments are to be made in favor of the act to give it effect according to the intent of the law-making power, does not apply in such cases, as the upholding of a part of an act is not favored, and where a part has been held unconstitutional and the remaining portion comes up for consideration as to whether it can stand as an independent proposition the presumptions are generally against it, and it will not be sustained unless that which remains is complete in itself and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected."

We having held, in *State v. Tibbets, supra*, the amended section 91 of the act of 1897 unconstitutional, can any portion of the same act stand? It is very evident that the new provisions of section 12 were not an inducement to the legislature to pass Senate File 176; and the new parts are all susceptible of being separated from the remainder of the act; and should these portions of this section claimed to be invalid be rejected and disregarded the act would be just as capable of being enforced as if the entire amendatory section was sustained, or if the new portions thereof had never been adopted. Especially is this true as regards the city of Lincoln, since the amendments to section 12 did not apply to such city, for the reason such municipality did not come within the operation of the charter governing cities of the first class subsequent to the adoption of the amendments of 1897. That Senate File 176 (Session Laws, 1897, ch. 14, p. 139) contains other invalid and also inconsistent provisions is conceded by counsel for respondents, and in speaking of them they aptly say: "The new ideas of the legislature on these subjects seem to be stuffed in as 'amendments,' without regard to relation, fitness of place or relevancy to the section amended, as though shot or stirred like plums in a pudding, lodging wherever they alighted or the motive power impelling

them came to rest." The same counsel argue that while some of the amendments may fall, they are independent of each other, and each must be tested by itself. It is not our purpose to consider at this time each provision of the amendatory act which is assailed by relators. The conclusion reached as to two of the amendatory sections now to be referred to makes it unnecessary to notice every provision of the amendatory act.

Section 13 of the original act, as amended in 1891, provides, *inter alia:* "In cities governed by the provisions of this act each ward shall elect from its residents two (2) councilmen for the term of one and two years respectively, and one annually thereafter for two years. In cities of this class now or hereafter subject to the provisions of this act, whenever, by reason of an increase of wards in such city, any ward shall be without representation it shall be lawful and proper at the next succeeding election to elect two councilmen for each of such wards for the term of one and two years. Officers whose terms are unexpired shall hold their offices for their unexpired terms, and elections shall be made as vacancies occur. There shall also be in each city governed by this act an excise board, consisting of the mayor, who shall be ex-officio member and the chairman thereof, and two members elected by the city at large, who shall hold their offices for two years. The terms of all elective officers shall commence on the Tuesday next after their election and continue until after their successors are elected and qualified," etc.

The foregoing, by the act of 1897, was changed so as to read as follows: "Sec. 13. * * * At the first annual election under the provisions of this act there shall be elected one councilman at large from each ward of such city for the term of one year, and at the expiration of the terms of such councilmen their successors shall be elected for the term of two years, at such annual election. Officers whose terms are unexpired, except councilmen and members of excise board, shall hold their offices for their

unexpired terms, and elections shall be made as vacancies occur. The terms of all elective officers shall commence on Tuesday next after their election and continue until their successors are elected and qualified," etc. (Session Laws, 1897, ch. 14, p. 141, sec. 6.) Among other changes of the original section 13 effected by the amendatory section are: First—The term of councilmen elected in 1897 was reduced from two years to one year. Second—The terms of councilmen elected in 1896 and members of the excise board were terminated. Third—The number of councilmen was reduced one-half. Fourth—Councilmen are required to be chosen by the electors of the entire city. Fifth—It abolishes the excise and police board, by omitting from the new section 13 the provision contained in the original section providing for its creation.

Attention has been challenged to the repeal of section 10 of the old law, which provided for the dividing of the city into wards, and from the fact of such repeal it is argued that ward lines have been effectually destroyed and obliterated, and the authority to create others is taken away, therefore the amended section 13, so far as it requires the election of "one councilman at large from each ward of the city," is inoperative and void. While the power to create or change the wards of a city of the class of Lincoln is withheld by the amendatory section, we are unable to agree with the counsel for relators that the entire system of ward division has been taken away or destroyed, at least as to any city governed by the old act at the time Senate File 176 was adopted. The repeal of section 10 had the effect alone to prevent the creating of other wards or the changing of the boundaries then existing at the date of such repeal. The act of 1897, in at least two sections, recognizes existing wards and ward lines. The section 4 of the amendatory act, which purports to amend section 11 of the old law, declares that precinct lines shall correspond to ward lines in any city governed by the act, and such precinct shall agree in number with the ward of the city and be co-extensive

with the same. And the amended section 13, under consideration, likewise recognizes the existence of wards theretofore established, by requiring the election of "one councilman at large from each ward of such city for the term of one year." We are constrained to hold that while the repeal of said section 10 destroyed or took away the authority to create wards, it did not have the effect to abolish existing wards.

While it is true that by the amended section 13 the terms of office of one-half of the existing councilmen were shortened and terminated, said amendatory section is not invalid for that reason. The precise question was adjudicated in *Douglas County v. Timme*, 32 Neb., 272, where it was distinctly held: "In the absence of any constitutional prohibition or affirmative provision fixing the term of office of any officer, or his compensation, the legislature may change such term or compensation, and such change of term or compensation will apply as well to the officers then in office as to those to be thereafter elected." The same principle applies to the offices of councilmen. The official tenure of such officers is not fixed by the constitution, and hence may be shortened or terminated at the will of the legislature.

As already indicated, this amendatory section 13 wiped out all authority for the creation of an excise and police board in cities governed by the act. Did this have the effect to invalidate either the section or the act of which it forms a part? It is inferable, from what has been said, that the legislature has the undoubted right to abolish an office other than one created by the constitution itself. The law for that purpose must, however, be constitutionally adopted. That is certain. By section 31 of Senate File 176 there was ingrafted into section 91 of the old law, by way of amendment, a clause providing for the creation of a board of fire and police commissioners in each city governed by the act, the appointment of the members of such board by the governor, and defining their duties and powers. This precise provision was

under consideration in *State v. Tibbets*, 52 Neb., 228, and the same was held unconstitutional and void because such provision was not expressed in the title to the act, and not germane to the subject-matter of the original section 91 purported to be amended. The reasons there given for that conclusion need not be restated here. The new subject-matter injected into section 91, relating to the creation of a board of fire and police commissioners, being unconstitutional, the next question to be determined is whether such provision was an inducement to the passage of the amendatory section 13. It is manifest that such clause formed one of the principal inducements for the amendment of section 13. The purpose of the legislature was not to abolish the excise and police board entirely, but rather to change the mode of selection of the members thereof from an election by the qualified voters of the city to an appointment by the governor. It is true the name of the old board is designated in the statute as "excise and police board," and in the new act it is called "board of fire and police commissioners," but this difference in name is an unimportant consideration. All the duties which had theretofore devolved upon the old board, and possibly others, were by the new act cast upon the last named body. The legislature would never have omitted from the amended section 13 the provision in the original section creating an excise board had it not been for the adoption of the new section 91. With the invalid portion of this last named section eliminated therefrom, the entire amendatory act is inoperative, since by the second proviso of section 25, chapter 50, Compiled Statutes, the exclusive power is vested in the excise board of the cities of the first class having more than 25,000 and less than 80,000 inhabitants to license the selling and giving away of intoxicating malt, spirituous, vinous, mixed or fermented liquors in such cities. If the amended section 13 stands, and the invalid portion of the new section 91 is rejected, then there is no board in existence having the power to grant liquor licenses in the city of

Lincoln. It is obvious, from a mere inspection of the act of 1897, that this situation was not within the mind of the legislature when the new section 13 was adopted, but that body contemplated that it had, by the amendatory section 91, made ample provision for the licensing of the liquor traffic. It is very evident that the said amendatory sections 13 and 91 must fall together, since the latter was the consideration for the passage of the former, and hence the original sections have not been superseded, but remain in full force and effect.

It results from this holding that the city council of Lincoln is composed of fourteen members, two from each of the wards of the city. The respondents Geisler and Guthrie were elected as their own successors to the council, and it is patent that in any view of the case a writ of ouster cannot be issued against them. Five of the relators claim to hold over on the ground that their successors have never been elected. The fact that the amended section 13 is invalid does not vitiate the vote cast for the respondents in April last for councilmen. The election was held on the same day prescribed therefor by law, before the attempted amendment of the city charter. The votes were cast for each respondent for the office of councilman, and each received a majority of the votes cast for that office in his ward, excepting the respondent Barth, who obtained a less number of votes in his ward than did William Schroeder, who was his opposing candidate for the same position. It is argued in the brief of relators that the respondents were elected "councilmen at large," which, it is insisted, is not the same office designated in the old law. There is no substantial foundation for this contention. The answer avers that defendants were each elected and duly qualified councilmen of said city, not at large, and the demurrer admits the same to be true. Moreover, the new law did not purport to change the office, but merely the election constituency, by requiring councilmen to be chosen by the voters of the entire city. Such undoubtedly was the office of the words "at

large" in the sense in which they are employed in the amendatory section 13. It is wholly immaterial that respondents may have pursued and recognized the law of 1897, and ignored the old one. Six of them were elected to the city council, a body legally composed of fourteen members, and have duly qualified as such; hence, as against those six, none of the relators can claim the offices as hold-overs. Mr. Barth not having received the majority of the votes cast in his ward for councilman, was not elected. The demurrer to the answer is overruled and the action will be dismissed as to him without prejudice, since his successful competitor for the office, Mr. Schroeder, is not a party to the suit, nor does it appear that he has failed to qualify. As to the other respondents, the

WRIT IS DENIED.

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CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLEE, V. JACOB KLEIN, TREASURER OF GAGE COUNTY, APPELLANT.

FILED JUNE 26, 1897. No. 9160.

1. Counties: TAXATION: LIMITATION. The meaning of section 5, article 9, of the constitution is that county authorities, except for the special reasons mentioned in said section, shall never assess taxes for county purposes in excess of 15 mills upon the dollar.

2. ———: TOWNSHIPS: TAXATION. A township in a county under township organization is an independent corporate entity,—a municipal corporation,—within the meaning of section 6, article 9, of the constitution, its existence authorized by that instrument and clothed by law with power to assess taxes upon property within its jurisdiction for such purposes as the legislature has declared to be township purposes.

3. ———: ———: ———. What is a township purpose, and what taxes may be assessed therefor, and by whom assessed, are matters for determination by the legislature.

4. Taxation: ASSESSMENT AND LEVY. To assess a tax is to adjudge and determine what proportion of his property the taxpayer shall

contribute to the public. To levy a tax is to make a record of this determination and to extend the assessment against the taxpayer's property.

5. ———: ———: COUNTIES. In counties under township organization the board of supervisors may assess taxes upon all taxable property in the county for county purposes, and the electors of the township in which such property is situate may also assess such property for township purposes; and although the aggregate taxes so assessed exceed 15 mills on the dollar, such excess is not void for that reason, although the taxes so assessed were not for the payment of a debt existing at the adoption of the constitution of 1875, nor for a purpose authorized by a vote of the people of such county.

APPEAL from the district court of Gage county. Heard below before STULL, J. *Reversed.*

*Samuel Rinaker, R. W. Sabin,* and *R. S. Bibb,* for appellant.

References: *Wabash, St. L. & P. R. Co. v. McCleave,* 108 Ill., 368; *Van Horn v. State,* 46 Neb., 62; *State v. Douglas County,* 47 Neb., 428; *Macon County v. Huidekoper,* 134 U. S., 332; *State v. Missouri P. R. Co.,* 27 S. W. Rep. [Mo.], 367; *State v. Dodge County,* 8 Neb., 125; *Curry v. District Township of Sioux City,* 17 N. W. Rep. [Ia.], 191; *Wright v. Wabash, St. L. & P. R. Co.,* 12 N. E. Rep. [Ill.], 240; *Turner v. Althaus,* 6 Neb., 54; *Pleuler v. State,* 11 Neb., 547; *Hills v. City of Chicago,* 60 Ill., 90; *Newell v. People,* 7 N. Y., 97; *Gibbons v. Ogden,* 9 Wheat. [U. S.], 188; *Hamilton v. St. Louis County Court,* 15 Mo., 3; *Salt Creek Township v. King Iron Bridge Co.,* 33 Pac. Rep. [Kan.], 303; *Coutant v. People,* 11 Wend. [N. Y.], 511; *Moers v. City of Reading,* 21 Pa. St., 188; *Lane v. Dorman,* 3 Scam. [Ill.], 238.

*Charles F. Manderson, E. R. Duffie, J. W. Deweese, James E. Kelby,* and *A. Hazlett, contra.*

References: *People v. Blodgett,* 13 Mich., 127; *Scott v. Sanford,* 19 How. [U. S.], 393; *Morgan v. Cree,* 46 Vt., 787; *Morton v. Peck,* 3 Wis., 714; *State v. City of Milwaukee,* 20 Wis., 87; *Watertown v. Cady,* 20 Wis., 502; *Crane v. City of*

*Fond du Lac*, 16 Wis., 196; *State v. Missouri P. R. Co.*, 27 S. W. Rep. [Mo.], 367; *State v. County Commissioners*, 47 Neb., 428; *City of Wahoo v. Reeder*, 27 Neb., 770; *City of Chicago v. Larned*, 34 Ill., 203.

RAGAN, C.

In the year 1896, and for some years prior thereto, Gage county was under township organization. In said year the Chicago, Burlington & Quincy Railroad Company owned certain property and lines of railway situate in certain townships of said county. In said year the electors of said townships, at their annual township meetings provided for by law, assessed for township purposes certain taxes upon the property of the railway company situate in said townships. The aggregate of these taxes did not exceed 7 mills on the dollar, the amount which the law allowed said electors to assess upon property in their townships for township purposes. In the same year the board of supervisors of Gage county assessed the property of the railway company in said townships for county purposes. The aggregate assessment made by the county board did not exceed 15 mills on the dollar. However, the aggregate assessment made by the electors of the townships and the supervisors of the county exceeded 15 mills on the dollar, and the railway company instituted this proceeding against the county treasurer of Gage county to enjoin him from collecting the excess of such taxes over 15 mills on the dollar, on the ground that such excess was void. The railway company had a decree as prayed in the district court of Gage county, and the treasurer has appealed.

1. The record before us does not disclose that the taxes assessed by the electors of the townships against the appellee's property exceeded the legal limit of 7 mills upon the dollar, nor is it suggested that any of said taxes so assessed by the township electors were for an illegal or an unauthorized purpose; nor does the record disclose

that the assessment made upon the appellee's property by the board of supervisors of Gage county for county purposes exceeded the legal and constitutional limit of 15 mills upon the dollar; nor is it suggested, either in the record or the argument, that any of the taxes assessed by the board of supervisors of said county were assessed for an illegal or unauthorized purpose. Since by the statutes of the state the electors of the townships of counties under township organization are authorized to assess taxes upon the property in their townships to the extent of 7 mills upon the dollar, and not prohibited from so doing by the constitution, and since the board of supervisors of counties under township organization are authorized to assess taxes upon all the taxable property of the county for county purposes to the extent of 15 mills upon the dollar, we might reverse this decree and dismiss this proceeding because the appellee has not pointed out the illegality of any particular tax assessed by the board of supervisors or the townships; but the question involved is too important to be decided upon a technicality. The theory of the appellee, and presumably the theory upon which the district court based its decree, is that township organization was unknown in this state at the time of the adoption of the constitution of 1875; that at that time the fiscal affairs of the counties of the state were managed by a board of commissioners, who assessed all taxes for all public purposes, except state, school district, city, and village; and that the framers of the constitution of 1875, by the adoption of section 5, article 9, of that instrument, intended that the aggregate taxes assessed upon property for all purposes, except state, school district, city, and village, should never exceed 15 mills upon the dollar, whether the county was under township organization or not; that prior to the adoption of the constitution the taxes now assessed by townships for road, bridge, and other township purposes, were assessed by the county commissioners for county purposes; that the taxes now assessed by townships on the property therein

for township purposes are in truth and in fact for county purposes; and that therefore the taxes assessed by said townships when added to the taxes assessed by the board of supervisors cannot exceed 15 mills upon the dollar, except they be assessed for the purpose of paying an indebtedness existing at the time of the adoption of the constitution of 1875, or for a purpose authorized by a vote of the people of such county.

The justness of this argument appeals with great force to this court; and it would afford us pleasure to be able to adopt this construction of the constitution, as the writer at least is persuaded that one of the crying evils of the times is the legal confiscation of the citizens' property under the name or guise of taxation. But we are not at liberty to adopt this construction. Both upon principle and authority we think the construction erroneous. Section 5, article 9, of the constitution provides: "County authorities shall never assess taxes the aggregate of which shall exceed one and one-half dollars per one hundred dollars valuation, except for the payment of indebtedness existing at the adoption of this constitution, unless authorized by a vote of the people of the county." Section 6 of said article is as follows: "The legislature may vest the corporate authorities of cities, towns, and villages with power to make local improvements by special assessment or by special taxation of property benefited. For all other corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes, but such taxes shall be uniform in respect to persons and property within the jurisdiction of the body imposing the same." Section 5, article 10, of the constitution is as follows: "The legislature shall provide by general law for township organization, under which any county may organize whenever a majority of the legal voters of such county voting at any general election shall so determine," etc.

Looking to all these provisions we think the framers of that instrument committed to the legislature the

power to adopt one of two systems of county government,—either to commit the management of the fiscal and other affairs of a county to some board, person, or tribunal, which should determine and assess the taxes necessary for the carrying on of the county government, in which event the taxes so assessed should not exceed 15 mills upon the dollar, or that the legislature should by law prescribe a system of township organization by which the affairs of the various townships of a county should be managed by the electors thereof, or some board or tribunal prescribed by law, and that these townships so constituted should assess such taxes upon the property therein for township purposes as they might see fit,—keeping within the limits prescribed by the legislature; that it was perfectly competent for the legislature in devising a scheme of township government to divide between a board of supervisors of a county having township organization, and the townships thereof, the performance of the duties,—the assessing and collecting of taxes,—which prior to the adoption of the constitution devolved entirely upon the board or tribunal invested with the management of the affairs of the county.

Counsel for the appellee insist, with much force, it must be confessed, that it was not the intention of the framers of the constitution to permit counties under township organization to assess taxes to a greater extent for what are in fact county purposes than such a county could have lawfully assessed had not the county adopted township organization. On the contrary, we think this very contingency was in the mind of the framers of the constitution. They knew, and must have known, that the government of a county under township organization might be more expensive than one governed by a board of county commissioners. They also knew that many of the people of this commonwealth are advocates of township government, on the theory that the power which administers their affairs and which assesses the taxes upon their property is nearer and more easily controlled by them

under township organization. Indeed the system of township organization, or the direct government of the affairs of a township by the inhabitants thereof, is the oldest form of democracy known to the Aryan race; and this system of government was styled by Thomas Jefferson as "the wisest invention ever devised by the wit of man for the perfect exercise of self-government and for its preservation." (3 Bryce, American Commonwealth [3d ed.], p. 595.) At the time the present constitution was adopted certain state officers, styled the "state board of equalization," assessed taxes upon all the property of the state for state purposes. The officers of the various school districts of the state assessed taxes upon the property in their jurisdiction for school purposes. City and village authorities assessed taxes upon the property in their respective municipalities for their own purposes, and the county authorities assessed taxes upon the property in the county for county purposes. The constitution of 1875 did not change this method of assessing taxes. It did not forbid its continuance and the system is in force at the present time. We think that the limitation found in section 5, article 9, of the constitution is that county authorities shall never assess taxes for county purposes in excess of 15 mills upon the dollar; and that a township in a county under township organization is a municipal corporation within the meaning of section 6, article 9; and the legislature is clothed with authority by the constitution to authorize such township to assess such taxes upon the property therein for township purposes as it may deem expedient; that the board of supervisors of counties under township organization have no authority, as the law now exists, to assess taxes for township purposes any more than they have authority to assess taxes for school district, city, village, or state purposes. What is a township, and what a county, purpose, is a matter for the legislature. How much tax and by whom it may be assessed for township purposes is a matter for the legislature. In the case at bar it appears that

the township electors assessed the taxes complained of for township purposes in accordance with the statutes in force. They were properly certified to the county clerk of Gage county according to the statute in force, and these taxes were then levied by the board of supervisors —practically by the clerk of the county—upon the property in the townships; but the legislature has not seen fit to confer upon boards of supervisors the power to assess taxes for township purposes. To assess a tax is to adjudge and determine what proportion of his property the taxpayer shall contribute to the public. To levy a tax is to make a record of this determination, and to extend the assessment against the taxpayer's property. The constitution gives to county authorities the power to assess taxes only for county purposes. No statute of this state confers or attempts to confer upon townships, in counties under township organization, authority to assess a tax for anything but a township purpose. In other words, a township in counties under township organization is an independent corporate entity, authorized by the constitution and vested by the legislature with power to assess taxes upon all the property therein for such purpose as the legislature has declared to be township purposes. If we assume that the taxes in controversy here were levied by the board of supervisors of Gage county in pursuance of section 77 of the revenue law of the state, and that such taxes exceed 15 mills upon the dollar valuation, it does not follow that the excess over 15 mills is void, because the command of the constitution is not that the county authorities shall not levy taxes in excess of 15 mills upon the dollar, but that they shall not assess such taxes. These views find support in *Wabash, St. L. & P. R. Co. v. McCleave*, 108 Ill., 368. This was a case strikingly like the one at bar, and in said case the supreme court of Illinois construed section 8, article 9, of their constitution, which is identical with section 5, article 9, of the constitution of this state, except in the Illinois constitution the limit of taxes which may be as-

sessed by the county authorities is 75 cents on $100 and in ours it is $1.50 upon $100. This case was followed and reaffirmed in *Wright v. Wabash, St. L. & P. R. Co.*, 12 N. E. Rep. [Ill.], 240. To the same effect see *Macon County v. Huidekoper*, 134 U. S., 332, in which a provision of the constitution of the state of Missouri similar to section 5, article 9, of our constitution was examined by the supreme court of the United States and the same construction placed thereon that was reached by the supreme court of Illinois in the cases just cited. It is true that the supreme court of the state of Missouri, in *State v. Missouri P. R. Co.*, 27 S. W. Rep., 367, has placed a different construction upon their constitution from the construction placed thereon by the supreme court of the United States. And since the constitutions of Illinois, Missouri, and Nebraska are similar, in respect to the matter under consideration here, the supreme court of Missouri has placed a different construction upon the language of the Illinois and Nebraska constitutions from that placed thereon by the supreme court of Illinois. But since this provision of our constitution was copied from that of Illinois, and since the supreme court of that state has construed the section of the constitution under consideration, if we were governed entirely in this case by precedent we should cheerfully follow the construction placed on the constitution by the supreme court of Illinois. As already stated, the appellee's contention is that the framers of our constitution and the people who adopted it understood and intended that all taxes to be levied by townships in counties under township organization were county taxes and included in the limitation of 15 mills upon the dollar which county authorities were then authorized to assess.

One other argument of appellee in support of this contention deserves consideration. It is said that section 5, article 10, of the Illinois constitution of 1870, from which section 5, article 10, of our constitution was copied, contained a provision which was omitted from our consti-

tution and that provision is as follows, commencing after the word "determine," found in section 5, article 10, of our constitution: "And whenever any county shall adopt township organization so much of this constitution as provides for the management of the fiscal concerns of the said county by the board of county commissioners may be dispensed with and the affairs of said county may be transacted in such manner as the general assembly may provide." It is said that the reason why this provision of the Illinois constitution was omitted from ours is: "When our constitution was adopted the whole taxing power was vested in the county authorities. The constitution limited the levy which these authorities were authorized to make, and that no possible scheme might be devised to evade the imposed limit, the taxing power was continued in the county authorities on whom the limit was fixed, and the Illinois plan of allowing the legislature to formulate some other scheme of conducting the affairs of the county, on the adoption of township organization, was rejected and repudiated. The taxing power was to continue where it had always been, so that no question could ever be raised as to the application of the limitation imposed by the constitution." Plausible as this argument seems, it is not tenable. It is true that the provisions of our constitution under consideration here were all taken from the Illinois constitution of 1870. But the first constitution of the state of Illinois, adopted in the year 1818, contains no reference whatever to any such a thing as township organization, nor did it provide or prescribe anything in reference to the government or fiscal management of the affairs of the counties of the state. The Illinois constitution of 1848 committed the management of the fiscal and other affairs of the counties to a county court, consisting of a county judge and one or more justices of the peace. Sections 17, 18, and 19, article 5, of the constitution of the state of Illinois of 1848, and section 6 of article 7 of said constitution, after providing that the general assembly should provide by

law for township organization, declared that when any county should adopt township organization that "so much of this constitution as provides for the management of the fiscal concerns of the said county by the county court may be dispensed with and the affairs of said county may be transacted in such manner as the general assembly may provide." The Illinois constitution of 1870, article 10, section 6, commits the management of the fiscal and other affairs of counties not under township organization to three officers, styled "the board of county commissioners," and section 5 of said article provided that the legislature should by general law provide for township organization, and then declared that "so much of this constitution as provides for the management of the fiscal concerns of the said county by the board of county commissioners may be dispensed with and the affairs of such county may be transacted in such manner as the general assembly may provide." It will thus be seen that it was necessary for the framers of the Illinois constitution of 1870 to retain therein that part of article 5, section 10 thereof, which was omitted from our constitution. Otherwise the constitution itself would have left the subject of county government in cases where counties had adopted township organization ambiguous; but there was no necessity for copying the provision alluded to into section 5, article 10, of our constitution, because section 4 of said article provided: "The legislature shall provide by law for the election of such county and township officers as may be necessary." In other words, it was necessary for the framers of the Illinois constitution of 1870 to make some provision for the management of counties that might adopt township organization, because, as the constitution of 1848 then stood, the affairs of counties as then managed were to be managed by a board of commissioners. But when the present constitution of Nebraska was adopted the constitution of 1866 was in force, and that did not prescribe or attempt to prescribe by whom the fiscal and other affairs

of counties should be managed. That matter was by that constitution left to the legislature, and the constitution of 1875 has still left it to the legislature to determine by whom the fiscal and other affairs of all counties shall be managed and conducted.

We conclude, therefore, that in counties under township organization the board of supervisors may assess taxes upon all the taxable property in the county for county purposes, and the electors of the various townships may assess taxes for township purposes upon all the property in the townships; and that, although the aggregate of the taxes so assessed exceeds 15 mills upon the dollar valuation, such excess is not for that reason void, even though the taxes so assessed were not for the payment of a debt existing at the adoption of the constitution of 1875, nor for a purpose authorized by a vote of the people of such county. The decree of the district court is reversed and the action dismissed.

REVERSED AND DISMISSED.

# CASES

## ARGUED AND DETERMINED

IN THE

# SUPREME COURT OF NEBRASKA.

## SEPTEMBER TERM, A. D. 1897.

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PRESENT:

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

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## W. H. LEARN ET AL. V. R. A. UPSTILL.

FILED SEPTEMBER 22, 1897. No. 7379.

1. **Principal and Agent.** One who, as agent, assumes to represent a principal who has no legal existence or status, is himself liable.
2. **Statute of Frauds:** ORIGINAL PROMISE TO PAY FOR IMPROVEMENTS. *Held*, That the contract declared on is not a conditional one to answer for the debt of another, but an original undertaking.
3. **Improvement of Highway:** ACTION FOR LABOR AND MATERIALS: JUDGMENT FOR PLAINTIFF. Damages *held* not excessive.
4. **Principal and Agent:** EVIDENCE OF AGENCY. Evidence examined, and *held* not to sustain the verdict as to the defendant Kyner.

ERROR from the district court of Brown county. Tried below before BARTOW, J. *Affirmed in part.*

*J. S. Davisson* and *Munger & Courtright*, for plaintiffs in error.

*P. D. McAndrew* and *L. K. Alder*, *contra*.

NORVAL, J.

This action was instituted by R. A. Upstill against W. H. Learn and others to recover for labor performed and materials furnished by plaintiff in the opening and improvement of a public highway. A verdict was returned for plaintiff below for $427.92, and from the judgment rendered thereon the defendants have prosecuted separate petitions in error.

The petition in the court below alleges that "on or about the 8th day of January, 1892, at a public meeting of the citizens of the village of Long Pine, Nebraska, the defendants were appointed and constituted a committee by said public meeting to open and improve a certain public road leading from the Niobrara river to the said village of Long Pine, and to hire workmen to saw lumber to build bridges, to haul lumber and to work and grade said road, put the same in good repair for travel, and to furnish all necessary material therefor; that the defendants, on or about said date, employed this plaintiff to labor on said road, to saw lumber for bridges and to build bridges, and to haul lumber for that purpose and to furnish material therefor, and individually guarantied the pay of this plaintiff for doing said work and furnishing said material, and as individuals promised to see him paid therefor, and agreed that this plaintiff should have the sum of $22.50 for each one thousand feet of lumber sawed and furnished by him, and agreed to pay him the sum of $25 for building each bridge and to pay him reasonable prices for all other work and material done and furnished by him; that this plaintiff did labor on said road, build bridges, and furnish material therefor in fulfillment of said contract verbally entered into with said defendant, as specified in the following

schedule: * * * That the defendants, by their chairman, said W. H. Learn, did oversee and superintend said work, and from time to time between the 8th day of January, 1892, and August 26, 1893, did direct this plaintiff where to build said bridges, saw said lumber, where to grade said roads, build culverts, and how and where to procure said material, and that this plaintiff worked, labored, and furnished said material according to the directions of said W. H. Learn; that no part of the said debt has been paid except the following items: * * * Making a total credit of $263.30, and leaving as balance due this plaintiff in the sum of $424.65; that the charges made for the several items herein are the reasonable and fair values thereof." The answer of the defendants was a general denial.

At the beginning of the trial defendants objected to the introduction of any evidence, because the petition did not state a cause of action. The overruling of this objection is the first matter urged upon our attention, it being insisted that plaintiff's action is grounded upon a verbal contract to answer for the debt of another, and therefore within the statute of frauds and void. The petition does not purport to declare upon a contract or undertaking to pay the debt of another, but upon the direct and unconditional promise of the defendants alone. While the pleading uses the words "individually guarantied the pay of this plaintiff," from the employment of which, standing alone, a conditional undertaking might be inferred, the other averments make it perfectly plain that a recovery was sought against the defendants upon their original individual undertaking, and not upon a mere collateral promise. The pleading charges that the defendants were appointed a committee by a public meeting of citizens of Long Pine to cause the public highway to be opened and improved. The defendants then, in that view, were the agents of a principal which had no legal existence or responsibility, and the petition discloses that they pledged their own individual responsibility, and that the

credit was given to them personally and not to their irresponsible principal. This being true, a cause of action is stated against them.

In *Eichbaum v. Irons*, 6 W. & S. [Pa.], 67, the members of a committee appointed by a political meeting for that purpose ordered a free public dinner for the party, and it was held that the members were personally liable. Chief Justice Gibson, in delivering the opinion of the court, observed: "Now it will not be pretended that nobody was responsible to the plaintiff for the order; and if the defendants were not, who else was? Were they to be viewed as the agents of a club, we would have something palpable to deal with. The question would be, whether they had become personally liable by having exceeded their authority, or whether they had not contracted on the credit of their constituents. But a club is a definite association, organized for indefinite existence; not an ephemeral meeting, for a particular occasion, to be lost in the crowd at its dissolution. It would be unreasonable to presume that the plaintiff agreed to trust to a responsibility so desperate, or furnish a dinner on the credit of a meeting which had vanished into nothing. It was already defunct; and we are not to imagine that the plaintiff consented to look to a body which had lost its individuality by the dispersion of its members in the general mass. * * * In a case like this, the usual presumption of credit is inverted; and, in the absence of evidence to the contrary, the vendor is supposed to have relied on the responsibility of the persons who gave the order."

In *Lewis v. Tilton*, 64 Ia., 220, the court, in construing a case with somewhat analogous facts, use this language: "But it is said, these defendants did not contract. They certainly represented that they had a principal for whom they had authority to contract. They, for or on behalf of an alleged principal, contracted that such principal would do and perform certain things. As we have said, there is no principal, and it seems to us that the defendants should

be held liable, and that it is immaterial whether they be so held, because they held themselves out as agents for a principal that had no existence, or on the ground that they must, under the contract, be regarded as principals, for the simple reason that there is no other principal in existence." The same doctrine is recognized in Mechem, Agency, sec. 557; *Blakely v. Bennecker*, 59 Mo., 193; *Steele v. McElroy*, 1 Sneed [Tenn.], 341; *Winona Lumber Co. v. Church*, 62 N. W. Rep. [S. D.], 107, and cases cited. See, also, *Lindsey v. Heaton*, 27 Neb., 662.

There was evidence before the jury tending to sustain the averments of the petition, and that credit alone was given by plaintiff to the defendants, and also testimony from which the inference might be drawn that the defendants did not undertake to be bound beyond the amount which should be collected from the citizens of Long Pine. The evidence, while conflicting, was sufficient to sustain the averments of the petition as to all the defendants, excepting Mr. Kyner. He and plaintiff were enemies of long standing. They never had any conversation upon the subject of the contract, or with reference to the furnishing of any labor or materials thereunder. His co-defendants were not shown to have been authorized to act for him, although Upstill testified substantially that Learn claimed authority to represent Kyner. But agency cannot be proven by the declaration of one assuming to act as such. (*Burke v. Frye*, 44 Neb., 223.)

Complaint is made of the ruling of the court below in permitting plaintiff, on rebuttal, to prove the contents of a subscription paper, and refusing to strike the testimony out of the record. While we do not think sufficient foundation had been laid for secondary evidence of what the paper contained, we are clearly of the opinion that the testimony objected to could not have prejudiced the defendants, or either of them. The answer of the witness was: "The paper stated that there was a committee organized, and in that paper the names of Mr. Bull and Kyner and Shavers were mentioned and for the purpose of

making a road from the mouth of Pine creek to the top of Mike Kernan's hill." Substantially the same fact was established by other testimony without objection; hence no prejudicial error.

The contention that the verdict is excessive is without merit, in view of the following admissions appearing on pages 15 and 16 of the bill of exceptions:

"Mr. Courtright: For the purposes of saving time defendants concede there is no dispute over the quantity of the material or the value of the price charged, except as to the price for the lumber. That we dispute.

"Mr. Alder: Then you admit the amounts of the labor done and the reasonableness of the price charged?

"Mr. Courtright: Yes.

"Mr. Alder: And you also admit the amounts of the balances to be correct?

"Mr. Courtright: Yes, except as to the price of lumber, and Mr. Learn suggests perhaps there is some dispute as to the payments.

"Court: There was nothing said about the payments in the admission.

"Mr. Courtright: Of course we deny any liability at all. And defendants now concede that there is no dispute as to the price of the lumber."

By the foregoing every issue for the jury to pass upon was eliminated, excepting the single one whether the defendants were liable upon the contract. If the jury found by the evdence that they were so bound, plaintiff was entitled to a verdict for the full amount claimed, and nothing less. The damages are not excessive, and the evidence sustains the judgment as to the defendants Learn and Shavers.

Complaint is made of the giving of the following instruction:

"2. You are instructed that the burden of proof in this case rests upon the plaintiff, to prove by a preponderance of the evidence all the material allegations of his petition. The material allegations in this case are: (1) The employ-

ment of the plaintiff by the defendants, or one or more of them, as a committee, or as individuals, to do the work and furnish the materials as charged in the petition; (2) the doing of the work and furnishing of the materials by the plaintiff in pursuance of the employment; (3) the reasonableness and fairness of the prices charged for the work and materials, about which in this case there is no dispute, the defendants having admitted these facts; and (4) the amount remaining due and unpaid for the work and material."

It is argued that the foregoing is erroneous, in that it omitted to submit to the jury the following material issues: Whether the defendants acted in a representative capacity in making the contract, and did they guaranty the pay? The petition tendered no such issue. As already stated, the action is not upon a contract of guaranty, but an original promise. The only thing for the jury to determine to justify a verdict for the plaintiff was: First, that he was employed by one or more of the defendants; second, that he performed the work and furnished the material in question; third, the value thereof; and fourth, the amount remaining unpaid. These points were all fully and fairly submitted to the jury. It is also urged that this instruction is faulty because it implies that the employment by one of the defendants would bind them all. This is an unfair criticism of the language. The fact that the jury were told that one of the material issues was whether the contract was made by the defendant or one or more of them, did not authorize a finding against all of the defendants if the evidence showed the contract was made by one of them alone. The jury must have so understood the instruction, when considered in connection with the fifth paragraph of the charge, which was in the language following: "If the jury believe from all the evidence that any one, or more, of the defendants promised the plaintiff that they would be individually responsible to plaintiff for the payment of the work and materials sued for, and that, relying upon such individual promise, or guaranty,

the plaintiff performed the work and furnished the material as set out in the petition, and if the jury should find such individual promise to be established by a preponderance of all the evidence on that subject, then you might find for the plaintiff against the one, or more, of said defendants, whom you should find made such promise, if you find any such promise or guaranty was made." The rule is that instructions are to be construed together and not separately, and if, when so considered, the issues are fairly submitted, it will suffice. Applying this principle to the second and fifth paragraphs of this charge, it was made plain to the jury that a recovery could be had against such of the defendants alone as the evidence disclosed made the contract with the plaintiff. No inference can be fairly drawn from the instructions that if one of the defendants was bound, all of them were likewise liable.

The eighth instruction it is insisted is misleading. We do not think so. It is made clear if the defendants only promised to be responsible for the sum collected from the citizens on the subscription lists, then the defendants were entitled to the verdict. The instructions, as a whole, were eminently fair. The judgment as to Kyner is reversed, and affirmed as to the other defendants.

JUDGMENT ACCORDINGLY.

HARRISON, J., not sitting.

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GEORGE A. BENNETT ET AL. V. CHARLES C. MCDONALD.

FILED SEPTEMBER 22, 1897. No. 7336.

1. **Instructions**: RECORD FOR REVIEW. Instructions to the jury, whether given or refused, when filed in a cause, are a part of the record and need not be embodied in a bill of exceptions.

2. ———: EXCEPTIONS. An exception to an instruction is sufficiently

preserved by the trial court noting the fact on the margin of such instruction.

3. ——: ——. Exception to instructions as a whole is insufficient unless each paragraph is erroneous.

4. **Rulings on Evidence:** EXCEPTIONS. Error cannot be successfully assigned upon the admission or exclusion of evidence, where no exception was taken to the ruling at the time it was made.

5. **Witnesses:** CROSS-EXAMINATION: FRAUDULENT CONVEYANCES. A failing debtor conveyed his property to his father-in-law, and the latter was examined as a witness in his own behalf, in a suit which he brought against the sheriff, who had seized the property under execution in favor of the creditor of the vendor. *Held*, That the cross-examination of the witness was too restricted.

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

*Hall, McCulloch & Clarkson*, for plaintiffs in error.

*W. W. Morsman, contra.*

NORVAL, J.

This action was brought by Charles C. McDonald upon the official bond of George A. Bennett, late sheriff of Douglas county, for the conversion by the latter of a stock of lumber and other personal property. Plaintiff claims the property under and by virtue of two bills of sale executed by W. L. Irish, who was the former owner of all, or the greater portion, of the chattels. The defendant sheriff seized said property under an attachment issued in favor of Charles L. Chaffee and against the said Irish. The amended answer of the defendants denies the conversion, admits the official character of the defendant Bennett, the execution of the bond, and the levy of the attachment, and avers "that the said plaintiff is the father-in-law of the said W. L. Irish; that at the time of the levy of the said writ the said Irish was insolvent, and that he had transferred, or pretended to transfer, all his property used in his said business, and all his property to which his creditors would look for payment of their debts, to the said McDonald under and by virtue of certain bills of sale,

through and under which the plaintiff claims; that the said defendant in levying said attachment writ did so for one C. L. Chaffee, who was a creditor of the said W. L. Irish, and that the said C. L. Chaffee has recovered a judgment therein and that, after the sale and application of the property taken under this writ in attachment, there is still due to the said C. L. Chaffee the sum of over $2,000; and that the instruments under which said plaintiff claims are fraudulent and void as against the said attachment creditor, C. L. Chaffee, * * * and were made to hinder and delay him in the collection of his debts, and were without consideration." The reply was substantially a general denial. The trial resulted in a verdict for the plaintiff, and to reverse the judgment entered thereon these proceedings are brought by the defendants.

The assignments of error may be grouped in three classes: (1) The giving and refusal of instructions; (2) the rulings upon the reception and exclusion of testimony; (3) the sufficiency of the evidence to support the verdict and judgment.

It is contended by counsel for plaintiff below that this court cannot review the charge to the jury, or consider any assignment of error based thereon, because the instructions given are not embodied in the bill of exceptions. A like question was determined in *Blumer v. Bennett*, 44 Neb., 873, wherein it was ruled that instructions given, as well as refused, on being filed become a part of the record and should not be incorporated in the bill of exceptions; furthermore, that exceptions to instructions are properly preserved by the notation of such exceptions on the margin of the instructions. Each request of the defendants to charge, which was not given, contains the following memorandum on the margin thereof: "Refused. Deft. excepts. J. H. Blair, Judge." This complied with the decision in *Blumer v. Bennett, supra*, and properly preserved the exceptions taken to the court's refusal to give the instructions asked by defendants. The only exception to the instructions given by the court on its own

motion was taken by the defendants' counsel filing in the office of the clerk of the trial court a paper signed by them on which it is stated that they except to certain numbered paragraphs of the charge. It is argued that this is not a sufficient evidence of the fact that exceptions were taken. Whether this contention is well founded or not we shall not pause to consider, since the exception was taken *en masse* to ten separately numbered paragraphs of the instructions containing as many distinct propositions. This was too general to be available on review unless each paragraph was erroneous, and no claim is made in this court that they were all bad. (*Union P. R. Co. v. Montgomery*, 49 Neb., 429.) Moreover, the instructions given were grouped in a single assignment in the motion for a new trial, and those refused were in like manner assigned therein for error; and, one or more in each group being free from error, the others included therein cannot be reviewed.

Some of the rulings of the court below on the admission and exclusion of testimony were not excepted to at the time. Therefore the errors committed in such rulings are waived, and not available here.

Charles C. McDonald, plaintiff below, was a witness in his own behalf. He testified, among other things, to the purchase of the property in dispute from his son-in-law Willett L. Irish, the execution and delivery of the bills of sale under which plaintiff claims title, to his acquiring possession of the chattels thereunder, and to having caused a written inventory to be taken recently before the levy of the attachment by the defendant Bennett. This invoice was introduced in evidence over the objection and exception of defendants without any showing that it correctly or truly described the different items of property or their values. It is not pretended that plaintiff had any part in making this invoice, or that he was present when it was taken. The persons who made the same had not been called to testify to its correctness. It requires no argument to show that the inventory

should not have been received, but probably the ruling was not reversible error, since, by agreement of the parties, it was not read to the jury. On cross-examination of plaintiff there was propounded to him by counsel for defendants the following question: "While the indebtedness of $2,000 might either be to your wife or to yourself, it cut no figure as between you, did it?" The question was objected to as immaterial and not cross-examination, which was sustained by the court, and the witness was not permitted to answer the interrogatory. This ruling is now assailed, and we think justly so. It was within the bounds of a proper cross-examination. Plaintiff had already testified to the consideration for the bills of sale, a portion of which he stated was $2,000 he had loaned for his wife to Mr. Irish a long time before and had taken a note therefor in her own name and that she had turned the note over to plaintiff. The defendants assailed the transfers, claiming that they were without consideration and made for the purpose of defrauding the creditors of the vendor. On cross-examination it was competent for the defendants to go fully into the question of consideration, for the purpose of showing, if possible, whether the transaction was colorable. Fraud being charged, much latitude should have been given upon cross-examination, especially in view of the relationship existing between the parties. The cross-examination of plaintiff in this and other respects disclosed by the record was too much restricted for the ascertainment of the entire truth of the transaction. (*Lane v. Starkey*, 15 Neb., 290.) We are also persuaded that plaintiff was allowed to introduce hearsay evidence, the questions eliciting the same being indicated on page 19 of briefs of defendants below.

The conclusion reached makes it unnecessary to consider the sufficiency of the evidence to support the findings. The judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

HARRISON, J., not sitting.

## ART ELIZA ALEXANDER V. JOHN OVERTON ET AL.

FILED SEPTEMBER 22, 1897. No. 8125.

1. **Taxation: ACTION FOR WRONGFUL SALE OF REALTY: PARTIES.** An action against a county treasurer and his sureties for the wrongful sale of property for taxes is properly brought in the name of the person to whom the certificates of tax sale and treasurer's deed were issued and the money invested belonged.
2. **Parties: TRANSFER OF PLAINTIFF'S INTEREST.** Where the interest of a plaintiff is transferred to another during the pendency of the cause, the suit may be prosecuted to its termination in the name of the original plaintiff, or the transferee may be substituted as plaintiff.

ERROR from the district court of Otoe county. Tried below before CHAPMAN, J. *Reversed.*

*C. W. Seymour*, for plaintiff in error.

*John C. Watson* and *John W. Dixon, contra.*

NORVAL, J.

This is the second appearance of this cause in this court. (*Alexander v. Overton*, 36 Neb., 503.) The action was brought under section 71, chapter 66, General Statutes, 1873, against the principal and sureties on the official bond of John Overton, as treasurer of Otoe county, to recover for the wrongful sale by him to plaintiff of certain real estate for taxes. The sole defense relied upon is that plaintiff is not the real party in interest. On the last as well as the first trial in the court below this issue was determined in favor of the defendants. On the former hearing in this court a reversal of the judgment was entered for want of sufficient evidence to sustain the said defense. In the opinion then filed it was held that plaintiff could maintain it, since it was proven that the lands were purchased from defendant Overton at tax sale in the name of plaintiff with moneys purporting to belong to her. On the last trial it was likewise estab-

lished by undisputed testimony that the lands in controversy were purchased for plaintiff by her brother W. D. Merriam; that he paid the money for her on the several sales to the defendant Overton, and that the latter made the certificates and tax deeds to plaintiff. These facts justified the bringing of the suit in her name when the same was instituted, no assignment of the causes of action at or prior to that time having been shown.

John A. Rooney, an attorney at law, in the office of John C. Watson, counsel for defendant, testified on the second trial that on his return from a business trip east, at the request of Mr. Watson he called upon plaintiff at her home in Sigourney, Iowa, and had a conversation with her, in which she stated she was a sister of W. D. Merriam; that she was not interested in any suits pending in the district court of Otoe county under the title of Art Eliza Alexander against John Overton; and that she possessed no money of her own. This testimony was wholly insufficient to defeat the action, and is easily reconciled with the evidence adduced on behalf of the plaintiff. W. D. Merriam testified, and his testimony is uncontradicted, that he bought the lots at tax sale from Mr. Overton for plaintiff, Mrs. Alexander, with her money and in her name; that he had no interest in the purchases; and that in January, 1894, since the commencement of this action and prior to the said conversation which Mr. Rooney had with plaintiff, Mr. Merriam purchased all of his sister's interest in this suit. The assignment was introduced in evidence, and is found in the bill of exceptions. While Mrs. Alexander did not in fact have any interest in the litigation at the time she conversed with Mr. Rooney, she was the real party in interest at the time the suit was brought. The assignment by plaintiff to Mr. Merriam did not abate the action, but the latter, under section 45 of the Code, had the undoubted right to prosecute the suit to final termination in the name of the original plaintiff. (*Magemau v. Bell*, 13 Neb., 247; *Temple v. Smith*, 13 Neb., 513; *Dodge v. Omaha & S. W. R. Co.*, 20

Neb., 276; *Howell v. Alma Milling Co.*, 36 Neb., 80.) Under the evidence the court should have directed a verdict for the plaintiff. The judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

HARRISON, J., not sitting.

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## CHRIS KROEGER V. HENRY W. NIEMAN ET AL.

FILED SEPTEMBER 22, 1897. No. 7402.

**Review: BILL OF EXCEPTIONS.** Findings of fact cannot be reviewed where the evidence is not brought before us by an authenticated bill of exceptions.

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

*Cavanagh, Thomas & McGilton*, and *C. J. Phelps*, for plaintiff in error.

*J. A. Grimison* and *George H. Thomas, contra.*

NORVAL, J.

In this lawsuit is involved the right of possession of certain property which was adjudicated by the trial court adversely to the defendant. Questions of fact alone are presented by the assignments of error and discussed in the briefs filed, which we are unable to review, since the bill of exceptions attached to the transcript is in no manner authenticated by the clerk of the district court. (*Andres v. Kridler*, 47 Neb., 585; *Reuther v. Zimbleman*, 50 Neb., 165, and cases there cited.)

AFFIRMED.

HARRISON, J., not sitting.

## MCCORD, BRADY & CO. ET AL. V. GUS HAMEL.

FILED SEPTEMBER 22, 1897. No. 7409.

1. **Instructions:** ASSIGNMENTS OF ERROR. Errors in respect to giving instructions must be separately assigned.
2. **Review:** ASSIGNMENTS OF ERROR. An assignment that the court erred in overruling a motion for a new trial, when such motion is based upon several distinct grounds, is too general.
3. ———: WAIVER. Assignments of error not argued will not be reviewed.

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

*Cavanagh & Thomas* and *B. N. Robertson*, for plaintiffs in error.

*I. C. Bachelor, contra.*

NORVAL, J.

This was replevin by Gus Hamel against Gustave Pegau to recover possession of a stock of groceries. The latter claimed possession under a chattel mortgage, while plaintiff asserted title by purchase from one John E. Nelson. McCord, Brady & Co., Consolidated Tank Line Company, and Consolidated Coffee Company intervened in the action and set up that they were creditors; that they severally commenced attachment proceedings, and garnished Pegau while he was yet in possession of the property, and that the transfer from Nelson to Hamel was fraudulent and void. Issues were joined, and upon the trial a verdict was returned in favor of plaintiff, upon which judgment was rendered. The defendant and intervenors severally prosecute proceedings in error.

The intervenors assign two errors: (1) That there was error in giving instruction No. 2; (2) the court erred in overruling their motion for a new trial.

The charge of the court consisted of eleven para-

graphs, numbered consecutively from 1 to 11, both inclusive. The entire eleven were grouped in a single assignment in the intervenors' motion for a new trial, while they were interested alone in the giving of instruction No. 2, since the other ten submitted the issues involved between the plaintiff and defendant. The assignment not being well taken as to each instruction, must be overruled as to all, and instruction No. 2 cannot be reviewed. (*Ætna Ins. Co. v. Simmons*, 49 Neb., 811; *Denise v. City of Omaha*, 49 Neb., 750.)

The assignment that the court erred in denying the motion for a new trial is too general to be available, since such motion was based upon seven distinct grounds. (*Glaze v. Parcel*, 40 Neb., 732; *Conger v. Dodd*, 45 Neb., 39; *Pearce v. McKay*, 45 Neb., 296; *Moore v. Hubbard*, 45 Neb., 612.)

The assignments in the petition in error of Gustave Pegau were neither argued at the bar nor in the briefs, hence are waived. (*Gaines v. Bonnell*, 45 Neb., 260; *Johnson v. Gulick*, 46 Neb., 817; *Wood v. Gerhold*, 47 Neb., 397.) The judgment is accordingly

AFFIRMED.

HARRISON, J., not sitting.

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MARY CLEMONS, APPELLANT, V. MICHAEL HEELAN, APPELLEE, IMPLEADED WITH BRIDGET HANLON, APPELLANT, ET AL.

FILED SEPTEMBER 22, 1897. No. 7425.

1. **Dower**: PROCEDURE. Where the right of dower of a widow is not disputed, it may be assigned by the county court, under the provisions of sections 8-11, chapter 23, Compiled Statutes. If such a right is disputed, it may be established by a decree of the district court.

2. **Foreign Laws**: EVIDENCE: DIVORCE. Proof of the law of Colorado, in evidence, relating to the jurisdiction of county courts of that

state to decree divorces, examined, and *held* not to satisfactorily establish such jurisdiction.

3. Judgments: FINDINGS. The findings of facts and the judgment must conform to, and be supported by, the allegations of the pleadings on which they were based.

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

*Ricketts & Wilson* and *Sawyer, Snell & Frost*, for appellants.

*Pound & Burr, contra.*

RYAN, C.

Mary Clemons filed her petition in the district court of Lancaster county alleging that on January 20, 1873, she had been married to Patrick Clemons; that she had continued to be his wife until the time of his death, which occurred on December 12, 1892; that on June 5, 1877, said Patrick Clemons had become the owner of a certain eighty acres of land in Lancaster county, which, on February 17, 1888, he had attempted to convey to one of the defendants, Patrick Helehan, and that on December 3, 1892, the said Patrick Clemons, by will, had devised said premises to Michael Heelan and Bridget Hanlon. It was further alleged that on March 20, 1893, Thomas Heelan had been appointed administrator of the estate of Patrick Clemons. The defendants in the aforesaid petition were the said administrators, Michael Heelan, Bridget Hanlon, and Patrick Helehan. In the petition it was averred that these defendants unlawfully and wrongfully had possession of the real property therein described, claiming to own the whole thereof in fee-simple, and denied the right of plaintiff to any part of said premises and had forcibly excluded plaintiff from her right of dower therein. It was further alleged that the plaintiff, at the time of filing the said petition, was thirty-eight years of age and that at the time of the death of

her husband she was thirty-seven years old, and that her estate of dower was of the value of $2,000. The prayer was as follows: "Wherefore this plaintiff prays that the court may find and adjudicate that the plaintiff was the lawful wife of said Patrick Clemons and entitled to dower in the said premises, and further prays that the court shall find the value of her dower in the said premises according to the value of the said premises and her expectancy as shown by the tables of mortality, and that the court decree and adjudge such sum so found as the fair and reasonable value of this plaintiff's dower interest in the property to be a first and prior lien upon said premises, and unless the same be paid within a short time, to be fixed by the court, that the same should be sold and the proceeds thereof applied to the payment of this plaintiff's said dower, and for such other, further, and different relief as equity may require." Michael Heelan answered the petition, and in his answer prayed that his co-defendants, Bridget Hanlon and Patrick Helehan, and plaintiff might be decreed to have no estate, right, interest, or title in the premises indicated, and for equitable relief in line with that specially prayed as above indicated. There were answers by the other defendants, but their nature need not be stated at length. It is sufficient to say that the petition and the answers presented a case wherein it appeared that the plaintiff, a widow of the deceased, was kept out of the possession of her dower right in the real property of the deceased by the defendants, who claimed the entire title and the exclusive right of possession. Where the right of the widow is not disputed it may be assigned in the county court. (Compiled Statutes, ch. 23, secs. 8-11.) If the dower right of the widow is disputed, however, we think she may, by an action in equity in a proper district court, settle such dispute. We shall therefore assume that the petition in this case stated sufficient facts to entitle plaintiff, on proper proof, to relief to the extent of establishing the fact that she was the widow of the deceased and as

such was entitled to a decree by which all disputes as to the existence of her dower right would finally be settled.

By their separate answers the defendants alleged certain facts in bar of the dower right of the plaintiff. From the answer of Michael Heelan we quote the language in which this defense was set out, as follows: "And this defendant further answering alleges that Patrick Clemons was on the 18th day of May, 1880, divorced from the said plaintiff by a decree of divorce duly rendered by the county court of Larimer county, in the state of Colorado, in an action therein pending, wherein the defendant was plaintiff and the said plaintiff herein was defendant; that said county court had jurisdiction of the parties to said action and the subject-matter thereof, and that said decree has ever since remained in full force and virtue, unreversed, unmodified, and unappealed from, and that said Patrick Clemons ever since said decree remained single and unmarried; that said court, at the time said decree of divorce was rendered, had, by the laws of said state of Colorado, jurisdiction to try and determine actions for divorce, and the plaintiff, who was a party defendant in such cause for divorce in which said decree was rendered, was duly served with notice and summons therein in the manner provided by the laws of said state of Colorado." There was a reply in which was contained a general denial of all the averments of the several answers. On a trial of the issues there was a decree against the plaintiff from which she has appealed.

It cannot be doubted that the jurisdiction of the county court of Larimer county, Colorado, to grant a divorce was an issue presented by the above pleadings. To establish this jurisdiction by the parties alleging it there were introduced in evidence two sections of Mill's Annotated Statutes of Colorado, which were in the following language:

"Sec. 1054. The county courts of the several counties of this state shall hereafter have concurrent jurisdiction with the district courts in all civil actions, suits, and pro-

ceedings whatsoever where the debt, damage or claim or the value of the property involved shall not exceed $2,000, except as otherwise provided in this act; *Provided, however*, That the limit of jurisdiction above named shall not apply in causes relating to the estates of deceased persons."

"Sec. 395. County courts shall be courts of record and shall have original jurisdiction in all matters of probate, settlement of estates of deceased persons, appointment of guardians, conservators, and administrators, and settlement of their accounts and such other civil and criminal jurisdiction as may be conferred by law; *Provided*, Such court shall not have jurisdiction in any case where the debt, damage, or claim, or value of property involved, shall exceed $2,000, except in cases relating to the estates of deceased persons."

There was introduced in evidence no other part of the statutes of Colorado, neither was there any proof of any construction of the statutes of that state by its supreme court which tended to sustain the jurisdiction claimed to be vested in the county courts of that state to grant divorces. We are therefore confined to the above quoted two sections in our investigation for our information as to the laws of Colorado on the subject indicated. The section last above quoted is quite similiar in its provisions and language to section 16, article 6, of the constitution of this state, which is as follows: "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 criminal cases in which the punishment may exceed six months' imprisonment or a fine of over $500; nor in actions in which title to real estate is sought to be recovered or may be drawn in question; nor in actions on mortgages or contracts for the conveyance of real estate,

nor in civil actions where the debt or sum claimed shall exceed one thousand dollars." Referring to this section of the constitution it was said in *Glade v. White*, 42 Neb., 336: "In determining whether the county court has jurisdiction in a particular case we must look to this constitutional provision and the acts of the legislature conferring and limiting jurisdiction in pursuance thereof, and not to the ancient distinctions between modes of procedure and forms of action." This rule is applicable to the two sections of the Colorado statutes above quoted, and we are therefore concerned with their provisions rather than with any argument which may be founded upon the proposition that county courts are courts of record. As to the jurisdiction concurrent with that of the district court mentioned in one of these sections and the original jurisdiction mentioned in the other, it is observable that there are qualifying words limiting the actions which may be maintained to those wherein the amount of the debt, damage or claim involved shall not exceed $2,000. It seems clear that the restricting words indicate that the jurisdiction of the county court is limited to debts, damages, and claims, that is to say that the action must be for the recovery of money or property within the limit in amount of $2,000. It may be, as the counsel for the appellees suggest, that the reports of Colorado show that the county courts of that state have long exercised jurisdiction in divorce cases; but if this suggestion is well founded the opinions of the supreme court of that state should have been introduced in evidence. As the matter stands we must construe the two sections of the statute offered in evidence according to our own unaided judgment, and, thus construing them, we are led to the conclusion that the county court of Larimer county has not been shown to have possessed jurisdiction to decree the divorce relied on by defendants. This disposes of the appeal of Mary Clemons.

There was an appeal by Bridget Hanlon, since deceased, and now represented by an administrator, and the

grounds of her appeal will now be considered. The district court found specially that during 1893, and a part of 1894, Michael Heelan had had the use and occupancy of the land of which the fair rental value was $400. It was found specially that the value of the improvements placed on the said premises by Michael Heelan between 1877 and the date of the death of Patrick Clemons was $900. In the judgment of partition between Bridget Hanlon and Michael Heelan the latter was credited with the amount of the value of the improvements and charged with one-half the above named rental value of the premises. As modified by these items the property was partitioned between these parties. In the pleadings there were no averments which justified the ascertainment of these items and the disposition of them which was made by the decree. The relief should have been confined to that prayed and which was justified by the averments of the pleadings between the parties. (*Lipp v. Horbach*, 12 Neb., 371; *Kitchen Bros. Hotel Co. v. Hammond*, 30 Neb., 618; *Dorsey v. McGee*, 30 Neb., 657; *Rockford Co. v. Manford*, 36 Neb., 801.) For the reason indicated this portion of the decree cannot be sustained. The judgment of the district court is reversed and this cause is remanded for further proceedings.

REVERSED AND REMANDED.

HARRISON, J., not sitting.

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CITY OF OMAHA V. FANNIE BOWMAN, ADMINISTRATRIX.

FILED SEPTEMBER 22, 1897. No. 7426.

1. **Municipal Corporations: PONDS: NEGLIGENCE.** With respect to water forming a pond on private property within the limits of a city, but not on, or in dangerous proximity to, a public highway, street, or alley, such city owes no duty to the general public (aside from that of a sanitary character) other than such as devolves on private owners of property similarly situated, even though the city may have created the pond of which complaint is made.

2. **Negligence:** EVIDENCE. Negligence must be fairly inferable from the evidence. Its existence cannot be a mere matter of conjecture, and it must be the proximate cause of the injury complained of.

3. **Cities:** PONDS: DEATH OF CHILD: EVIDENCE. Instructions which assumed that evidence of such overflow of lots by the massing thereon by a city of the water of a running stream as would entitle the lot owners to damages would be proper proof in support of a claim for compensation for personal injury to one who had no interest in the lot itself, *held* erroneous.

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

*W. J. Connell* and *E. J. Cornish*, for plaintiff in error.

*Silas Cobb, contra.*

RYAN, C.

This action was brought in the district court of Douglas county by Fannie E. Bowman, as administratrix of the estate of Albert D. Bowman, for the recovery of damages sustained by the estate of the intestate by reason of his death. The deceased, it was alleged in the petition, was about seven years of age when he was drowned in a pond of water which plaintiff in error negligently had permitted to accumulate and be, and remain in, over, and by, the side of Davenport street in the city of Omaha. There was a verdict and judgment against the city in the sum of $1,000. The accident happened on June 15, 1892. The evidence showed that about six years before the date just named the city had constructed an embankment on Davenport street which interfered with the flowing of water from certain lots abutting on said street. The pond in question was caused by this water. The sidewalk was about seven feet from the water and quite a distance above the water level. There seems to be no dispute in the evidence that to reach the water from the street it was necessary that a person should cross an intervening strip of private property at least six feet in width. A few days before the date of the accident some boys tore

up a part of the sidewalk and launched it on the pond. Albert D. Bowman, and some juvenile friends, took possession of this piece of sidewalk and were using it for a raft when young Bowman fell off and was drowned. The mere fact that he was thus drowned was alleged in the petition and admitted in the answer. There was no effort to show whether the deceased reached the pond, as he might have done by passing from his home near by, over private property, or by way of the street. It is not clear from the petition just what acts and omissions on the part of the city are claimed to constitute negligence on its part. There was charged a failure to place a fence, or visible boundary, between the street and the private property adjoining. In view of the fact that it was not claimed that the child entered the water from the street this averment has no bearing on the questions under consideration. The following averments seem to have described the negligence principally, if not entirely, relied upon, and we shall therefore quote them at length: "Plaintiff further states that said pond of water was formed by the water that formerly would have run through a ravine at said place, the same being filled over at said place by said city in constructing and filling up Davenport street at said place, which said water was negligently permitted to accumulate and remain as aforesaid, and the natural outlet for said water being closed and filled up by the defendant city of Omaha a long time previous to the said June 15, 1892, by the city filling up the street at said Davenport, near Twenty-eighth street, and thereabouts, where said death occurred, being filled about five feet on the north side and about fifteen feet on the south side of said Davenport street, and thereby filling up and stopping a creek or ravine that was wont theretofore to flow along where said street was filled as aforesaid, and although there is, and has been a long time prior to June 15, 1892, a sewer about two blocks away from the place of said death, yet there was no provision made for the drainage of said water by the city or

said Moody and Stockdale (the owners of the private property on which the pond was), from said lots, said water thereby being discharged upon said lots in and over and upon Davenport street as aforesaid, and there negligently confined, and negligently by all of said defendants permitted to remain upon said property." In this connection it was alleged that the pond caused in the manner above described had, before June 15, 1892, been dangerous and menacing for many years, was very enticing and attractive to children of tender age, many of whom in that locality were in the habit of playing in said pond of water, and that the dangerous, menacing, and enticing condition of the pond had been well known by said Moody and Stockdale and the officers and authorities of the city of Omaha at the time of and before said death.

The defendant in error was permitted to recover upon a theory rather narrower than that above stated, as appears from the following instruction given by the court: "(1.) The court charges the jury that if the grade and fill was over and across the ravine, through which, prior to the filling, water from springs and the drainage from the vicinity was accustomed to flow, then it was the duty of the defendant, in making said fill, to provide a passage-way for the escape of the water which might reasonably be expected to flow along the course of the ravine." The instruction following that above quoted was in this language: "(2.) If by reason of the failure of the defendant when making the fill in Davenport street to provide a culvert or other passage for the water naturally flowing in and along the ravine the pond in question was formed, and you shall so find from the evidence, then that is a fact that you should consider along with other facts as hereinafter instructed in making up your verdict."

In the brief for the defendant in error it is insisted that this court in *City of Beatrice v. Leary*, 45 Neb., 149, has recognized the applicability of the principles laid down in the above instructions to the facts in this case. In

the case just cited there was involved the question of the liability for the diversion of water from a water-course by the city, it is true, but this liability was for physically damaging the real property of a private person. The rule is general that the city may not divert the flowage of a running stream from real property or mass its water on such property, without making compensation for such damage as thereby may ensue to the property-rights of the owner. This principle is in no manner connected, however, with, or correlative of, the proposition contended for, and that is that the massing of the water of a flowing stream on private property renders the city liable to one who has no interest in such property, for whatever personal damages he may sustain from his own voluntary use of such water. It is also urged that these instructions were correctly given in this case in view of the holding of this court in the case of *City of Omaha v. Richards*, 49 Neb., 244, and in the opinion on the rehearing on the same case, reported in 50 Neb., 804. In both the opinions there was enforced the liability of the city for damage caused by the drowning of a child. The negligence of the city consisted in permitting water to collect and remain on a traveled street without any precaution being taken to avoid accidents therefrom to the public. The pond which formed was partly in the street and partly on private property, and it was held that the mere fact that the child had fallen off the improvised raft into the water on the private property did not exonerate the city from the consequences of its negligence. Whether the water was that of a flowing stream or was the accumulation of surface-water was a question of no importance.

As has already, perhaps, been sufficiently indicated, there is presented in the case at bar the question of the liability of a city for the death of a child from drowning in a pond situated on private property. This child is not shown to have used the street in any way, even for the purpose of reaching the pond in which afterwards he

was drowned. This question is connected with, or modified by, no other, as, for instance, the fact that the city had invited the public to go upon, or even in dangerous proximity to, the water. In so far as the facts of this case are disclosed there is shown nothing of the acts of the child before its presence on the raft. That fact was merely alleged and admitted by the pleadings. The inducement charged was that the water was enticing to a person of the age of this one. This was a statement of a general proposition applicable to the attraction of any body of water for boyish nature. In what was the city negligent, in its duty towards the public, by passively permitting, or actively causing, the accumulation of this water on private property? We have already pointed out the fact that we are not considering the property rights of the owner of the lots whereon the pond was formed. There is involved no element of damage resulting from loathsome smells or from dangerous sanitary conditions permitted by the city in violation of its duties in that respect. Simply stated the fact is that the city,—so far as the record shows without any objection from the owner of the lots,—overflowed said lots with water. In respect to the public traveling upon its highways, except as above indicated, the city, with respect to the pond formed in the manner indicated, held the same relations as did the owner of the real property submerged. In *Richards v. Connell*, 45 Neb., 467, these relations with the attendant obligations and liabilities were fully considered and it was held that a cause of action could arise in none but one of the following classes of cases: "1. Cases in which the owner of the land has made or permitted a dangerous excavation, or embankment, or the like so near a public highway as to injure one in the rightful use thereof. * * 2. Cases in which the defendant has negligently left exposed dangerous machinery likely to attract children and resulting in their injury. Illustrative of this class which constitutes a recognized exception to the rule are the so-called turn-table cases. 3. Cases where the plaintiff was

injured while upon the defendant's premises by invitation of the latter, and where the negligence consists in a failure to keep such premises in a reasonably safe condition." This case has been cited with approval in *Peters v. Bowman*, 115 Cal., 345, in which, as well as in the two opinions of *City of Omaha v. Richards, supra*, the adjudicated cases are reviewed to sustain the proposition above stated. In an opinion on a rehearing of *Peters v. Bowman, supra*, it was pointed out that the principle of the turn-table cases should not be applied because a turn-table is not only a danger specially created by its owner but it is a danger differing in kind from those under consideration. "A pond," said Beatty, J., "although artificially created, is in nowise different from those natural ponds and streams which exist everywhere, and which involve the same dangers and present the same appearance and the same attractions to children. A turn-table can be rendered absolutely safe without destroying or materially impairing its usefulness, by simply locking it. A pond cannot be rendered inaccessible to boys by any ordinary means. Certainly no ordinary fence around the lot upon which a pond is situated would answer the purpose; and, therefore, to make it safe, it must either be filled or drained, or, in other words, destroyed. But ponds are always safe and often necessary, and where they do not exist naturally, must be created in order to store water for stock and for domestic purposes, irrigation, etc. Are we to hold that every owner of a pond or reservoir is liable for damages for any child that comes uninvited upon his premises and happens to fall in the water and drown? If so, then upon the same principle must the owner of a fruit tree be held liable for the death or injury of a child who, attracted by the fruit, climbs into the branches and falls out."

Referring back to the three classes of cases described in *Richards v. Connell, supra*, it may be said confidently that this case falls within neither. The intestate, uninvited by the city, on private property, took possession of

a fragment of a floating sidewalk, from which, accidentally, he fell into the water. Negligence is a fact to be shown by evidence. Its existence cannot be left to mere conjecture. (*Kilpatrick v. Richardson*, 37 Neb., 731, 40 Neb., 478; *Omaha & R. V. R. Co. v. Clarke*, 39 Neb., 65; *Omaha Street R. Co. v. Leigh*, 49 Neb., 782.) The negligence pleaded and proved must be the proximate cause of the injury of which complaint is made. (*Brotherton v. Manhattan Beach Improvement Co.*, 48 Neb., 563. There was not sufficient evidence to meet the first of the above requirements, and, as to the second, there was not only a failure of proof, but the instruction hereinbefore quoted proceeded upon the theory that the city could be held liable for the injury of a person on a state of facts showing that the injury, if any, was one to the mere property right of an individual not a party to the suit. For the errors indicated the judgment of the district court is

REVERSED.

HARRISON, J., not sitting.

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EDWIN R. SAXTON V. MICHAEL F. HARRINGTON.

FILED SEPTEMBER 22, 1897. No. 7444.

1. **Attorney and Client:** ACTION FOR FEES: EMPLOYMENT: EVIDENCE. Where it is sought to hold liable a party for attorney's fees earned in the foreclosure of a mortgage held by such party, and the employment of the attorney is dependent on whether or not one who had authorized the commencement of such foreclosure proceedings did so with authority from the mortgagee, the burden of proof is on the attorney to establish such authority, and evidence which tends to negative the existence of such authority in the alleged agent is admissible, under proper pleadings.

2. ———: ———: ———: RATIFICATION: EVIDENCE. Where the attorney seeks to recover fees alleged to be due him for the foreclosure of a mortgage, and it is claimed by such attorney that the mortgagee, with knowledge of the facts, by his silence ratified the acts of such attorney while the foreclosure was progressing, and after-

wards, that the mortgagee's ratification was evidenced by his receiving the avails of the foreclosure proceedings, and the defense is that the employment of the attorney was not by the mortgagee, but by one who wished to cut out a subsequent mortgage, evidence which tends directly to establish the fact that such representations were made to the mortgagee as to the purposes of the foreclosure of his mortgage, and that the party benefited would pay the attorney's fees in such foreclosure, is competent in explanation of the failure of the mortgagee to disaffirm the foreclosure proceeding when brought to his knowledge.

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

*R. R. Dickson* and *H. J. Harwi*, for plaintiff in error.

*N. B. Chapman* and *H. E. Murphy, contra.*

RYAN, C.

On the 22d of August, 1894, Michael F. Harrington, an attorney at law, filed his petition in the district court of Holt county, whereby he sought to recover from Edwin R. Saxton the sum of $500 and interest. There was a verdict and judgment as prayed. In his petition Mr. Harrington alleged that, at the request of said defendant, he, the said Harrington, on April 9, 1889, entered into the service of defendant and at defendant's request commenced an action in said district court in favor of said defendant against George W. Bridges and others, which suit he, the said Harrington, prosecuted to final decree and secured payment of the amount due defendant from said Bridges and others, and that the value of the said services remained wholly unpaid. As one matter of defense Mr. Saxton answered that he had never employed defendant in error, but that whatever services had been rendered by Mr. Harrington had been rendered for the aforesaid Bridges and one J. R. Johnson. The sole questions presented by the record which we deem important are, whether or not Mr. Saxton authorized, in advance, the commencement of the foreclosure proceedings, or, after

they had been commenced, whether he ratified the employment of Mr. Harrington.

The property against which this foreclosure was had was the O'Neill Roller Mills. On March 3, 1888, George W. Bridges and Henry L. Childs, the owners of the mill property, with their wives, gave two promissory notes to E. R. Saxton for the aggregate sum of $10,000, one due April 1, 1890, the other April 1, 1891. These notes were secured by a mortgage contemporaneously made on the mill property by the makers of said notes. On March 23, 1888, George W. Bridges, who had meantime become the sole owner of the mill property, executed a promissory note to John R. Johnson for the sum of $10,250, due March 22, 1890. To secure the payment of this note, Bridges and his wife on the same day mortgaged the mill property to Johnson. On August 20, 1888, G. W. Bridges executed two promissory notes to Edward P. Allis & Co.,—one due April 1, 1889, and the other due September 12, 1889,—each for the sum of $6,384.71. Of these mortgagees, E. R. Saxton resided in Pennsylvania, John R. Johnson resided in Crete, Nebraska, and Edward P. Allis & Co. was a firm doing business in Wisconsin. At the time the foreclosure proceedings were begun, W. H. Bridges, a brother of G. W. Bridges, was in possession and control of the mortgaged property as lessee. His deposition was taken in this case, and his testimony was to the effect that at the time of the foreclosure there was no interest due on the notes secured by the mortgage to Saxton but there was due unpaid interest on the other notes. This witness said he was acquainted with Mr. Palmenteer, the president of the First National Bank of O'Neill, who represented that he was Mr. Saxton's agent for loaning money and collecting interest on the same. As to whether Mr. Palmenteer's assumption of power to act was with reference to the foreclosure, W. A. Bridges testified that he did not represent that he was authorized so to act, but he did act, as a matter of fact. W. A. Bridges thus described the history of the commencement

of the foreclosure proceedings upon which Mr. Harrington, in this action, founds his claim that he should be paid by Mr. Saxton: "At the time this action was begun to foreclose these mortgages there was a large amount of interest due and unpaid on the second mortgage of J. R. Johnson. Mr. Johnson was anxious to receive what was due and authorized me to employ an attorney to foreclose his mortgage. I employed M. F. Harrington, the plaintiff in this case, as such attorney, and together we went to the office of Mr. Palmenteer to see what would be done with regard to the first mortgage. Mr. Palmenteer and Mr. Harrington decided that the best way would be to foreclose under the first mortgage and let the other mortgagees appear as answering defendants. It was done in this way and Mr. Harrington appeared for both Mr. Saxton and J. R. Johnson. * * * I settled with Mr. Harrington all the fee he asked, which was twenty dollars. Q. Was there anything said by M. F. Harrington at the time you paid him the fee, or at any other time pending the foreclosure, about his charging E. R. Saxton any fee, and if so, what was said? A. Nothing was ever said to me at that time, or at any other time, by Mr. Harrington about his charging Mr. Saxton any fee in this case for his foreclosure." Mr. Harrington testified that he was employed by Mr. Palmenteer to begin the foreclosure proceedings above described. Mr. Palmenteer, by his deposition taken in California, gave the following testimony: "Mr. Edward R. Saxton made a loan to Mr. Bridges and Childs for $10,000 on the mill property situated in O'Neill, Holt county, Nebraska. Said loan was also secured by insurance signed over to E. R. Saxton before the loan became due. The mill was shut down for a time. During that time Mr. Saxton told me that he had been notified that the insurance had been canceled, and he was alarmed about his security and was afraid it was insufficient, and if Mr. Bridges and Childs would not have some insurance taken out in his favor he would want his mortgage foreclosed. When I went to O'Neill,

Nebraska, I went and saw Mr. Bridges and tried to get him to take out some insurance to satisfy Mr. Saxton. This Mr. Bridges refused to do. I so notified Mr. Saxton and he forwarded the notes of Mr. Bridges and Childs to the First National Bank of O'Neill, Nebraska, and they were delivered to Mr. Harrington (I think by Mr. Kelly, cashier) to foreclose. Mr. Harrington was never paid anything by me for Mr. Saxton for his services in foreclosing this mortgage. Neither did Mr. Harrington receive anything, to my knowledge, for foreclosing this mortgage."

The petition for this foreclosure was filed April 9, 1889. It would naturally be inferred from the above testimony, unexplained, that the demand for insurance, the refusal thereof, and the notice of that refusal to Mr. Saxton, immediately preceded his forwarding the notes for foreclosure proceedings and probably induced him to authorize proceedings to be instituted. Mr. Saxton testified that he did not authorize a foreclosure; that the first he knew that there was a foreclosure was by seeing a notice of it in the newspaper published at O'Neill. Mr. Saxton testified as to the interview between Mr. Palmenteer and himself as follows: "Mr. Palmenteer came there, I think it was about the first of June, and I mentioned to him that I had seen it in the paper that the foreclosure was going on and asked him how it was done; that no interest or principal was due me—the interest was paid a month before it was due—and he said that he held back the coupons due April 1, 1889, and that Bridges wanted to have it foreclosed to cut Mr. E. P. Allis & Co. out." Immediately after the above testimony the bill of exceptions states that the following proceedings were had: "Q. What was said by Mr. Palmenteer as to who should pay the expenses of the foreclosure? (Objected to as incompetent, irrelevant, and immaterial, and no such issue here,—It would have to be pleaded in the answer here. Sustained. Defendant excepts. The defendant here offers to prove by the witness on the stand that at this con-

versation down in Pennsylvania that Mr. Palmenteer informed the defendant Saxton at that time that the foreclosure was being conducted at the expense and suggestion of Mr. Bridges who was acting for Mr. Johnson, and that Mr. Bridges was to be at all the expense connected therewith, including costs and attorney fees, and to that end asks the witness the following question:) Q. You may state, Mr. Saxton, what, if anything, was said at that conversation between Mr. Palmenteer and yourself as to who was to pay the expenses of this foreclosure? (Objected to as incompetent, irrelevant, and immaterial, leading, and suggestive, and not binding on plaintiff. Sustained, and defendant excepts.)" There was presented the question of the admissibility of evidence of this same character by the refusal of the court to permit to be read certain letters written by Mr. Palmenteer to Mr. Saxton before the foreclosure proceedings were begun. The earliest written of these letters was dated February 25, 1889, and is evidently one of those referred to by Mr. Palmenteer in his deposition. After the date the following is a copy of this letter:

"*E. R. Saxton, Esq.*—DEAR SIR: I have been waiting to see Bridges. He came back home last night. In reference to the mill, it is like this: Your mortgage of $10,000 first, then J. R. Johnson, who is a brother-in-law of Bridges, has $10,250 second mortgage, then E. P. Allis & Co., of Minneapolis, Wis., have a $12,500 third mortgage, so the mill is now mortgaged for over $32,000. I had a talk with Bridges and he says if this first mortgage is left alone he will pay it off, or, if it is sold, of course they will have to bid it off, and they claim they want to shut off the third mortgage. The mill is where there is not a bit of danger, in my opinion, of catching fire, and the companies would not insure unless the mill was running, and grain has all been marketed, and Bridges tells me they don't want to start the mill until next harvest, although there are stock companies that will insure the mill. If you say so we will try and get it insured, but I

don't think there is any more danger of the mill burning than there is of Robert Wormald's brick smoke-stack at the chemical works."

Two days after the date of the above letter there was written another by Mr. Palmenteer to Mr. Saxton in which there was this language: "Bridges just told me to send to you for the coupons on your mortgage and he would be ready to pay them off when they get here providing you would allow the ten per cent for the time they run before due." This letter was excluded when offered in evidence, as also was another in which the following language had been written by Palmenteer to Saxton on March 4, 1889: "Herewith I hand you a draft for $495.83 to pay int. * * * which would be $4.17." The grounds on which these letters were held inadmissible are sufficiently described by the following objection, which was sustained, to one of them by the court: "Objected to as incompetent, irrelevant, and immaterial; and furthermore that there is no pretense here that Palmenteer was the agent of Mr. Harrington, but it is shown that he was the agent of Mr. Saxton and can in no way possibly bind the plaintiff." The theory of the court with reference to the offer to prove Mr. Palmenteer's explanation to Saxton that the foreclosure of the mortgage held by Saxton was being conducted at the expense of Mr. Bridges, acting for Johnson, who was to pay all necessary expenses, including attorney's fees, seems to have been that this evidence was incompetent because, in so far as it affected the rights of Harrington, it was mere hearsay. The same view seems to have been entertained with reference to the letters, and accordingly all this evidence was excluded from the consideration of the jury. The employment of Mr. Harrington by virtue of which it is sought to hold Mr. Saxton responsible for the foreclosure fees was by Mr. Palmenteer, as the agent of Mr. Saxton. There was no proof or pretense of a general agency. There was evidence tending to show that the First National Bank of O'Neill, of which Mr. Palmenteer

was president, was the agent of Mr. Saxton in the collection of coupons due him when they matured. The coupons which would have fallen due April 1, 1889, were paid before March 4, 1889. The foreclosure was begun April 9, 1889, when solely by virtue of his position as president of the First National Bank, and of its limited authority to collect and remit the proceeds of coupons as they fell due, Mr. Palmenteer impliedly had no power to authorize the commencement of an action. The special authority to employ counsel to foreclose the mortgage of Mr. Saxton was therefore a fact proposition which Mr. Harrington must establish to entitle him to recover as against Mr. Saxton. It would ordinarily be a justifiable assumption, in the absence of explanatory proof to the contrary, that, as the foreclosure was allowed by Mr. Saxton to proceed in his name, and as Mr. Saxton reaped the benefit of such foreclosure, he should pay for it. The rejected proof by the proffered letters disclosed the fact that the testimony of Mr. Palmenteer might have been misleading, which in close connection both in time and dependence upon each other, grouped the demand of Bridges for insurance, his refusal, the notice of that refusal to Mr. Saxton; and Mr. Saxton's forwarding of the notes to the bank. The letter which advised of the result of the demand to reinsure was written on February 25, 1889, and the foreclosure proceeding was begun on April 9, immediately thereafter. In this letter Mr. Palmenteer strongly advised against Mr. Saxton's insistence on reinsurance, and yet, in the petition for foreclosure, the failure to insure was the only ground truthfully stated as furnishing a pretense for foreclosing on Mr. Saxton's mortgage before the note which it secured by its terms fell due. It seems to us that these letters should have been admitted in evidence as tending to show that Mr. Palmenteer, in April, had no authority to act for Mr. Saxton in the commencement of foreclosure proceedings. The proffered evidence of the representations of Mr. Palmenteer to Mr. Saxton after the foreclosure pro-

ceedings were begun was rejected because it was with reference to a conversation between Mr. Saxton and Mr. Palmenteer who, as it was claimed, was Mr. Saxton's agent. But the question which was being litigated was whether or not that relation in fact existed with relation to the subject-matter of this action. To shut out all the evidence which tended to show that Mr. Palmenteer was not the agent of Mr. Saxton with reference to matter now in dispute, on the assumption that such agency in fact existed, was to beg the only contested question in the case. Mr. Harrington did not claim to have acted on the assumption that Mr. Palmenteer was the agent of Mr. Saxton by reason of anything said to him by Mr. Saxton. Mr. Harrington undertook to show, as an independent fact, the extent of the special agency of Mr. Palmenteer. If, as Mr. Saxton claimed, the use made of the first mortgage on the premises was solely to enable Mr. Bridges and his brother-in-law to "freeze out" the third mortgage, Mr. Harrington could only look to the parties interested in the success of this plan for his compensation in carrying it out. If, in pursuance of such plan, Mr. Harrington and Mr. Bridges arranged with Mr. Palmenteer for him to allow a foreclosure to be brought on the notes made to Saxton, but entrusted to Mr. Palmenteer for a different purpose, this alone would not entitle Mr. Harrington to look to Mr. Saxton for his compensation. For that he must look to the party for whom he rendered the service in question. In the nature of the case it was probable that no one but Mr. Palmenteer and Mr. Saxton could testify as to the nature and extent of the agency of the former for the latter. Mr. Palmenteer's deposition might be construed as indicating that Mr. Saxton gave special authority to commence foreclosure proceedings immediately upon being informed by Palmenteer that Mr. Bridges refused to reinsure the mortgaged property. The correspondence which Mr. Palmenteer's evidence possibly assumed was sufficient to justify the inference of authority to cause to be begun foreclosure proceedings,

should therefore have been admitted in evidence, for it was the best evidence on that point. If Mr. Harrington was induced to begin foreclosure proceedings without authority from Saxton there could be no recovery for attorneys' fees, if there was no sufficient proof of ratification by Mr. Saxton of the employment of Mr. Harrington. As we have already intimated, the fact that the foreclosure went through its regular stages, and that Mr. Saxton was benefited thereby, was evidence tending to show a ratification. The proofs offered and rejected, however, tended to show that Mr. Saxton was induced to forbear interfering with the pending proceedings for foreclosure by the representation of Mr. Palmenteer that the foreclosure was for the benefit of Mr. Johnson, by whom, or by Mr. Bridges, the attorney fees were to be paid. The sufficiency of this explanation was a question of fact solely for the jury. If Mr. Saxton's theory was adopted as correct in fact, he was entitled to a verdict. The evidence rejected tended to establish this theory. Its rejection was, therefore, erroneous, and the judgment of the district court is therefore reversed.

REVERSED AND REMANDED.

HARRISON, J., not sitting.

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## M. A. DISBROW & COMPANY, APPELLANT, V. C. C. MCNISH, APPELLEE, ET AL.

FILED SEPTEMBER 22, 1897. No. 7423.

**Bill of Exceptions: ALLOWANCE BY REFEREE.** In the course of a trial before a referee only the referee has the power to certify as to exceptions; and a bill of exceptions embodying only such matters, if settled and signed by the clerk of the district court alone, is entirely nugatory.

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

*Montgomery & Hall*, for appellant.

*M. McLaughlin* and *A. R. Oleson, contra.*

RYAN, C.

This action was brought in the district court of Cuming county for the foreclosure of a mechanic's lien. The property improved was owned by C. C. McNish. The contract to erect a building was entered into with Albert Miller, a builder and contractor. The amount to be paid was $1,829.97, but there was a failure to furnish all the stipulated articles so that the amount to which Miller was entitled as payment was but $1,762.84. M. A. Disbrow & Co., a corporation, furnished Miller certain necessary lumber of the value of $812.84, and within sixty days perfected its right to a lien. Afterwards, Miller requested from M. A. Disbrow & Co. an itemized statement, showing what had been furnished by M. A. Disbrow & Co., with the view of procuring a settlement with McNish. By reason of an oversight, M. A. Disbrow & Co. omitted some of the items which should have been included, and from this oversight and omission it resulted that the bill as rendered showed a balance due of but $519.65, instead of $812.24, the correct amount. This bill formed a part of the basis of settlement between McNish and Miller. The cause was referred to a referee, who found the above recited facts, and that by reason of the settlement on the basis furnished by M. A. Disbrow & Co. the corporation was estopped to claim the correct amount due it as against McNish. Over the objections of M. A. Disbrow & Co. the report of the referee was confirmed in the district court and accordingly there was a judgment. As very readily appears, this record presents for review no other questions than those of fact.

There was no settlement of a bill of exceptions by the referee. Instead, there was the following stipulation and statement by the clerk of the district court: "The foregoing is all of the testimony given or offered by either

party on the trial of the cause, and on application of the plaintiff this bill of exceptions is allowed by me and ordered to be made a part of the records in this case. Dated this 25th day of December, 1893. Emiel Heller, clerk of the district court of Cuming county."

"It is hereby stipulated and agreed by and between the plaintiff and defendant in the foregoing action that the clerk of the district court of Cuming county may settle and allow the foregoing bill of exceptions as a true bill and make the same a part of the records in this case. J. C. Crawford, attorney for the plaintiff. M. McLaughlin, attorney for the defendants."

It was held by this court in *Light v. Kennard*, 10 Neb., 330, that the referee is the proper person to certify to such exceptions as may be taken during the trial before a referee and that the court could not certify as to such exceptions. There was the same holding in *Turner v. Turner*, 12 Neb., 161, and in *State v. Gaslin*, 30 Neb., 651. The provisions of section 311, Code of Civil Procedure, with reference to the power of the clerk of the district court to certify a bill of exceptions, are expressly restricted to acts in that respect in the place of the judge, and not of a referee. These provisions conclude with the general proposition that when the bill has been settled by the clerk in a proper case instead of being certified by the judge the bill shall "have the same force and effect as though signed by the court." As was held in the cases above cited, a judge cannot certify as to exceptions taken in the course of a trial before a referee. The certificate of the clerk was therefore nugatory. In view of the fact that there is no bill of exceptions to which we can refer to ascertain upon what evidence the referee acted, the decree of the district court in this case is

AFFIRMED.

HARRISON, J., not sitting.

## J. THOMPSON & SONS MANUFACTURING COMPANY V. W. D. NICHOLLS ET AL.

FILED SEPTEMBER 22, 1897. No. 7410.

1. **Replevin:** RIGHTS OF MORTGAGEE: PETITION. A petition in replevin by a mortgagee of chattels alleging that the plaintiff has a special interest in the property by virtue of a chattel mortgage, and that he is entitled to the immediate possession of such property, without alleging the facts in reference to his special ownership and the facts showing his right to the possession of the mortgaged property, does not state a cause of action.

2. **Record for Review:** AMENDMENT OF PLEADINGS. The statutes neither command nor authorize the supreme court to amend the record of the trial court in a case brought here for review.

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

*George Arthur Murphy*, for plaintiff in error.

*E. O. Kretsinger, Griggs, Rinaker & Bibb, Alfred Hazlett*, and *S. D. Killen, contra.*

RAGAN, C.

This is an error proceeding to review a judgment of the district court of Gage county. The action was brought originally in said district court and was one in replevin. Both the petition and affidavit in replevin filed in the court below alleged "that they [the plaintiffs] have a special interest by virtue of chattel mortgages made to them by George Raymond in the following described goods and chattels; * * * that plaintiffs are entitled to the immediate possession of said goods and that defendants wrongfully detain the same." The plaintiffs had a verdict and judgment.

1. It is evident that this petition does not state a cause of action, and consequently the pleadings do not support the judgment. (See *Raymond v. Miller*, 50 Neb., 506; *Hudelson v. First Nat. Bank of Tobias*, 51 Neb., 557; *Bolin v.*

*Fines*, 51 Neb., 650; *Camp v. Pollock*, 45 Neb., 771.) In all these cases it was distinctly ruled that a plaintiff in replevin claiming under a chattel mortgage must, in his petition, allege the existence of facts which show him entitled to possession of the mortgaged property. The petition in the case at bar does not allege what promise or obligation of the mortgagor, or others, the mortgage was given to secure; that the promise which the mortgage was given to secure the fulfillment of had been broken; nor does it allege the existence of any fact or the occurrence of any event which vested the mortgagee with the right to possession of the mortgaged property.

2. The plaintiffs below have filed a motion here for leave to amend the petition filed in the district court by setting out the facts showing their special interest in the mortgaged and replevied property, and the facts which show that they were entitled at the commencement of the suit to the possession of said property, all which said facts were proved upon the trial. Section 144 of the Code of Civil Procedure is as follows: "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, or a mistake in any other respect, or by inserting other allegations material to the case, or, when the amendment does not change substantially the claim or defense by conforming the pleading or proceeding to the facts proved. And whenever any proceeding taken by a party fails to conform in any respect to the provisions of this Code, the court may permit the same to be made conformable thereto by amendment." But we are of opinion that said section of the Code has no reference to this court when sitting as an appellate tribunal; that the section neither commands nor authorizes this court, while exercising appellate jurisdiction, to amend a record of the district court brought here for review. Section 599 of the Code of Civil Procedure

abolishes writs of error and *certiorari*, and provides that the court shall have the same power to compel complete and perfect transcripts of the proceedings containing the judgment or final order sought to be reviewed to be furnished as they possessed under said writs. This section of our Code is section 530 of the Code of Civil Procedure of the state of Ohio, and the supreme court of that state, in *Wood v. Newkirk*, 15 O. St., 295, construed this section of the Code and held that the appellate court might order the court below to send up a perfect transcript of its record, but that the appellate court was without power to order an amendment of the record. To the same effect see *K. v. H.*, 20 Wis., 252. The motion to amend the petition filed in the court below is overruled. The judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

HARRISON, J., not sitting.

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## WILLIAM H. BOYD V. ANNIE E. MAINS.

FILED SEPTEMBER 22, 1897. No. 7433.

**Review:** ASSIGNMENTS OF ERROR. An assignment in a petition in error "errors of law occurring at the trial" presents nothing to this court for review.

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

*B. B. Willey* and *C. B. Willey*, for plaintiff in error.

*Campbell & Wallis, contra.*

RAGAN, C.

This is an error proceeding to review a decree in equity of the district court of Pierce county.

1. We notice only two assignments in the petition in error. The first is that the decree of the court is not sustained by sufficient evidence. We have carefully examined the evidence, and, without setting it or any part of it out here, it must suffice to say that it amply sustains the decree.

2. A second assignment of error is "errors of law occurring at the trial." Such an assignment as this presents no question to this court for review. (See *Fremont, E. & M. V. R. Co. v. Root*, 49 Neb., 900, and cases there cited.) The judgment of the district court is

AFFIRMED.

HARRISON, J., not sitting.

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

FILED SEPTEMBER 22, 1897. No. 7407.

**Review:** SUFFICIENCY OF EVIDENCE. Evidence examined, and *held* to sustain the judgment of the district court.

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

*D. Van Etten*, for plaintiff in error.

*Connell & Ives, contra.*

RAGAN, C.

This is an error proceeding to review a decree in equity of the district court of Douglas county.

The only question presented by the record is the sufficiency of the evidence to sustain the decree. After a patient and somewhat protracted examination of this evidence we have no doubt that the decree rendered is the

one that should have been rendered under the evidence and it is accordingly

AFFIRMED.

HARRISON, J., not sitting.

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EUGENE F. SEAVER ET AL. V. JOHN HALL.

FILED SEPTEMBER 22, 1897. No. 7124.

**Vendor and Vendee:** BREACH OF CONTRACT: DAMAGES. (See *Seaver v. Hall*, 50 Neb., 878.)

REHEARING of case reported in 50 Neb., 878. *Approved.*

*Wharton & Baird, Bartlett, Baldrige & De Bord,* and *Breckenridge & Breckenridge,* for plaintiffs in error.

*George W. Doane* and *W. G. Doane, contra.*

RAGAN, C.

This is a rehearing of *Seaver v. Hall*, 50 Neb., 878. Since the rehearing in the case was granted it has been re-argued at the bar and we have again carefully reviewed the briefs and arguments of counsel and re-examined the questions presented by the record. It would subserve no useful purpose here to restate the reasons for our conclusion and it must suffice to say that we are now all of the opinion that our former conclusion in this case was the correct one and we accordingly adhere to it. The judgment of the district court is reversed.

REVERSED AND REMANDED.

HARRISON, J., not sitting.

## GEORGE THOMPSON v. HERBERT H. GAFFEY.

FILED SEPTEMBER 22, 1897. No. 7393.

1. **Contracts: BREACH: REMEDIES: DAMAGES.** Where one party to an express contract is wrongfully prevented by the other party from completing, he may sue upon the contract for a breach thereof, and the measure of his damages will be the value of the part performed as measured by the contract price plus the profits, if any, which would have accrued to him had he completed the contract according to its terms; or he may ignore the contract and declare upon a *quantum meruit* or *quantum valebat*, in which case the measure of his damages will be the fair and reasonable value of what he has done.
2. **Evidence: VALUE OF PLUMBING.** In a suit by a plumber to recover the fair and reasonable value of certain plumbing material furnished by him to the defendant at a certain time and place, the price which other plumbers at such place and time charged for such material as that sued for is, standing alone, irrelevant.

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

*Lamb, Adams & Scott*, for plaintiff in error.

*McNerney & Altschuler, contra.*

RAGAN, C.

Herbert H. Gaffey brought this suit in the district court of Lancaster county against George Thompson and alleged in his petition that he had performed certain labor and furnished certain plumbing material to Thompson at his special instance and request; that the fair and reasonable value of such labor and material was $115, for which sum he prayed judgment. Thompson, after interposing a general denial to this petition, answered that the labor and material for which Gaffey sued were furnished in pursuance of an express contract between the parties in and by which Gaffey agreed to furnish the material and do the plumbing work for $160; that he partly performed the contract, but that the material fur-

nished by him was of an inferior quality and the labor performed unskillfully done, contrary to the terms of the contract; that in doing what he did do Gaffey perpetrated injuries to his, Thompson's, house to the extent of $200 and that before the work was completed Thompson abandoned the job and refused to complete it, and Thompson prayed judgment on his counter-claim for $200 damages. Gaffey in his reply admitted that the labor and material had been furnished in pursuance of the contract pleaded by Thompson, alleged that he abandoned the work undertaken before its completion because he was prevented from completing the work by the wrongful acts of Thompson, and denied the other allegations in the answer. Gaffey had a verdict and judgment and Thompson prosecutes here a petition in error.

1. The finding of the jury in favor of Gaffey includes a finding that he was wrongfully prevented by Thompson from completing the contract. On the trial the district court instructed the jury as follows: "If you find from the evidence that the plaintiff performed his part of the contract * * * and stood ready to further perform his part of the contract and * * * was prevented from further prosecution of the work by the acts of the defendant, then the plaintiff will be entitled to recover from the defendant the fair and reasonable value of the work and material already furnished by him regardless of the contract." Thompson insists that the giving of this instruction was error, as it prescribed an improper rule for the measure of Gaffey's damages. It is insisted by the plaintiff in error that, since it stands admitted in the pleadings and established beyond controversy on the trial, that the labor and material sued for by Gaffey were furnished by him in pursuance of an express contract with Thompson, if Gaffey was prevented from completing his contract by the wrongful acts of Thompson, then Gaffey's measure of damages is such proportion of the entire contract price as the part performed is of the entire contract plus the profits, if any, which Gaffey

would have realized by completing the contract according to its terms. If Gaffey had relied upon the contract between him and Thompson, and based his action on that contract, then doubtless the rule contended for by the plaintiff in error for the measure of damages would have been the correct one. (*Hale v. Hess*, 30 Neb., 42; *Von Dorn v. Mengedoht*, 41 Neb., 525; *Jewett v. Wilmot*, 51 Neb., 700.) But Gaffey has not based his action upon the contract between him and Thompson. He has abandoned or ignored this contract and elected, because of Thompson's wrongful refusal to permit him to perform it, to sue for the fair and reasonable value of the labor and material furnished Thompson. This we think he had the right to do. Where one party to an express contract is wrongfully prevented by the other party from completing, he may sue upon the contract for a breach thereof, in which case the measure of his damages will be the value of the part performed as measured by the contract price plus the profits which would have accrued to him had he completed the contract according to its terms; or he may ignore the contract and declare on a *quantum meruit* or *quantum valebat*, in which case his measure of damages will be the fair and reasonable value of what he has done. We are all of opinion that the measure of damages laid down by the district court in the instruction complained of was correct.

2. On the trial a witness in behalf of Gaffey was asked on direct examination the following questions:

"1. Where in January, 1893, a charge of $3.85 was made for 95 feet of $\frac{3}{8}$ inch gas pipe, was that the ordinary charge for that kind of material at that time among plumbers in the city? [of Lincoln].

"2. You may examine these items, Mr. Hooker, and say after examination whether they were fair and reasonable charges in that trade [plumbing] at the dates given there, January 20 and 23, during the month of January, 1893.

"3. You may now state whether the charges contained in this charge book, copies of which you have seen,—the

different exhibits,—whether the charges were fair and reasonable charges, the ordinary charges among plumbers and gasfitters in the plumbing and gasfitting trade for such material and services in January, 1893."

All these questions were objected to by the defendant below. The objections were overruled and the witness answered in substance that the charges made by Gaffey and sued for were the ordinary charges and prices for the material among plumbers in the city of Lincoln at the time the material was furnished. The ruling of the court in permitting these questions to be answered is the second assignment of error which we notice. We think the admission of this evidence was prejudicially erroneous.

The plaintiff below alleged that the labor and material furnished by him to Thompson was of the fair and reasonable value of so many dollars and he could not establish this allegation of his petition solely by showing what other plumbers in the city of Lincoln ordinarily charged for such material. The ordinary prices charged by the plumbers and gas-fitters in the city of Lincoln for such material as that furnished by Gaffey to Thompson was incompetent evidence to prove the allegation in the petition. The fair and reasonable value of the plumbing material furnished by Gaffey may have been a very different thing from the prices charged by the plumbers in the city of Lincoln for such material. The pleadings and the proof must agree, and without showing that the charges made for plumbing material by the gas-fitters of the city of Lincoln were fair and reasonable charges, then the evidence as to the charges made by the gas-fitters for material did not prove that the charges made for the material by Gaffey were the fair and reasonable ones. The judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

HARRISON, J., not sitting.

## JOHN H. YAGER V. EXCHANGE NATIONAL BANK OF HASTINGS.

FILED SEPTEMBER 22, 1897. No. 7434.

1. **Jury Trial:** EXISTENCE OF RIGHT. Whether or not a right to trial by jury exists must be determined from the object of the action as determined by the averments of the petition, and in case of ambiguity by resort to the prayer.
2. ———: ———: EQUITY. If the action is in its nature one triable by jury, the right to such trial will not be defeated because, in order to accomplish the main object of the action, it becomes necessary to determine issues as to the existence of equitable rights.
3. ———: DEEDS: MORTGAGES: PROCEEDS OF SALE. A petition alleged that the plaintiff had executed to the defendant a deed absolute in form, but in fact a mortgage; that the defendant had sold the land, receiving more than sufficient to pay the debt. The prayer was for judgment for that surplus. *Held*, That the plaintiff was entitled to a jury trial.

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

The opinion contains a statement of the case.

*Capps & Stevens*, for plaintiff in error:

The court erred in making the order of reference and in denying plaintiff the right to a trial by jury. (Constitution, art. 1, sec. 6; *Mills v. Miller*, 3 Neb., 94; *Lamaster v. Scofield*, 5 Neb., 154; *Kinkade v. Hiatt*, 24 Neb., 562; *Cornell v. Illuminating Co.*, 16 N. Y. Sup., 306; *Andrus v. Home Fire Ins. Co.*, 41 N. W. Rep. [Wis.], 956; *Welsh v. Darragh*, 52 N. Y., 590; *Ludlow v. American Nat. Bank*, 59 Barb. [N. Y.], 509; *Averill Coal Co. v. Verner*, 22 O. St., 372; *McMartin v. Binghan*, 27 Ia., 234; *Town Lot Co. v. Walker*, 50 Ia., 376; *Rowell v. Giles*, 53 How. Pr. [N. Y.], 244; *Van Rensselaer v. Jewett*, 6 Hill [N. Y.], 373; *Mullin v. Kelly*, 3 How. Pr. [N. Y.], 12; *Wickham v. Frazee*, 13 Hun [N. Y.], 431; *Read v. Lozin*, 31 Hun [N. Y.], 286; *McDon-*

*nell v. Stevens*, 9 Hun [N. Y.], 28; *Morrison v. Horrocks*, 40 Hun [N. Y.], 428; *Grim v. Norris*, 19 Cal., 140; *Smith v. Pollock*, 2 Cal., 93; *Levy v. Brooklyn Fire Ins. Co.*, 25 Wend. [N. Y.], 687.)

*Tibbets, Morey & Ferris, contra:*

The prayer of the petition does not control in determining what relief shall be given, nor whether the parties are entitled to a jury trial. (*Bell v. Merrifield*, 4 Am. St. Rep. [N. Y.], 436.)

The right to have equity cases dealt with by equitable methods is as sacred as the right of trial by jury. (*Brown v. Buck*, 13 Am. St. Rep. [Mich.], 438.)

A deed absolute in form, if given as security for a debt, can be declared a mortgage only in a court of equity. (*Schade v. Bessinger*, 3 Neb., 140; *Stinchfield v. Milliken*, 71 Me., 567; *Hogel v. Lindell*, 10 Mo., 483; *Foley v. Kirk*, 33 N. J. Eq., 170; *Bragg v. Massie*, 38 Ala., 89; *Artz v. Grove*, 21 Md., 456; *Murphy v. Calley*, 1 Allen [Mass.], 107; *Russell's Appeal*, 15 Pa. St., 322; *Vanderhaise v. Hugues*, 2 Beas. [N. J. Eq.], 244; *Hovey v. Holcomb*, 11 Ill., 660; *Finlon v. Clark*, 118 Ill., 32.)

In an action at law, parol evidence is not admissible to show that an absolute deed was intended as a mortgage and is only admissible in equity. (*Moore v. Wade*, 8 Kan., 381; *McClane v. White*, 5 Minn., 178; *Webb v. Rice*, 6 Hill [N. Y.], 219; *Stevens v. Cooper*, 1 Johns. Ch. [N. Y.], 424; *Bragg v. Massie*, 38 Ala., 89, 79 Am. Dec., 82; *Gee v. Thrailkill*, 25 Pac. Rep. [Kan.], 588.)

Plaintiff having pleaded a trust in his petition is confined to a court of equity. (*Lake v. Freer*, 11 Ill. App., 576; *Carter v. Gibson*, 29 Neb., 324; *McCartney v. Bostwick*, 32 N. Y., 53; *Norton v. Hixon*, 25 Ill., 439; *Coates v. Woodworth*, 13 Ill., 654.)

IRVINE, C.

The petition of Yager against the Exchange National Bank alleged that on June 18, 1890, plaintiff was indebted

to the bank in the sum of $900, and on that day executed to Yeazel, then cashier of the bank, a note for $2,000 secured by mortgage on certain land; that the object of the transaction was to secure the bank the indebtedness then existing and for future advances; that certain money was afterwards advanced. Thereafter Yeazel died and Lane became the cashier of the bank; that on the 2d day of September, 1891, a different arrangement was made whereby plaintiff executed and delivered to Lane a deed to the land, absolute in form, under the agreement that the bank should hold the land subject to plaintiff's disposition, and when the plaintiff should find a purchaser it would convey the property, receive the purchase money, apply the same to the discharge of an existing senior mortgage, to the indebtedness due the bank, and pay the surplus to the plaintiff; that this was the sole object of the conveyance; that November 28, 1892, the defendant sold the premises for $7,200. The petition also alleged the amount of the indebtedness of plaintiff to defendant, and charged that the bank received, over and above incumbrances and this indebtedness, $2,689, and that it had received rents for the land amounting to $600. The prayer was for a judgment against the bank for $3,389 with interest. The answer amounted in brief to a denial of the averments whereby plaintiff claimed that the conveyance was in effect a mortgage to the bank, and pleaded that it was a sale absolute to Lane, who in consideration thereof agreed to discharge the indebtedness, and in that behalf pleaded the execution by Lane to plaintiff of a written agreement to hold plaintiff harmless from the indebtedness. The reply, among other things, pleaded, or attempted to plead, fraud in procuring the plaintiff to accept a delivery of the last mentioned instrument. The court, on the motion of the defendant and against the objection of the plaintiff, referred the case to a referee to take the testimony and report on the law and the facts. The plaintiff excepted to this order. The referee reported in favor of the de-

fendant. The report was confirmed and the case dismissed. The plaintiff brings this judgment here for review by petition in error, assigning, among other things, as error, the order referring the case, and contending that the case was one in which the plaintiff was entitled to a trial by jury. We think this assignment is well taken.

The constitutional provision is that "the right to trial by jury shall remain inviolate." (Constitution, art. 1, sec. 6.) The Code provides that "issues of fact arising in actions for the recovery of money, or of specific real or personal property, shall be tried by a jury unless a jury trial is waived or a reference be ordered as hereinafter provided." (Code, sec. 280.) Of course where the constitutional right to a trial by jury exists the cause cannot be referred in the absence of a waiver of that right. The effect of the constitutional provision has been frequently considered. It has been said that the guaranty is of the right to a jury trial as such right existed when the constitution was adopted. (*Sharmer v. McIntosh*, 43 Neb., 509.) So it has been held that where a defendant in possession insists upon the right, an action to determine the legal title to real estate cannot be tried without a jury, in spite of the statute on that subject. (Compiled Statutes, ch. 73, sec. 57.) The reason is that in such case the proceeding is in its nature one in ejectment for the recovery of specific real property, and both the constitution and the statute entitle a party to a jury trial. Whether or not an accurate test of the existence of the right can be found by ascertaining whether under the former procedure the action would be one at law or one in equity, may be open to some doubt. Nevertheless, unless in exceptional cases, the test suggested is certainly sufficient, and in most of the cases in this court this has been recognized as the true test. (*Mills v. Miller*, 3 Neb., 87; *Lamaster v. Scofield*, 5 Neb., 148; *Roggencamp v. Converse*, 15 Neb., 105; *Dohle v. Omaha Foundry & M. Co.*, 15 Neb., 436; *Kinkaid v. Hiatt*, 24 Neb., 562; *Sharmer v. McIntosh*, *supra*.)

It is clear that if this action under the old procedure

would have been at law, it would be in the form of assumpsit for money had and received, so that it would fall within the general rule and the foregoing cases would be applicable. Was it such an action? The prayer is simply for a money judgment and this would stamp it as an action at law. It is contended, and we think correctly, that the nature of the action cannot be determined alone from the prayer of the petition. On the contrary, it must be determined, as a rule, from the substance of the petition itself. One must see what sort of a case the plaintiff makes by his averments, and from that ascertain what would be the nature of the case and the relief required under the former procedure. But this court has already held that when this question arises, if the substance of the petition be ambiguous, presenting facts sufficient whereon to base either a legal or equitable claim, the prayer may be resorted to to determine the true character of the action. (*Harral v. Gray*, 10 Neb., 186).

The defendant contends that, in order to obtain the relief prayed, it is necessary in the first place to declare a deed absolute in form a mortgage; secondly, to establish a trust relation between the parties; and thirdly, to compel the trustee to account, and that these are matters that were determinable in a court of equity. It is true that in order to establish the plaintiff's right to the money it is necessary for him to show that a deed absolute in form was a mortgage; but the determination of this issue is only incidental to the main object of the action, which is the recovery of money. No decree declaring the trust is required, nor is it sought to establish any equitable interest in the land. It is merely necessary to prove these facts in order to accomplish another object. It is quite well established that assumpsit for money had and received will lie in favor of one entitled to a surplus as against a mortgagee who has disposed of the property. (*Ballinger v. Bourland*, 87 Ill., 513; *Cope v. Wheeler*, 41 N. Y., 303; *Webster v. Singley*, 53 Ala., 208; *Cook v. Basley*, 123 Mass., 396.) It was held otherwise in *Chaffee v.*

*Franklin*, 11 R. I., 578, but that was a case where the land had been sold after the death of the mortgagor. His administrator brought the action. It was held that under such circumstances the surplus moneys should be treated as real estate descending to the heirs and not vesting in the administrator, and the estates of the various heirs being complicated a resort to equity was necessary under the facts of the case to determine their interests. The necessity of proceeding in equity therefore did not arise from the general character of the action but from the peculiar facts of the case. Nevertheless, under a similar state of facts it is held in Massachusetts that assumpsit will lie by the administrator. (*Varnum v. Meserve*, 8 Allen, 158.) It will be said, conceding assumpsit lies in case of a mortgage which is so on its face, the case is different where it is a deed absolute in form, because in that case a resort to equity is necessary to establish the oral defeasance. A sufficient answer to this is that under the old procedure a mortgagor after condition broken had in all cases to resort to equity for relief, as much so when the defeasance was expressed as when the mortgage was a so-called "equitable mortgage." But beyond this consideration it is evident that the argument is unsound. All actions on implied assumpsits, especially perhaps that for money had and received, are to a certain extent equitable in character though not in form. By that we mean that through this form of action rights equitable in their nature could be enforced at law, and the action lay, although in order to establish the plaintiff's case it was necessary to trace his rights through facts ordinarily of equitable cognizance. (*Thompson v. Thompson*, 5 W. Va., 190.)

It has been held in this state that under the general issue in ejectment the defendant may prove any fact which defeats the plaintiff's right of possession; as, for instance, that a deed in plaintiff's chain of title was procured by fraud. It is not necessary to resort by cross-petition to a proceeding to set aside the deed. (*Franklin*

*v. Kelly*, 2 Neb., 79; *Staley v. Housel*, 35 Neb., 160; *Wanser v. Lucas*, 44 Neb., 759, and similarly in replevin, *Phœnix Iron Works Co. v. McEvony*, 47 Neb., 228.) Suppose, then, that the property had not been sold and the plaintiff had remained in possession and Lane had brought ejectment. There could be no doubt that as a defense to that purely legal action the plaintiff might have shown that the deed was in fact a mortgage, and so it was held in *Locke v. Moulton*, 108 Cal., 49; and this in order to determine the right of the parties to a jury trial. We think it is therefore clear that the right to a jury trial must be determined from the object of the action and not by inquiry as to whether it is necessary by proof to establish equitable rights.

We are very clearly of the opinion that the case before us was in its nature one for money had and received; that the plaintiff was entitled to a jury trial, and that the court erred in referring the case. This being true, the report of the referee must be set aside and it becomes unnecessary to consider any of the questions arising from a consideration of that report.

REVERSED AND REMANDED.

HARRISON, J., not sitting.

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TILGHMAN JOHNSON, APPELLEE, V. LEONARD W. COLBY ET AL., APPELLANTS.

FILED SEPTEMBER 22, 1897. No. 7442.

1. Judicial Sales: ORDER: DECREE. A decree of foreclosure is sufficient authority in itself for its execution. No order of sale need issue, and if one be issued, a sale made thereunder will not be set aside for formal defects in the order, or for failure of the officer to follow entirely the command of the order, provided he follow the law and the decree.

2. ———: APPRAISEMENT: DEPUTY SHERIFF. A deputy sheriff may act for his principal in appraising and selling land under decree of foreclosure.

3. ———: ———. An appraisement is not so defective as to invalidate the sale where it finds the value of each of several tracts and the incumbrances on each separately, but concludes by stating defendants' interest in gross.

4. ———: ———: CERTIFICATE OF INCUMBRANCES. Nor will a sale be set aside on motion of the mortgagor because no certificates of incumbrances were procured, when the incumbrances found and deducted were less than those actually existing.

5. **Descent.** Where an ancestor dies intestate his lands descend instantly to his heirs. It does not require settlement of his estate or a probate order declaring heirship to vest the title.

6. **Judicial Sales:** NOTICE: PROOF OF PUBLICATION. Publication of a notice of foreclosure sale may be proved by affidavit of any one knowing the fact, and such knowledge need not be expressly stated in the affidavit.

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

*W. H. Ashby* and *L. W. Colby*, for appellants.

*E. O. Kretsinger, contra.*

IRVINE, C.

This is an appeal from an order confirming a sale made in pursuance of a decree of foreclosure. The decree was rendered November 11, 1892. An order of sale was issued August 18, 1893, in pursuance whereof the property was appraised at $10,000, and the interest of the defendants, after deducting prior incumbrances, at $9,405.95. The property was twice offered for sale and not sold for want of bidders. November 23, 1893, a second order of sale was issued and a new appraisement had whereby the property was valued at $6,000, and the interest of the defendants at $5,495.95. A sale was then had. The defendants objected to its confirmation and moved to set both sale and appraisal aside. The sale was set aside, but the motion to set aside the appraisement was

overruled. April 20, 1894, still another order of sale was issued and the property was sold without a new appraisement. This sale was confirmed and defendants' motion to set it aside was overruled. We take up the defendants' objections to the validity of the sale in the order in which the briefs present them.

It is said that the sale was either void or voidable because the order on which it was made does not run in the name of the state of Nebraska. It is unnecessary to consider whether or not the order sufficiently followed the constitutional provision as to the style of process, because a decree of foreclosure operates directly upon the mortgaged property and is itself sufficient authority for the officer to proceed. It is unnecessary that any order aside from the decree should issue. (*Rector v. Rotton*, 3 Neb., 171; *Fried v. Stone*, 14 Neb., 398; *Burkett v. Clark*, 46 Neb., 466.)

It is next said that the sale should be set aside because the order directed the sheriff to appraise, advertise, and sell the property, whereas he proceeded to advertisement and sale without appraisement. For the same reason as stated above, the sale should not be set aside on account of any defect in the order of sale. The decree directed the sale and the law prescribed the manner of making the same. It is only after land has been twice advertised and offered for sale, and remains unsold for want of bidders, that a new appraisement can be made, unless it be in cases where the court has set aside the existing appraisement. (Code, sec. 495.) The court had refused to set aside this appraisement and it was proper for the sheriff to proceed to sell thereunder.

The next objection is that the sale was bad because the appraisement and sale were made by a deputy sheriff. This question has been considered and decided adversely to the plaintiffs in *Nebraska Loan & Building Association v. Marshall*, 51 Neb., 534.

It is next objected that the appraisement was invalid for the reason that the interest of the defendants was ap-

praised in gross and not in each lot. It appears from the record that the decree directed the sale of four lots. Of these, lots 1 and 2 were occupied by a dwelling house. It was manifestly improper to sever these two lots and sell them separately. They were appraised together. Lot 3 and lot 4 were then separately appraised. The incumbrances on each lot are separately stated in the appraisement, but the interest of the defendants is stated in gross. We do not think that this last was such an irregularity as would justify setting the sale aside. The value of each tract being stated, and then the incumbrances on each tract being found, the appraisement of the defendants' interest was a mere matter of computation, and on the sale each tract brought more than two-thirds the value of the defendants' interest as determined from the face of the appraisement. In connection with this objection, it is also argued that the appraisers did not obtain new certificates of incumbrances, but simply deducted the amount of incumbrances as certified to the first appraisers. This was an irregularity which in a proper case would justify setting aside the appraisement on motion made for that purpose. But it appears that the only incumbrances certified were taxes and that the lien occasioned thereby had increased since the first appraisement was made. If new certificates had been obtained the defendants' interest would have been found at less than it actually was determined, so that the irregularity was not to the prejudice of the defendants.

The next objection is that one of the appraisers, Elmer E. Clancy, was not a freeholder. The sheriff returns that he is a freeholder. Whether this may be contradicted by extrinsic evidence we need not now determine, because the evidence shows that Clancy's father, some months before the appraisement was made, died intestate, seized of certain land in Gage county, in fee simple. It also appears that the estate had not been settled at the time of the appraisement, nor had any order been made determining who were the heirs. But in cases of intes-

tacy the title to real estate vests in the heir instantly on the death of the ancestor. (*Shellenberger v. Ransom*, 41 Neb., 631.) The fact that that title may be afterwards divested by proceedings subjecting and selling the land for the payment of the ancestor's debts, does not prevent title from passing, and renders the estate none the less one of freehold.

It is urged that the appraisement was inadequate. Treating the motion filed after the first sale as a motion seasonably filed to set aside the appraisement, and assuming that this appeal presents the order of the court overruling that motion for review, we are satisfied that the finding of the court is not without sufficient support in the evidence.

The proof of publication of the notice of sale is by affidavit of one who describes himself as "principal clerk" of the newspaper in which the notice was published. Some statutes, with regard to proof of publication, require that the proof shall be made by affidavit of certain persons only, as by the printer, his foreman, or principal clerk. This notice, however, falls within the general provision of the Code (sec. 403), whereby publications required by law to be made in a newspaper may be proved by affidavit of any person having knowledge of the fact. (*Miller v. Lefever*, 10 Neb., 77.) Instead of restricting the manner of proof this statute extends it. We do not think that it requires that the affiant should swear that he knew the fact. Unless he knew it his affidavit would be false. This we cannot presume.

The foregoing disposes of all objections urged except those that are merely corrollary to points already discussed.

AFFIRMED.

HARRISON, J., not sitting.

## LOUIS C. EICKHOFF ET AL. V. J. C. EIKENBARY.

FILED SEPTEMBER 22, 1897. No. 7421.

1. **Replevin:** ACTION ON BOND: PLEADING: ATTACHMENT. The condition of a replevin bond is that the plaintiff in replevin shall comply with the judgment; and, in replevin against an officer who justifies under writs of attachment, it is necessary for the officer to prove the debt and the regularity of the proceedings. Therefore, after judgment for the defendant, it is unnecessary in a suit on the replevin bond for the officer to plead those facts. It is sufficient to plead the replevin judgment.

2. **Principal and Surety:** FAILURE TO SUE PRINCIPAL. Mere forbearance by a creditor to sue a principal will not release the latter's sureties; and this is true although by lapse of time remedies may be lost against the principal.

3. **Replevin:** JUDGMENT: RETURN OF PROPERTY. A plaintiff in replevin against whom judgment has been rendered, must, in order to satisfy the judgment for a return of the property, return or offer to return the identical property replevied and not other property of like kind and value.

4. ———: RETURN OF PROPERTY: INSTRUCTIONS. Where property replevied was of such a character that an actual manual delivery thereof was impracticable, and a return could be had only constructively or by surrendering possession of the place where the property was situated, it was not error to instruct the jury, the fact of an offer to return being in issue, that they should inquire whether that offer had been made in good faith.

5. ———: ———: EXECUTION. A plaintiff in replevin against whom judgment has been rendered owes the affirmative duty of returning the property, and, if he fail so to do, the defendant may proceed to enforce the alternative judgment by an ordinary execution. The execution need not be in the alternative.

6. ———: SUFFICIENCY OF BOND. A replevin bond was entitled as of the case, naming parties plaintiff and defendant. It recited the institution of the action, again naming the parties, and further recited that one B., as coroner, had seized the property under the writ. It named the obligee as follows: "We, * * *, undertake to the said B., defendant in said action." *Held*, That the insertion of B.'s name as obligee was merely surplusage and could be rejected, leaving a sufficient bond manifestly running to the defendant.

7. **Instructions:** EXCEPTIONS: REVIEW. A judgment will not be reversed because the court failed to mark on the margin of instructions the word "given," or "refused," where the defeated party

himself noted on the margin an exception to the giving or refusal of the instruction as the case might be, although such exception was accompanied by a special exception to the failure of the court to so mark it.

8. **New Trial:** MISCONDUCT OF COUNSEL. Certain questions of evidence and practice, resting on no new principle, set forth in the opinion and *held* not to have been erroneously decided below.

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

*Wharton & Baird, J. H. Haldeman,* and *Beeson & Root,* for plaintiffs in error.

*H. D. Travis* and *E. H. Wooley, contra.*

IRVINE, C.

This was an action by Eikenbary against the plaintiffs in error on a replevin bond. Eikenbary was sheriff of Cass county and had seized the contents of a lumber yard on writs of attachment. James W. Williams replevied the property, Eikenbary and Wendt executing the bond as sureties. Pending the action Williams died. There was a revivor in the name of his executrix. The estate of Williams proceeded to settlement and on September 18, 1890, the executrix was discharged. Judgment was rendered in the replevin suit October 20, 1890, in favor of the defendant. The case was brought to this court, where the judgment was affirmed. Subsequently the present action was commenced on the bond against the executrix and the two sureties. Separate motions for a new trial were filed, but the defendants have joined in the petition in error, so that if the judgment is right as to one it must be affirmed as to all; and as the questions argued relate chiefly to the liability of the sureties, we consider no questions which would affect solely the liability of the executrix.

The first assignment argued is that the petition states no cause of action in that it fails to allege that judgment was recovered in the attachment suit wherein the levy

was made by the sheriff, nor does it allege that the claim of the plaintiff in that suit is unsatisfied in whole or in part. We think such an allegation was unnecessary. The condition of the bond is "that the said James W. Williams, plaintiff, shall duly prosecute his action aforesaid, and pay all costs and damages which may be awarded against him, and shall return said property to said defendant in case a judgment for the return thereof shall be rendered against the plaintiff herein." That is, the condition of the bond is not to pay such damages as may be proved to have been sustained in the suit on the bond, but it is to answer the judgment in the replevin suit. On one of the several occasions when this very replevin suit was before this court, it was held that where an officer attaches property found in the possession of a stranger claiming title, in an action of replevin therefor by such stranger, the officer, in order to justify, must not only prove that the attachment defendant was indebted to the attachment plaintiff, but that the attachment was regularly issued. (*Williams v. Eikenberry*, 25 Neb., 721.) The validity of the attachment and the existence of the debt on which it is based are, therefore, matters in issue in the replevin suit itself. They are determined by the judgment in that suit, and, the bond being conditioned for the performance of that judgment, it is unnecessary to again plead and prove such facts in an action on the bond.

It is next contended that, under our laws with relation to the estates of decedents, a claim like the present must be presented in the county court against the estate; that an independent action will not lie therefor; that Eikenbary, having failed to present a claim against the estate of Williams, the principal on the bond, and more than two years having elapsed before the commencement of this suit, all remedy against the estate has been lost, and the sureties are thereby discharged. It will be recalled from the statement of facts that the estate was settled and the executrix discharged before judgment was ren-

dered in the replevin suit. But it is insisted that prior to that judgment the claim on the bond was a contingent claim and should have been presented as such in order to continue the obligee's rights against the sureties. We do not find it necessary to determine all the questions suggested by this line of argument. It is a well settled principle of law, several times recognized in this state, that mere forbearance to sue a principal will not discharge a surety. In order to operate as a discharge the plaintiff must do some act which releases the principal or suspends the right to proceed against him, and a mere failure to proceed with the present power of doing so does not operate as a discharge. (*Dillon v. Russell*, 5 Neb., 484; *Sheldon v. Williams*, 11 Neb., 272; *Smith v. Mason*, 44 Neb., 610.) In *Burr v. Boyer*, 2 Neb., 265, it was held that negligence on the part of the creditor, whereby security held by him is sacrificed to the detriment of the sureties, will operate to discharge them. But the general rule was there recognized and the case distinguished from a mere failure to pursue legal remedies. The reason for this rule is that the surety is not put to any hazard by the forbearance of the creditor as he has it in his power to protect himself. He may either pay the debt, and thus become subrogated to the rights and securities of the creditor, or he may compel the creditor to sue; and it follows that if a statute of limitations is permitted to run against the principal in such case, the fault is as much that of the surety as of the creditor. Cases directly in point with reference to the loss of remedy against the estate of a deceased principal are: *Villars v. Palmer*, 67 Ill., 204; *Johnson v. The Planters' Bank*, 4 S. & M. [Miss.], 165; *Marshall v. Hudson*, 9 Yerg. [Tenn.], 57; *Sichel v. Carrillo*, 42 Cal., 493; *Bull v. Coe*, 77 Cal., 54; *Banks v. State*, 62 Md., 88.

The judgment was for the value of the property as well as for the damages and costs in the replevin suit. One defense interposed was that there had been an offer to return the property, and that the sureties were thereby

discharged to the extent of its value. The evidence, however, showed that Williams, after obtaining the property under the writ, proceeded to conduct the lumber business, selling from the stock and buying new material. The question of the identity of the property which it was proposed to return with that replevied was submitted to the jury, the court proceeding on the theory that it was the duty of the plaintiff in replevin to return the identical property, and that the judgment for the return was not satisfied by a tender of similar property, even of equal value. The theory of the defendants is that the property being a lumber yard, an offer to return lumber of the same kind, amount, and value, was sufficient, and they cite in support of that view another opinion of this court in the replevin action. (*Williams v. Eikenberry*, 22 Neb., 210.) The court was there considering whether Williams had estopped himself from prosecuting a proceeding in error by offering to comply with the judgment, Eikenberry having conditionally accepted the offer; that is, he had offered to accept a return provided that "all the property so replevied" was returned. The court proceeded no further than to ascertain that this condition amounted to a refusal to accept the offer as made, and the language there used, which the plaintiffs in error now contend sustains their position, was directed to characterizing the offer which Williams had then made, and not to designate what would be a sufficient offer to return the property. In *Reavis v. Horner*, 11 Neb., 479, it was held that a party might return a portion of the property where its value had been separately ascertained, and tender the value of the remaining property in money. But this case would not apply to one like the present where there had not been such separate ascertainment of value, and where the tender was made in bulk of different property. In the case last cited the court said, as to the duties of a party under such a judgment, "They were only required to return the property in the like condition in which they received it." There can be no doubt that in

order to satisfy a judgment for the return of property the identical property must be tendered in substantially the condition in which it was received. (*Irvin v. Smith*, 68 Wis., 220; *Irvin v. Smith*, 68 Wis., 227.) The action of replevin is for the recovery of specific chattels. The judgment, when for the defendant, is for a return of those chattels or for their value. It is not for a return of other chattels of like kind.

In this connection it is also argued that the court erred in excluding evidence tending to show that the district court had refused Williams permission to withdraw the tender. We cannot see how, if this was error, it could prejudice the plaintiffs in error. Williams filed a written offer to return the property. Eikenbary filed a conditional acceptance of that offer. Williams then asked leave to withdraw his tender and the evidence excluded was a refusal of the court to permit him to do so. If, in order to discharge the sureties, it was only necessary to offer to return the property, and it was not necessary to keep the offer good, then it was immaterial whether or not Williams had been permitted to withdraw the offer. This was the view taken by the district court, and the case was submitted to the jury under an instruction to that effect, which was all that the plaintiffs in error could ask.

It is assigned that the court erred in permitting the clerk of the district court to testify that "proper papers" had been filed in his office for the purpose of taking the replevin case to the supreme court. This was error without prejudice. It was admitted of record that the judgment had not been superseded by the appellate proceedings, so that it was not very material whether or not the case was prosecuted beyond the district court. Moreover, the mandate following the judgment of affirmance and reciting that judgment was immediately offered in evidence. The fact that proceedings in error had been prosecuted was not controverted, and no one was injured by the question and answer referred to. The clerk testified

from his own knowledge and recollection, and not by the production of the record as to the amount of costs in the replevin suit. This is assigned as error. He was first asked whether he could now state the total amount of costs. This question was objected to as not being the best evidence, and the objection properly overruled. The inquiry was only as to the clerk's knowledge of the fact, and the objection that it was not the best evidence was clearly untenable. This was followed by a question as to the amount, and that question was not objected to.

The plaintiff offered in evidence an execution in the ordinary form on the money judgment alone. It is contended that the court erred in admitting this execution and the return thereof because it was not in the alternative, following the judgment. It has been held that the plaintiff in replevin cannot complain if the judgment is absolute instead of in the alternative, unless he makes it appear that a return of the property could be had. (*Goodman v. Kennedy*, 10 Neb., 270.) It would seem that if he could not complain of the form of a judgment he could not complain of the form of the execution in this respect. But however that may be, the writ of *retorno habendo* does not usually issue where proceedings in replevin are like those in this state. It is the general doctrine that it is the affirmative duty of the plaintiff to comply with the judgment by returning the property or offering to do so. It is not his duty merely to yield to process having that object. If he failed to perform this duty the defendant may proceed to collect the money judgment by ordinary process. (Cobbey, Law of Replevin, secs. 1179, 1182.) Our statute provides (Code of Civil Procedure, sec. 196): "No suit shall be instituted on the undertaking given under section 186, before an execution issued on a judgment in favor of the defendant in the action shall have been returned, that sufficient property whereon to levy and make the amount of such judgment cannot be found in the county." There is no provision for the form of execution, but the object of this provision is merely to

require a resort to the property of the principal under the replevin judgment before permitting another action to be brought on the bond, and this requirement is satisfied if the plaintiff fails to return the property and an execution on the money judgment is issued and returned unsatisfied.

It is argued that the court erred in admitting the bond in evidence, on the ground that it runs to the coroner of the county instead of the defendant in replevin. The bond bears at its head the title of the case as follows: "James W. Williams, plaintiff, v. James C. Eikenbary, sheriff of Cass county, Nebraska, defendant." It opens with a recital that "Whereas James W. Williams above named has caused an order for delivery of the following goods and chattels, to-wit: * * * to be issued out of the justice court of C. H. King, a justice of the peace of Weeping Water, within and for the county of Cass, in a cause now pending in the said justice court wherein the said James W. Williams is plaintiff and one James C. Eikenbary, sheriff of Cass county, Nebraska, is defendant." Then follows a recital that the order was delivered to Henry Boeck, coroner of Cass county, and the goods were by him taken and appraised. Then comes the following: "Now, therefore, we, James W. Williams and L. C. Eickhoff, and August Wendt, undertake to the said Henry Boeck, defendant in said action," etc. It is evident that the intention was to execute an undertaking to the defendant as the statute requires. The defendant is twice named, once in the caption and once in the recital of the bond. The bond also recites who Henry Boeck was and shows that he was merely the officer levying the writ. The insertion of his name in the body of this bond as obligee was, under the circumstances, merely surplusage and may be disregarded, leaving a valid bond running to the defendant. It required no information or proof of extrinsic circumstances to show who was the real obligee intended.

Complaint is made of an instruction whereby in sub-

mitting the question of the offer to return the property to the jury, the court seems to have required the jury to find, in order to sustain that defense, that the offer was made in good faith. It is argued that if the offer to return was in fact made, it was immaterial whether it was made in good faith or in bad faith. Under the evidence we think the instruction was correct. The offer was made at a time when an officer was present at the lumber yard about to seize it under a writ of execution. The nature of the property was such that an actual delivery thereof was impracticable. It was merely a matter of surrendering possession of the place where the property lay. Under such circumstances it certainly was necessary, in order to constitute such an offer a good tender of a return of the property, that it be made in good faith for the purpose and with the intention of putting the plaintiff in replevin in possession of the property, and that it be not made colorably for the purpose of preventing the levy of an execution or of laying the foundation for future litigation or defenses, without any intention of actually surrendering the property.

Complaint is made of another instruction for giving undue prominence to certain facts. This also was an instruction relating to the issue bearing upon the return of the property, and stated to the jury that it should consider all the testimony bearing on that issue, the written offer to deliver, the request to withdraw the offer, Williams remaining in possession of the property, selling and disposing of the same, his ability to return the identical property, and all surrounding facts and circumstances as shown by the evidence. We do not think the instruction was objectionable on the grounds stated. It fairly collated the principal matters in evidence relating to that issue and also cautioned the jury to consider all other facts and circumstances in evidence bearing thereon.

The court failed to mark certain instructions which went to the jury "given," and to mark others "refused." Section 54, chapter 19, Compiled Statutes, requires that

instructions shall be marked "given" or "refused," as the case may be, on their margin; and by section 56 of the same chapter it is provided that a neglect or refusal on the part of the court to perform any duty enjoined by the preceding sections shall be error and a sufficient cause for the reversal of the judgment. But it was certainly not intended by the legislature to require a reversal for harmless error, and it has been held that in order to preserve the matter for review exception must be specially taken on that ground. (*Omaha & Florence Land & Trust Co. v. Hansen*, 32 Neb., 449.) In the case before us special exceptions were taken, but in this form: "Defendants severally except to the giving of this instruction and also to the refusal of the court to indorse hereon the word 'given,' or some equivalent word." This exception was taken by noting it on the instruction itself. By the general exception to the giving of the instruction the defendants themselves supplied the neglect of the court. The only possible object of the statute was to have each instruction show on its face that it was either given or refused, and an express exception written on the instruction to the giving thereof sufficiently shows that it was given.

It is disclosed by affidavits in support of the motion for a new trial that both in the opening statement, and in the argument of the case, counsel for the plaintiff stated to the jury that the sureties sued were indemnified and would not have to pay the judgment. It is claimed that this was misconduct on the part of counsel for which a new trial should have been granted. It is admitted that in the opening statement counsel did state that he expected to prove such a fact. Counsel are given the right by statute in the opening statement to briefly state the evidence which they expect to adduce. On the trial evidence of that character was offered but was excluded. We must assume that the offer was made in good faith, and so far as the opening statement was concerned counsel was guilty of nothing more than a mistake as to the

admissibility of evidence. It further appears that no objection was made to this language at that time. When the statement was repeated during the closing argument it appears that the court interposed and warned the jury not to consider the remark, and counsel immediately desisted from that line of argument. This cured the error.

We find no error in the record prejudicial to the plaintiffs in error.

AFFIRMED.

HARRISON, J., not sitting.

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## HERBERT M. BRONSON V. MCCORMICK HARVESTING MACHINE COMPANY.

FILED SEPTEMBER 22, 1897. No. 7427.

1. **Guaranty:** RELEASE OF GUARANTOR. A creditor who, by his voluntary act parts with security for the debt, thereby, to the extent of the value of such security, releases a surety or guarantor.
2. ———: ———. Case distinguished from that of mere forbearance to sue.

ERROR from the district court of Boone county. Tried below before THOMPSON, J. *Reversed.*

*J. A. Price,* for plaintiff in error.

*Pratt & Barkley, contra.*

IRVINE, C.

The McCormick Harvesting Machine Company sued Bronson on a written guaranty of payment of a promissory note for $50 made by F. J. Francisco and two others to the plaintiff. The defendant answered that the note was given in part consideration for the sale of a harvesting machine, and that the following was a copy thereof:

"$50.00. ALBION, NEB., July 19, 1893.

"I (or we) promise to pay to the McCormick Harvesting Machine Company, a corporation organized and existing under the laws of the state of Illinois, and having its chief office and place of business in the city of Chicago, county of Cook, state of Illinois, or order, at Albion, Neb., fifty dollars, with interest at seven per cent per annum from date until due; ten per cent per annum thereafter until paid. The express condition of the sale and purchase of the harvester and binder machine for which this note is given is such that the title, ownership, or possession does not pass from the said McCormick Harvesting Machine Company until this note and interest are paid in full; and the said McCormick Harvesting Machine Company have full power to declare this note due and take possession of the said harvester and binder machine whenever they deem themselves insecure, even before the maturity of this note, and sell the same at public or private sale without notice. The proceeds (after the expenses and interest are paid) to be applied upon this note, and any balance then unpaid shall in consideration of the use and rent of said property be a valid and subsisting claim against the vendee."

Defendant further answered that after the note became due the defendant requested the plaintiff to foreclose the contract of sale, but the plaintiff neglected to do so, and instead thereof brought an action at law against the makers of the note, recovered judgment thereon, and caused an execution to be issued and levied upon the harvester in question as the property of the makers of the note; that said makers each filed an inventory of their personal property in the court from which the execution was issued, and thereupon by order of the plaintiff's attorney the officer released the levy; that the harvester was then worth more than the amount due on the note. A general demurrer to this answer was sustained, and the defendant refusing to plead over, judgment was rendered against him.

We think the court erred in sustaining the demurrer. By the contract set forth in the answer the plaintiff retained the title to the harvester with the right to repossess itself thereof. In other words, the sale was conditional, title being reserved in the vendor as security for the payment of the purchase price. We are not called upon to express any opinion as to whether in such case the bringing of an action or the obtaining of judgment upon the note would constitute a waiver of the condition and operate to pass title to the vendee. Whether or not it would have that effect, there can be no doubt that causing an execution on such a judgment to be levied on the property sold, as that of the vendee, would estop the plaintiff from thereafter asserting that title had not passed. Furthermore, the allegations of the answer are of a voluntary release of the levy. While it may be inferable that the inventories filed by the vendees were for the purpose of claiming their exemptions, it does not appear that the release of the levy was compelled by proceedings upon those inventories. On the other hand, it is charged that the release was voluntary by direction of plaintiff's attorney.

In cases of suretyship and guaranty if the creditor by his own act parts with collateral security the surety or guarantor is *pro tanto* discharged. (*Burr v. Boyer*, 2 Neb., 265; *Bell v. Paul*, 35 Neb., 240.) It is unnecessary to cite cases from other courts. They are legion. The reason of the rule is that a surety or guarantor on paying the debt becomes subrogated to any securities which the creditor may hold; that this right is traced through the creditor and extends only to the rights which the creditor had at the time the surety or guarantor paid the debt. The surety is entitled to have securities held by the creditor preserved so that they may be made applicable to the satisfaction of the debt. The case is very different from those cited by defendant in error, where it is held that mere non-action by the creditor does not release a surety, although securities in the meantime become impaired or

rights are lost. An application of that rule may be found in the case of *Eickhoff v. Eikenbary*, 52 Neb., 332, just decided. This, on the other hand, is a case of the creditors, performing an affirmative act which has the effect of releasing the surety. The judgment of the district court is reversed and the cause remanded with directions to overrule the demurrer, and for further proceedings according to law.

REVERSED AND REMANDED.

HARRISON, J., not sitting.

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CARLTON D. HUTCHINSON ET AL., APPELLANTS, V. CITY OF OMAHA ET AL., APPELLEES.

FILED SEPTEMBER 22, 1897. No. 7306.

1. **Municipal Corporations**: GRADING STREETS: ASSESSMENTS. The charter of metropolitan cities, as it existed in 1890, granted to the mayor and council power to grade "any street," or part of street, one-half the expense to be paid from the general fund and one-half by local assessment upon property abutting, or adjacent, and specially benefited. When owners of abutting property representing three-fifths of the frontage petitioned therefor, the mayor and council were required to grade, and in that case the whole expense was defrayed by local assessment on abutting property. *Held*, That under the latter provision two or more streets could not be united in a single improvement and the total expense distributed against the property abutting on all.

2. ———: ———: ASSESSMENTS. Where power to make an improvement is derived from a petition of property owners the work must be done according to the petition in order to found a local assessment to pay therefor.

3. ———: ———: ———. The provision of a charter that no court shall entertain a complaint that the party was authorized to make, and did not make, to the board of equalization has no application where the tax complained of is void.

4. ———: BOARD OF EQUALIZATION. A board of equalization must be and remain in session ready to hear complaints during the hours advertised for its meeting.

5. ———: TAXES: ESTOPPEL. A taxpayer is not estopped from resisting a tax because he has suffered the work to proceed before complaining, when in so doing he was not guilty of laches.

6. ———: INVALID TAXES: REMEDY: COURTS. The levying of a tax is not a judicial act and the court cannot impose, as a condition of relief against a void tax, the payment of such tax as would be lawful, where new proceedings and a different basis of assessment are necessary to ascertain what tax is lawful.

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

*John P. Breen*, for appellants.

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

IRVINE, C.

This was an action by Carlton D. Hutchinson and several others, on behalf of themselves and others similarly situated, the purpose of which was to obtain an injunction restraining the defendant city from collecting certain local assessments. The district court found for the defendants and dismissed the case. Plaintiffs appeal. There is in the city of Omaha an addition known as "Walnut Hill," laid out in rectangular blocks, and traversed from east to west by George, Nicholas, and Nelson streets, and from north to south by Rebecca, Bird, Eureka, Dale, and Dewey streets and Institute boulevard. It appears that in 1890 property owners in Walnut Hill filed a petition with the city council whereby they asked that the streets above named within said addition "be graded to the present established grade of said streets, as soon as practicable, and without expense to the city." The charter provision then applicable is embraced in section 69 of an act incorporating metropolitan cities (Session Laws, 1887, ch. 10), as amended by Session Laws, 1889, ch. 13, sec. 14. By this section the mayor and council are given power "to open, * * * grade, * * * or otherwise improve, * * * in any man-

ner they may deem proper, any street, avenue, or alley within the limits of the city, * * * and to defray the costs and expense of such improvements or any of them, the mayor and council of such city shall have power and authority to levy and collect special taxes and assessments upon the lots and pieces of ground adjacent to or abutting upon the street, avenue, alley, or sidewalk, thus in whole or in part opened, * * * graded, * * * or otherwise improved or repaired, or which may be specially benefited by any of said improvements." By said section it is further provided that one-half of the expense of bringing the streets to the established grade shall be paid out of the general fund of the city, but further that "whenever the owners of the lots abutting upon any street or alley or part thereof, within said city representing three-fifths of the feet front abutting on such part of street or alley desired to be graded shall petition the council to grade such street or alley, or part thereof, without charge to the city, the mayor and council shall order the grading done and assess the cost thereof against the property abutting upon such street or alley or such part thereof so graded." It was under this last provision that the petition was designed to operate. In pursuance of the regular course in such matters the petition was referred to the city engineer, who certified that each of the streets except Rebecca street and Institute boulevard was represented on the petition by the requisite signatures of abutting property owners. An ordinance was then passed declaring the necessity of grading each of the streets named except Institute boulevard. There was an appraisement of damages and the council then passed an ordinance ordering the grading of all the streets except Rebecca street and Institute boulevard. It seems that there was at the time no grade established for some of the streets named and the council, after these proceedings, established a grade. A contract was then let for the work and the streets named in the last ordinance were graded. From the scheme there were, however, omitted

Rebecca street and Institute boulevard, which were included in the original petition, and this for the reason that the petition did not receive the signatures of the owners of three-fifths of the frontage upon those streets. The next step was to change the grade of at least one street, to-wit, George street, and the work was done according to the changed grade. When the work was completed a notice was published of a meeting of the council as a board of equalization to equalize the assessment therefor. The council held, or pretended to hold, a session as a board of equalization and adopted a scheme of taxation whereby the total cost of grading the seven streets was ascertained, this divided by the total frontage of all the streets graded, and an assessment made per front foot of all the property abutting on the streets graded. It is this assessment of which the plaintiffs complain.

It will be observed that the scheme of the petition was a joint grading of all nine streets; that the city, instead of following the petition, treated it in the first operations as a petition for nine different improvements and as sufficient only with regard to seven; that the work was not carried out in accordance with the petition by grading "to the present established grade," but some streets were graded according to grades thereafter established, and one, at least, was graded to a new grade, the change being made after the petition was filed. Then the city abandoned its theory of each street constituting a separate improvement and treated the seven streets graded as a single improvement, distributing the cost among all the abutting property owners on the seven streets and not charging against those on each street simply the cost of grading that street.

We think this tax was in its inception, in its groundwork, and throughout, absolutely void. It is familiar law that in order to sustain an assessment of this character the record must show affirmatively a compliance with all the conditions essential to the valid exercise of the taxing

power. (*Smith v. City of Omaha*, 49 Neb., 883.) It is no less familiar that statutes authorizing the exercise of such power are to be strictly construed. Expressing his individual opinion only, the writer will say that he believes that such grants of power hold out temptations and opportunities for the confiscation of property to such an extent that the protection of property rights demands that they should receive the very strictest construction, and that the courts should be insistent that the proceedings should be of the utmost regularity. Recurring to the charter, we find the grant of power is to grade "any street." This is followed by express permission to grade a part of the street. There is no express authority to join several streets in a single improvement and to charge upon the owners of land abutting upon one the expense of grading another. Nor do we think that we have any right to imply such authority from the language of the charter. That such a measure would in some instances be more economical and of actual advantage to property owners is wholly aside from the question. That was a matter for the legislature to determine, and such a power cannot be sustained by the courts, merely from motives of expediency, in the absence of legislative authority. The petition was joint and the owners of lots abutting on different streets joined indiscriminately therein. It was the manifest purpose of the petition that the work should be carried on as a joint improvement of the nine streets. It was therefore insufficient to confer power upon the city to proceed under the so-called three-fifths clause, whereby the total expense of grading is charged upon abutting property, and the city had no right to sever the petition and treat it as a petition for nine distinct improvements; much less to return partially to the original scheme, and after carrying out the improvement of seven streets alone, for the purposes of assessment treat those seven as a single improvement. This was not in accordance either with the original petition or the earlier proceedings under which the work was done. (*Baker v. Ashland*, 50 N. H.,

27; *Arnold v. City of Cambridge*, 106 Mass., 352; *Weckler v. City of Chicago*, 61 Ill., 142; *Mayall v. City of St. Paul*, 30 Minn., 294.) Moreover, in order to justify a local assessment which derives its authority as in this case solely from a petition of property owners, it is clearly necessary that the work should be done in accordance with the petition. Were it proper to unite the nine streets in one petition, the city lost its power to assess the whole expense against the abutting property by omitting two streets of the nine from the improvement and by grading others to grades not then established as the petition required.

It is contended by the city that the plaintiffs cannot be heard in this proceeding because by another clause of said section 69 it is provided that "no court shall entertain any complaint that the party was authorized to make and did not make to the city council sitting as a board of equalization, * * * nor any complaint that does not go to the ground-work, equity, and justice of the tax." The writer is very firmly of the opinion that the legislature is without power to prevent the courts from granting any relief which the circumstances of the case may render necessary. But without passing on the provision quoted in its whole scope, it is sufficient to say that it is now settled by a long line of decisions that no such provision is applicable to a void tax. At most it can only relate to such taxes as are irregular merely. (*Touzalin v. City of Omaha*, 25 Neb., 817; *Bellevue Improvement Co. v. Village of Bellevue*, 39 Neb., 876; *Morris v. Merrill*, 44 Neb., 423.) This tax was void. The petition which was necessary to authorize it was insufficient, and the tax was assessed for the purpose of paying for work different from that contemplated in the petition. Furthermore the record discloses that there never was a sitting of the board of equalization in any proper sense of the term. The notice was that the council would sit as a board of equalization at the office of the city clerk on the 4th day of December, 1891, from 9 A. M. to 5 P. M. About the first hour named a majority of the members of the council

appeared at the place designated and appointed a chairman. They one by one drifted away, and an entry was made that a recess had been taken subject to the call of the chairman. The chairman himself remained for the purpose of receiving written protests, but the board was not there to hear them. Some days thereafter, without any new notice, the chairman, by casual meetings on the streets, called the board together and the session was resumed and the scheme of assessment agreed upon. Such a proceeding cannot be tolerated. Property owners are entitled to have the board in session during the hours advertised, and when they do not in fact sit they cannot conceal their dereliction under the subterfuge of a recess and a subsequent meeting without notice.

It is also claimed that the plaintiffs are estopped because they did not proceed until after the work was completed. It is only in cases of laches that the plaintiffs are estopped by permitting the work to progress. The fact that the work was progressing was not notice to these plaintiffs that the city did not intend to proceed therewith according to the petition, and some of them had no actual knowledge of the fact. Moreover, the city had a general power to grade the streets, assessing one-half the cost against the abutting and adjacent property and that specially benefited. As it had that power, it is difficult to see how the plaintiffs could have prevented the performance of the work.

The plaintiffs offer in their petition to pay such a tax as is just and lawful, and the defendant insists that in any event they should be required as a condition of relief to pay one-half the expense of the grading, it being within the general power of the city to perform the work and assess one-half the cost against them. But we cannot in this action impose such a condition. The levying of assessments is not a judicial act. The cost of the work under the general power must be defrayed by ascertaining the cost of grading each street separately and assessing one-half thereof against not only the abutting property

but the adjacent property and that specially benefited; and it goes almost without saying that it must be confined to property specially benefited. (*Smith v. City of Omaha, supra.*) The assessment must be on an entirely different basis from that pursued, and is a matter for the mayor and council and not for the court. The plaintiffs are entitled to a decree in accordance with the prayer of their petition, perpetually enjoining the collection of the tax of which they complain, and such a decree will be entered in this court.

JUDGMENT ACCORDINGLY.

HARRISON, J., not sitting.

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## HERMAN F. GRANGER v. STATE OF NEBRASKA.

FILED OCTOBER 6, 1897. No. 9364.

1. **Statutes:** EXPEDIENCY. A statute will not be declared invalid merely because the court may deem the provisions thereof unwise or inexpedient.
2. TITLE AND SUBJECT. Chapter 77, Laws, 1895 (Criminal Code, sec. 117*a*), embraces but one subject of legislation, and the same is with sufficient clearness expressed in the title.
3. ———: CATTLE STEALING. Said act is complete in itself, was not intended to, and did not, amend either sections 114, 119, or 120 of the Criminal Code. Its purpose was to create an independent substantive crime, and provide a penalty therefor.

ERROR to the district court for Sheridan county. Tried below before KINKAID, J. *Affirmed.*

*R. C. Noleman*, for plaintiff in error.

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

POST, C. J.

This was a prosecution for stealing a cow. The principal ground urged for a reversal is that the act of the legislature of 1895, under which the defendant was con-

victed, is unconstitutional and void. The act in question is chapter 77, Laws, 1895 (Criminal Code, sec. 117*a*), and reads as follows:

"An act to punish cattle stealing and to punish persons receiving or buying stolen cattle, and to punish all persons harboring or concealing cattle thieves.

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

"Section 1. If any person shall steal any cow, steer, bull, or calf, of any value, or if any person shall receive or buy any cow, steer, bull, or calf, that shall have been stolen, knowing the same to have been stolen, with intent by such receiving or buying to defraud the owner, * * * or if any person shall conceal any cow, steer, bull, or calf, knowing the same to have been stolen, every such person so offending shall be imprisoned in the penitentiary not more than ten, nor less than one year."

It is suggested in the brief that this "act is a vicious one, and possesses no point whereby it impresses the court to uphold it." We cannot yield assent to the proposition; nevertheless, if it be true that the law is not a wise one, it is no reason why the courts should declare it invalid. The argument made by counsel against the statute under consideration would have been more appropriate were it addressed to the lawmaking body, as the constitution has not conferred upon this court the power to repeal laws, but the authority to interpret and enforce them in proper cases.

It is insisted that the act referred to is repugnant to section 11, article 3, of the constitution, which declares that "no bill shall contain more than one subject, and the same shall be clearly expressed in its title." The object of the law is single. The act makes the stealing of cattle a crime and provides a penalty for the same. All the provisions of the law are germane to the subject of legislation,—cattle stealing. Whether there is any merit in the suggestion that there is nothing in the title to the act to warrant the provision in the body of the law mak-

ing it a crime to conceal any cow, knowing the same to have been stolen, it is unnecessary to determine, since the defendant has not been convicted of that offense. The act under consideration is not amendatory of sections 114, 119, and 120 of the Criminal Code, but it defines a new crime and prescribes a penalty therefor. (*State v. Arnold*, 31 Neb., 75; *Brown v. State*, 33 Neb., 354; 34 Neb., 448.)

Lastly, it is urged that this prosecution was under a special law, and the information is defective, for the reason it failed to mention said statute. The only answer which need be made to this contention is that the act of 1895 is not a special law, but is general in its scope and purpose, hence it was not required to be pleaded and proven. The judgment is

AFFIRMED.

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## GRETNA STATE BANK V. JOHN GRABOW.

FILED OCTOBER 6, 1897. No. 7461.

1. **Review: SUFFICIENCY OF EVIDENCE: MOTION FOR NEW TRIAL.** An objection that the findings and judgment are not sustained by the evidence will not be considered in this court where the record does not disclose that a motion for a new trial was presented to the trial court and its ruling obtained thereon. Following *Losure v. Miller*, 45 Neb., 465.

ERROR from the district court of Sarpy county. Tried below before KEYSOR, J. *Affirmed.*

*J. J. O'Connor*, for plaintiff in error.

*James Hassett, contra.*

POST, C. J.

The Gretna State Bank was sued in the district court of Sarpy county for the recovery of $90 with interest thereon from March 20, 1890. The plaintiff, John

Grabow, alleged that he had deposited with said bank, to be paid to Owen Ward, the sum aforesaid; that Ward had refused to receive said money and that the bank had refused to return said money on Grabow's demand. A jury was waived and the cause was tried to the court. There was a judgment against the bank for the sum of $96.85 and costs. A reversal of this judgment is sought by the bank by its petition in error.

The record contains only the following recitations with reference to the action of the trial court in respect to the motion for a new trial: "This case came on for hearing on the motion [of] the defendant for a new trial herein, and being advised in the premises the court overrules the said motion of plaintiff for a judgment on the findings of the court." It does not appear from this recitation that the motion for a new trial has ever been passed upon, and moreover there is preserved no exception to whatever ruling was made. As the trial was to the court, a jury having been waived, the admissibility of the evidence received cannot be considered; and on the record there remains but one question, and that is, the sufficiency of the proofs to sustain the findings of the trial court. This we cannot consider for the reason that plaintiff in error has obtained no ruling on his motion for a new trial. (*Losure v. Miller*, 45 Neb., 465.) The judgment of the district court is therefore

AFFIRMED.

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## JAMES KELLY V. NEBRASKA EXPOSITION ASSOCIATION.

FILED OCTOBER 6, 1897. No. 7412.

1. **Subscriptions:** PLEADING: STATE FAIR: BOARD OF AGRICULTURE. In an action by an association on a subscription in its favor which stated that it was made for the purpose of securing the state fair to be located at a designated place, a general denial did not put in issue the corporate existence of the State Board of Agriculture, the body by which such location was fixed.

2. ———: ———: ISSUES. *Held*, Further, that the answer did not present an issue of any illegality of the subscription as being for the purpose of aiding in improperly influencing the decision of the State Board of Agriculture in designating the place for holding a fair.

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

*Joseph Wurzburg* and *Wooley & Gibson*, for plaintiff in error.

*A. G. Greenlee, contra.*

HARRISON, J.

The defendant in error commenced this action in the district court of Lancaster county to recover of plaintiff in error the sum of $100 with accrued interest, alleged to be due by reason of a subscription in its favor by plaintiff in error in the principal sum stated, to aid it in securing the state fair to be located and held at or near the city of Lincoln. The petition was as follows: "The plaintiff alleges that it is a corporation duly organized and existing under and by virtue of the laws of the state of Nebraska, and having its principal place of business in Lincoln, in said state; that on the 27th day of December, 1889, the defendant executed and delivered to this plaintiff for its use and benefit a certain agreement, a copy whereof is as follows:

"'COPY OF AGREEMENT.

"'LINCOLN, NEB., Dec. 27, 1889.

"'We, the undersigned, hereby agree to pay the sum set opposite our names for the purpose of securing the state fair located at Lincoln for the ensuing five years, and agreed to pay the same on or before March 1, 1890, to the secretary of the Nebraska Exposition Association. In case the state fair is not located at Lincoln this subscription to be void.

James Kelly ..... $100 00'

That upon the strength of said subscription, and relying thereon, the plaintiff made a proposition to the authorities having in charge the matter of the location of the state fair for the ensuing five years, which was accepted, and the said state fair was located at the city of Lincoln for the years 1890 to 1894, inclusive, and that the plaintiff, relying upon said subscription, upon the faith thereof complied with its proposition and expended large sums of money therein. That this defendant has failed, neglected, and refused to pay the said subscription or any part thereof, although the said fair was located at the said city of Lincoln on and prior to the 1st day of March, 1890, and the defendant was called upon to pay the same. There is now due upon the subscription $100 with interest from the 1st day of March, 1890. Wherefore the plaintiff prays judgment against said defendant for $100 with interest from the first day of March, 1890, and costs of suit." The answer was a general denial of the allegations of the petition except an admission that the plaintiff in error signed the agreement of subscription. A jury was waived. The parties entered into a stipulation of the facts and the cause was submitted. The court determined the issues in favor of the association and rendered judgment in its favor for the sum claimed. The unsuccessful party presents the case here for review.

The questions argued are that the State Board of Agriculture had no corporate existence, and that if it had, the subscription to assist in having it locate the fair at the particular place indicated in the agreement was void, being in the nature of a bribe to, or an improper influence exercised on, the will or choice of the board clothed with the power of choosing the location for holding the fair. Passing over the question of whether it is competent in this, a suit to which it is not a party, to attack the corporate existence of the State Board of Agriculture, it seems clear that it was not placed in issue by a general denial which would not have put in issue the corporate

existence of the Nebraska Exposition Association, the complainant in the action. (*Herron v. Cole*, 25 Neb., 692; *Dietrichs v. Lincoln & N. W. R. Co.*, 13 Neb., 43; *Zunkle v. Cunningham*, 10 Neb., 162; *National Life Ins. Co. v. Robinson*, 8 Neb., 452.)

In regard to the second point it will not be presumed that the amount subscribed was to be used in the nature of a bribe or to improperly influence the State Board of Agriculture, or any member thereof, in any part of the proceedings, either preliminary or final, attendant upon the selection of a location for the state fair. No such issue was tendered by the answer, a general denial, nor was there anything in the stipulated statement of the facts to warrant or support a finding that the amount subscribed was for a use such as is suggested by the argument on behalf of plaintiff in error, or that the fair was by reason of this subscription directed by the State Board to be held at any other than the proper and best place for the public interests or convenience and welfare of any and all concerned, hence this point is not well taken. (*Harris v. Roberts*, 12 Neb., 631.) No available error having been assigned or prescribed, the judgment of the district court must be

AFFIRMED.

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## CATHERINE REULAND V. SAMUEL WAUGH, EXECUTOR.

FILED OCTOBER 6, 1897. No. 7405.

1. **Review:** CONFLICTING EVIDENCE. If the evidence is conflicting, a finding or decree thereon will be affirmed unless clearly wrong.

2. **Executions:** APPRAISEMENT. It is the duty of an officer making a sale of real estate under execution or order of sale to deposit in the office of the clerk of the court from which the writ issued a copy of the appraisement of the property and other papers as required by section 491*d* of the Code of Civil Procedure, and such duty must be performed prior to the advertisement of the sale. (*Burkett v. Clark*, 46 Neb., 466.)

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

*Byron Clark* and *C. A. Rawls*, for plaintiff in error.

*A. N. Sullivan, contra.*

HARRISON, J.

This case is presented to this court by proceedings in error to obtain a review of an order of the district court of Cass county confirming a sale of real estate under execution. The sale was made August 27, 1894, and October of the same year, on motion of attorney for defendant in error for confirmation of the sale, it was ordered that cause be shown by November 7th why the sale should not be confirmed.

In the journal entry of the further proceedings appears the following: "And now, on this 8th day of November, this cause came on to be heard upon motion of plaintiff for the confirmation of the sale heretofore made of lots 16, 17, and 19 in section 7, township 12 N. of range 14 E. of 6th P. M., in Cass county, Nebraska, and no exception to said sale being on file in this court, and the proceedings appearing in all respects to be regular, said sale is ordered confirmed and the same is approved. Thereupon comes Byron Clark, attorney for defendant, and at his request is given leave to file exceptions to said sale and affidavits in support thereof, and plaintiff is given a reasonable time in which to file counter-affidavits." The motion filed for plaintiff in error contained the following statement showing its purpose: "Now comes Catherine Reuland, defendant, and moves the court to set aside the confirmation of sale in the above entitled cause for the following reasons, and to vacate said sale." The journal entry of what subsequently transpired leads us to believe that the trial court considered the validity and regularity of the sale as drawn into question under the motion. It reads as follows: "And now, on this twenty-seventh day of November, this

cause came up to be heard upon the exceptions herein filed and the affidavits in support thereof and the counter-affidavits and arguments of counsel, and the court being well and fully advised in the premises, finds in favor of the plaintiff. The court further finds that the said sale was based upon a valid judgment and valid writ, and that the proceedings in all respects have been regular and according to law. The court further finds that the lands included in said sale, or any part thereof, are not the homestead of the defendant. It is therefore ordered, considered, adjudged, and decreed that said sale be and the same is hereby approved, and the sheriff is hereby ordered to execute and deliver to the plaintiff and purchaser herein, John Black, a good and sufficient deed, and is further ordered to place the said John Black in possession of said premises and to remove the said defendant therefrom." We are thus particular in regard to this matter because there was some contention between counsel in the argument with reference to the scope of the motion and hearing, one asserting that it was to set aside the confirmation, and the other that it also involved an attack on the sale. It is true that an order of confirmation had been made, but the trial judge, without a formal order to such effect, so far as the record discloses, seems to have opened the whole matter for examination and adjudication, and by this view we will be governed in our consideration of the points presented.

It was one of the grounds of the motion that the real estate sold was the homestead of the plaintiff in error and not subject to sale under execution. Whether the property was in fact a homestead was the subject of conflicting evidence in form of affidavits and was determined in the negative by the trial judge, and the finding having sufficient of the evidence in its support will not be disturbed.

Another ground of the motion was that "no true certified copy of the appraisement was filed with the clerk of

the court at the time and in the manner provided for by law." And still another, "that said property did not sell for two-thirds of its appraised value."

The property sold was described as follows: "Lots 16, 17, and 19 in section 7, township 12 N. of range 14 E. of 6th P. M., in Cass county, Nebraska." On July 19, 1894, there was filed with the clerk of the district court a copy of the appraisal of the lots, on which was indorsed the following: "I hereby certify that this is a true copy of the original appraisement and all the indorsements thereon. J. C. Eikenbary, Sheriff, by Harvey Holloway, Deputy, Cass county, Neb." In the body of this document there were these statements: "Lot 16, $200.00; lot 17, $600.00; lot 19, $50.00. Gross value of lands and tenements, $850.00. Report of liens waived by John Black." We will state here that on the back of the execution there was written, "(Cert. liens waived by Black.)" There were no deductions of liens, and $850 was given as the appraised value of the real estate. The date of this paper was July 7, 1894. This was the sole evidence of the substance of the appraisal which appeared in the record as it was filed in this court December 13, 1894. On June 2, 1896, there was filed for defendant in error a request to be allowed to supply certain stated matters which it was suggested had been omitted therefrom, one being the original appraisement and what purports to be a report of the county treasurer of taxes against the property sold under the execution, delinquent, and liens thereon. The defendant in error was allowed to file the papers tendered, and in what purported to be a reproduction of the original appraisement were these statements:

| | |
|---|---|
| "Lot (16) | $200 00 |
| Lot (17) | 600 00 |
| Lot (19) | 50 00 |
| Gross value of said land and tenements | $850 00 |
| Taxes as per county treasurer's certificate | 62 30 |
| Which deducted from the gross value of said real estate | $787 70 |

(Report of liens waived by John Black.)

Which we appraise as the real value in money of the interests of Katherine Reuland in said lands and tenements."

On the margin or bottom of the page was written, "Copy of appraisement filed with clerk." On this paper, so far as disclosed by its copy, the clerk had not placed a filing mark or date. The certificate of the clerk indorsed on the copy states that it is "a true copy of the original appraisement returned in said cause as appeared of record in my office," from which we take it that the original appraisal in this case, as is the practice, was returned with and at the time of the return of the execution after the completion of the sale, and the paper which was placed on file with the clerk before the sale, and which purported to be a copy of the appraisal, was not a copy, in that it contained no reference to any lien for taxes and its deduction from the gross value of the real estate; hence did not convey correct information of the appraisal.

Section 491*d* of the Code of Civil Procedure is as follows: "The officer holding such appraisement shall forthwith deposit a copy thereof, including his application to the officers enumerated in section three of this act, and their official certificates as in said section provided, in the office of the clerk of the court from which such execution issued, and shall immediately advertise and sell said real estate, lands and tenements agreeably to the provisions of this act, but in no case shall he sell any such real estate, lands or tenements for less than two-thirds the appraised value of the interest of the person, persons or corporation against whom the execution was issued, unless it appear from the appraisement under this act that the liens and incumbrances thereon equal or exceed its real value in money."

In the opinion in the case of *Burkett v. Clark*, 46 Neb., 466, it was stated of this and other sections of the Code on the same subject: "It will thus be seen that the officer holding an execution for the sale of real estate has not authority to advertise the same for sale until he has levied

upon it, caused it to be appraised, and deposited in the office of the clerk from which the execution in his hands was issued a copy of the appraisement made by him and the two freeholders, together with the application in writing for liens made by him to the clerk of the district court, the county treasurer, and the register of deeds, and the certificates which such officers furnished him in pursuance of said application. * * * The object of this statute in requiring an officer to deposit in the office of the clerk of the court from which the execution issued, before advertising the sale, a copy of the appraisement made, a copy of his application for liens, and the certificates of liens made by the clerk of the district court, register of deeds, and the county treasurer, is to afford the execution defendant and plaintiff an opportunity to know at what value the property has been appraised and to examine and ascertain what liens have been certified as existing against the property, and, if a mistake has been made, to afford them time and opportunity to make application to the court to which the execution is returnable for an order vacating the appraisement before the sale occurs. Generally this can only be done before the sale, since the sheriff and the freeholders in making the appraisement act judicially, and objections that the value put on the property is too high or too low must be made and filed in the case with a motion to vacate the appraisement before the sale occurs. (*Vought v. Foxworthy*, 38 Neb., 790.)"

As there was no copy of the appraisal on file with the clerk prior to the time the sale was advertised or made, it was ineffective. If it could be claimed that the document filed with the clerk was a true copy of the appraisement, then the property did not sell for two-thirds of the appraised value, for separately neither of the lots sold for two-thirds of the amount for which it was appraised in the copy of appraisal filed with the clerk prior to the sale, nor combining the bids did they amount to two-thirds of the aggregate of the sums of appraisal.

There were some other matters in regard to the report of the county treasurer, when it came into the record, its date which appeared to be the same as the date of the sale, the absence from the record of any application to the treasurer or certificate of liens, and other points to which we deem it unnecessary to make any extended reference. Their discussion at this time would not materially assist in a disposition of the case, and furthermore they have in the main, if not wholly, been brought into the case since it was removed to this court. The order of confirmation must be vacated and held for naught, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

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## SUNDAY CREEK COAL COMPANY V. S. H. BURNHAM ET AL.

FILED OCTOBER 6. 1897. No. 7406.

1. **Insolvency**: FRAUDULENT CONVEYANCES: KNOWLEDGE BY CREDITOR OF DEBTOR'S FRAUDULENT INTENT. A failing debtor may pay a pre-existing indebtedness by sale and conveyance of property to the creditor of a value not materially or appreciably greater than the amount of the debt, if the transaction is *bona fide* on the part of the creditor; and the validity of the sale will not be affected by the existence of a fraudulent intent of the vendor of which the purchaser has knowledge in regard to the claims of the other creditors, provided he does not participate in such intent.

2. **Instructions**: REVIEW WITHOUT BILL OF EXCEPTIONS. If errors are assigned of a trial court's refusal to give requested instructions, and to determine the force of such assignments would necessitate an examination of the evidence introduced at the trial, the bill of exceptions containing the evidence having been quashed, the evidence is not before this court, the errors, if any, do not affirmatively appear, and the assignments may be overruled.

3. **Fraudulent Conveyances**: KNOWLEDGE OF FRAUDULENT INTENT. The opinion in the case of *Bollman v. Lucas*, 22 Neb., 796, insomuch as it applied the following rule: "To avoid a sale upon the ground that it is fraudulent as to creditors, the purchaser must have knowledge of the fraudulent purpose of the seller or have notice

of such facts tending to show a fraudulent purpose as would put a man of ordinary prudence on inquiry," to a transaction of sale by a failing debtor to one of its creditors in payment of the pre-existing debt,—disapproved.

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

The opinion contains a statement of the case.

*Cornish & Lamb* and *A. S. Tibbets*, for plaintiff in error:

A purchaser of goods from a debtor, knowing or chargeable with notice of the debtor's fraudulent intent, is not a purchaser in good faith, and such a sale is void as to creditors. (*Bollman v. Lucas*, 22 Neb., 813; *Temple v. Smith*, 13 Neb., 513; *Jones v. Loree*, 37 Neb., 816; *Beidler v. Crane*, 22 Ill. App., 538.)

A purchaser's knowledge of the seller's intent to defraud creditors need not be positive information or notice of such fact, but may be inferred from knowledge of facts sufficient to raise such suspicions as to put him, as a reasonably prudent man, on inquiry in relation thereto. (*Rindskopf v. Myers*, 57 N. W. Rep. [Wis.], 967; *Grimes v. Shaffer*, 41 Neb., 112; *Burggren v. Reid*, 39 Neb., 645; *Stephens v. Rogenstein*, 89 Ala., 561.)

*Sawyer, Snell & Frost, contra:*

The knowledge, or notice that would lead to knowledge, of a creditor who accepts property from his debtor in satisfaction of a pre-existing debt, that the debtor makes the transfer with the intent to defraud other creditors, does not invalidate the transfer where the creditor does not participate in the fraudulent purpose of his debtor. (*Bleiler v. Moore*, 69 N. W. Rep. [Wis.], 164; *Smith v. Whitfield*, 2 S. W. Rep. [Tex.], 822; *Shelley v. Boothe*, 73 Mo., 74; *Rice v. Wood*, 33 S. W. Rep. [Ark.], 637; *Gray v. St. John*, 35 Ill., 222; *Kohn v. Clement*, 12 N. W. Rep. [Ia.], 551; *Chase v. Walters*, 28 Ia., 469.)

The case of *Bollman v. Lucas*, 22 Neb., 796, cited by

plaintiff in error, does not control. (*Jones v. Loree*, 37 Neb., 816; *Grosshans v. Gold*, 49 Neb., 599; *Pollock v. Meyer*, 96 Ala., 176; *Bamberger v. Schoolfield*, 160 U. S., 149; *Smith v. Craft*, 123 U. S., 436.)

HARRISON, J.

It appears herein, from the allegations of the petition filed, that the plaintiff recovered a judgment in the district court of Lancaster county against Gorham F. Betts and William H. Weaver, partners in business under the name and style of Betts & Weaver, for a sum stated in the petition; that such proceedings were had to collect said judgment, that the defendants appeared in court and made answers as garnishees in regard to property, etc., of the firm of Betts & Weaver in their possession or under their control, which answers were to the plaintiff unsatisfactory, and this suit was instituted for it, the further allegations of the petition being as follows: "That at the time said garnishment summons was served upon said defendants and each of them, and at the time said answers were made, said defendants were possessors of and had under their control personal property, money, rights in action, real estate, leases, good-will of the firm of Betts & Weaver and creditors of the said Betts & Weaver, and coal, wood, notes and accounts of the said Betts & Weaver of the value in excess of the amount of plaintiff's said judgment, and that the said defendants were then and are now owing and indebted to the said Betts & Weaver in the sum of money in excess of said judgment, to-wit, in the sum of $2,500, and said defendants were in possession of said property and credits, choses in action at the time said summons in garnishment was served upon said defendants and each of them, and acquired said possession and held the same in fraud of the rights of the creditors of Betts & Weaver and of this plaintiff herein, done on the part of Betts & Weaver and on the part of the defendants for the purpose of hindering, delaying, and defrauding the creditors of Betts &

Weaver." The answer of defendants contained an admission of their appearance in court in obedience to a summons in garnishment proceedings, and that they answered that they had neither property nor credits of the firm of Betts & Weaver in their possession or under their control. The further answer was a general denial of the other allegations of the petition. A trial of the issues resulted in a verdict and judgment favorable to defendants. The plaintiff asks a review in this court of the proceedings during the trial.

The bill of exceptions containing a transcript of the evidence adduced during the trial was, on motion in this court, having such purpose in view, quashed; hence the evidence is not before us for consideration in connection with any of the alleged errors. The transaction between the defendants and the firm of Betts & Weaver, to the extent we can gather its nature from the pleadings in the action, was a sale, by a debtor to a creditor, of property, the consideration moving to the debtor being the extinguishment of his pre-existing indebtedness to the purchaser, and which sale was attacked by the plaintiff as fraudulent and void as to the rights of plaintiff and other creditors of the firm.

The trial court in its charge to the jury stated that if the sale was made with the intent on the part of the firm of Betts & Weaver to defraud creditors, that such intent existed would not render the sale void unless the intent was shared by or participated in by the creditor to whom the sale was made. To each paragraph of the charge in which the foregoing proposition was embodied, the plaintiff duly excepted and made a separate assignment of error. For the plaintiff there were prepared and presented several instructions in which was set forth that if it appeared that the debtor in making the sale had a fraudulent intent in reference to the rights of creditors other than the one to whom the sale was made, and the latter had notice or knew of such intent, or had notice of facts which tended to show a fraudulent purpose suffi-

cient to put a person of ordinary prudence on inquiry, then the sale was invalid as to the rights of other creditors. These the court refused to read in the charge to the jury, and its action in regard to these requests is presented here by proper assignments of error.

It is well established in this state that a debtor in failing circumstances may prefer any one or several of his creditors to the exclusion of others, if the transaction from which such preference results be *bona fide*. (*Costello v. Chamberlain*, 36 Neb., 45.) It has also been decided that "A mortgage taken by a creditor to secure a pre-existing debt will not be held void merely because the creditor, when he took the mortgage, had notice of an intent upon the part of the mortgagor to hinder, delay, or defraud his creditors. In order to avoid such mortgage the creditor must have participated in such intent." (*Jones v. Loree*, 37 Neb., 816; see, also, *Grosshans v. Gold*, 49 Neb., 599.) The question arises: Is the foregoing rule applicable to a transaction of sale between an insolvent or failing debtor and one of his creditors, whereby, in extinguishment of the debt due from the former to the latter, property of the former is sold and transferred to the latter, resulting in his preference as a creditor? The general rule doubtless is that where property is sold with a fraudulent intent, and the purchaser has knowledge of the intent or of sufficient facts to put a person of ordinary prudence upon inquiry, the sale is a fraudulent one. But it might be said that there is an exception to this of which the case at bar furnishes an example,—where the sale is made in payment of a pre-existing debt due the purchaser. A direct purchaser is a stranger, or volunteer, with no pre-existing reason for his purchase, while the creditor has a motive other than the direct purchase of the property,—that of obtaining payment of that which is due him, which right the law accords him, and notwithstanding his grantor or vendor may have a fraudulent purpose in making the sale to the knowledge of the creditor purchaser, the latter is not a party to it and

charged with its consequences unless he participates in it.

The case of *Bleiler v. Moore*, 69 N. W. Rep. [Wis.], 164, was one in which a son in embarrassed circumstances was indebted to his father and in payment of the indebtedness conveyed his real estate and personal property to the father. Other creditors of the son procured executions to be levied on the personal property as belonging to the son. In an action of replevin by the father to recover possession of the property levied, the issue presented was whether the sale to him by the son was fraudulent and void as against the son's creditors. In the opinion appears the following: "The appellant complains that the trial court, in substance, instructed the jury 'that a sale made by a vendor with the intent to hinder, delay, and defraud his creditors is void, if the vendee has knowledge of facts and circumstances such as should put a prudent man upon inquiry, by which he might find out the fraudulent purpose.' This is alleged to be error. But this really states the rule applicable to a sale made by an insolvent debtor to a stranger with substantial accuracy. The stranger is bound at least to refrain from knowingly obstructing the rights of creditors. But the case is different where a creditor in good faith takes the property of his debtor in payment of his honest debt. He is no mere volunteer or stranger. He is restricted merely to honesty. He may not purposely obstruct other creditors of his debtor, even to come by his own. But it is no fraud upon the other creditors, although he may know or believe that the debtor is giving his debt a preference for the purpose of avoiding the payment of other debts, and that other creditors will thereby fail to realize their claims, provided, always, the purpose of the vendee is *bona fide* the realization of his debt, and he does not participate in the fraudulent purpose of his debtor; for, in order to avoid such a sale, both parties must participate in the fraudulent design. (*Gage v. Chesebro*, 49 Wis., 486, 5 N. W. Rep., 881; *Plow Co. v. Hanthorn*, 71 Wis., 529, 37

N. W. Rep., 825; *Erdall v. Atwood*, 79 Wis., 1, 47 N. W. Rep., 1124; *Bannister v. Phelps*, 81 Wis., 256, 51 N. W. Rep., 417; *Barr v. Church*, 82 Wis., 382, 52 N. W. Rep., 591.) *David v. Birchard*, 53 Wis., 492, 10 N. W. Rep., 557, which decides that 'Where a mortgage is given to secure an honest debt, but with an intent to hinder, delay, or in any way put off the creditors of the mortgagor, it is void if the mortgagee had knowledge of such intent; and this knowledge need not be actual, but may be inferred from the knowledge of the mortgagee of facts and circumstances sufficient to raise such suspicions as should put him on inquiry,'—is entirely out of harmony with the decisions of this court, both before and since, and is not to be followed as an authority upon this question. Mere knowledge of the corrupt sentiment in the mind of his debtor, not shared by him, does not deprive the honest creditor of the right to accept the proffered payment or security of his just claim."

The case of *Shelley v. Boothe*, 73 Mo., 74, 39 Am. Rep. 481, is in point. It was observed in the opinion: "The third instruction is as follows: 'If Woy and Smith in making the conveyance of the goods in suit intended to delay J. W. Wood & Co., their creditors, and if the plaintiff either by himself or his agent present at the sale was aware of such intent, then you will find for the defendant.' There is a class of cases to which the doctrine asserted in the instruction applies; as, if one knowing of judgment and execution against another goes and purchases his goods in order to defeat the execution, or if one knowing that a debtor is selling his property to hinder, delay, or avoid the payment of his debts, buys it and pays the full value of it, thereby enabling the debtor to carry out his fraudulent design, such sales will be adjudged fraudulent because the purchaser becomes a participant in the iniquitous purpose of the debtor. But cases of this kind should not be confounded with those which only amount to giving a preference of one creditor over another. A debtor may give a preference to a particular

creditor or set of creditors by a direct payment or assignment, if he does so in payment of his or their just demands and not as a mere screen to secure the property to himself. The pendency of another creditor's suit is immaterial and the transaction is valid though done to defeat that creditor's claim. (*Kuykendall v. McDonald*, 15 Mo., 416; *Murray v. Cason*, 15 Mo., 415; *State v. Benoist*, 37 Mo., 500; Bump, Fraudulent Conveyances, 350, 351; *Potter v. McDowell*, 31 Mo., 74.) The right of a debtor to prefer one creditor over another necessarily implies the right of such creditor to accept such preference. While the effect of such preference must, to the extent that it is made, necessarily be to defer or to hinder or delay other creditors, the mere knowledge of the preferred creditor that such will be its effect, and the debtor intended it should have that effect, will not be sufficient to avoid the transaction as to a creditor not preferred. But if in such case it further appears from the circumstances attending the transaction that the preferred creditor was not acting from an honest purpose to secure the payment of his own debt, but from a desire to aid the debtor in defeating other creditors, or in covering up his property, or in giving him a secret interest therein, or in locking it up in any way for the debtor's own use and benefit, he will not be protected, and the sale would be fraudulent as to other creditors, because in such cases the fraud of the debtor becomes the fraud of the preferred creditor because of his participancy therein." (See, also, *Smith v. Whitfield*, 2 S. W. Rep. [Tex.], 822; *Rice v. Wood*, 33 S. W. Rep. [Ark.], 637; *Kohn v. Clement*, 12 N. W. Rep. [Ia.], 551; Bump, Fraudulent Conveyances [4th ed.], sec. 170, p. 196; 8 Am. & Eng. Ency. of Law, p. 855; *Pollock v. Meyer*, 11 So. Rep. [Ala.], 386; *Bamberger v. Schoolfield*, 160 U. S., 149; *Cook v. Thornton*, 20 So. Rep. [Ala.], 14; *Seiler v. Walz*, 29 S. W. Rep. [Ky.], 338.

The general rule in regard to sales by a failing debtor with a fraudulent intent to parties not creditors was announced and enforced by this court in the cases of *Tootle*

*v. Dunn*, decision reported in 6 Neb., 99; *Savage v. Hazard*, 11 Neb, 323; *Temple v. Smith*, 13 Neb., 513; and in *Bollman v. Lucas*, 22 Neb., 796, cited herein for plaintiff, the same rule was held applicable to a transaction of sale between a debtor and creditor wherein the property was conveyed in payment of the debt. Great respect and weight are due to the decision of the able and learned judge who wrote the opinion in the case to which we have last referred, but we feel forced to the conclusion that the best reasons and the precedents are opposed to the application of the rule under discussion therein made, and to such extent the opinion in that case must be disapproved. We will further state that the decision in *Bollman v. Lucas* was right on the ground that the value of the property conveyed was largely in excess of the amount of the debt which constituted the consideration for its transfer to the creditor. It is stated in the opinion: "It is quite impossible to arrive at the value of the goods and accounts from the evidence, but it may be assumed that the evidence tends to fix it at nearly twice the amount stated as the consideration of the bill of sale."

It follows from the foregoing views that the rule embodied in the charge of the trial court was the correct one and that the rule as stated in the instructions tendered and refused was not so; hence there was no error in giving the former and refusing to give the latter.

There were other assignments of error in relation to the trial court's refusal to read certain instructions prepared and requested for plaintiff, but to determine whether such action as to either of them was erroneous would necessarily involve an examination of the evidence. As it is not properly before us this cannot be done and the assignments must fail. The judgment of the district court is

AFFIRMED.

JOHN W. PERCIVAL, WATER COMMISSIONER OF THE CITY OF LINCOLN, APPELLANT, V. AUSTIN H. WEIR, MAYOR, ET AL., APPELLEES.

FILED OCTOBER 6, 1897. No. 7411.

**Municipal Corporations: WATER COMMISSIONER: REMOVAL OF EMPLOYES.** The water commissioner of the city of Lincoln has not the power to remove a subordinate employe in the water department of the city, or to make appointments to fill vacancies occurring therein.

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

*E. H. Wooley* and *W. S. Hamilton*, for appellant.

*N. C. Abbott, contra.*

NORVAL, J.

John W. Percival was elected water commissioner for the city of Lincoln at the general election held in said city on April 3, 1894, duly qualified and entered upon the discharge of the duties of his office. On May 6, 1894, he appointed one P. W. Worthington as fireman for a certain station of the water-works department of the city, known as the Antelope or Rice station, and pursuant to such appointment Worthington entered upon the discharge of his duties and continued therein until the 9th day of said month, when he was removed from his position by the defendant Wier, the mayor of the city, who at the same time appointed the defendant A. L. Quay to said position of fireman. This action was instituted by Percival in the court below in 1894 to restrain the removal of Worthington from said position and to prevent the installation of Quay therein. From a decree dismissing the action, plaintiff appeals.

The sole question presented is whether at the time this action was instituted in the court below authority or

power was lodged in the water commissioner to appoint employes in the water department of the city of Lincoln. Section 13, article 1, chapter 13*a*, Compiled Statutes, 1893, provides for the election of a water commissioner. Section 89 of the same article, as it existed in 1887, after enumerating his duties and powers, declared that "said water commissioner shall perform such other duties as may be required of him by ordinance, and upon his recommendation the mayor and council may employ such laborers and clerks as it may appear necessary." But so much of said clause as reserved to the water commissioner the right to recommend persons for employment in his department was taken away by the legislature in 1889. (Compiled Statutes, 1889, ch. 13*a*, art. 1, sec. 89.) When this suit was brought no authority to appoint subordinate employes was conferred by statute upon the water commissioner, nor did there exist any legislative enactment fixing the number of employes in the water department.

The following are the only provisions contained in the Municipal Code of the City of Lincoln, 1889, which have any bearing upon the question:

"Section 202. The mayor shall appoint such number of employes in the fire and water departments of the city as the council may provide by ordinance or resolution.

"Section 203. Such number of clerks and assistants as the council shall authorize by ordinance or resolution may be appointed by the mayor to assist the various city officers; *Provided*, That such persons only may be appointed as shall be recommended by the respective officers and be satisfactory to a majority of the council.

"Section 315. The water commissioner, under the direction of the mayor and council, shall have control and management of the water-works system of the city.

"Section 319. Subject only to the direction of the mayor and council, the water commissioner shall have control of all engineers, firemen, tappers, and other employes of the water department, and they shall obey his orders.

"Section 321. The water commissioner shall not pur-

chase any material for the use of, or employ any laborers in his department except upon the authority of the council or water committee thereof, unless it be repairs in case of emergency."

No authority is contained in any of the foregoing provisions for the appointment of employes in the water department by the head of that department, although the water commissioner, under the direction of the mayor and council, has control of the water-works system of the city and the employes in his department. They are required to obey his orders, but the power to remove any of them or to appoint others in their places does not devolve upon him. Whether such authority exist in the mayor alone, or is vested solely in the mayor and city council, it is unnecessary to determine, inasmuch as the appointment of Worthington being illegal, this action cannot be maintained, irrespective of whether the appointment of Quay by the mayor was legal or not. It is obvious that section 203 of the Municipal Code, quoted above, has no application to employes in the fire and water departments of the city. That section has no reference to the employes in either of said departments, but applies to clerks and assistants in the other branches of the city government. The conclusion reached by the trial court was right and its judgment is

AFFIRMED.

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## WARREN REMA V. STATE OF NEBRASKA.

FILED OCTOBER 6, 1897. No. 9091.

1. **Indictment and Information: TIME OF COMMISSION OF OFFENSE: LARCENY.** Under section 412 of the Criminal Code, an indictment or information is not rendered fatally defective "for omitting to state the time at which the offense was committed, in any case where time is not of the essence of the offense, nor for stating the time imperfectly."

2. ——: ——: ——. An information for larceny is not to be

quashed because it alleges that the offense was committed "on or about" a certain date.

3. ———: ———: ———. An information which avers that the defendant "unlawfully and feloniously did steal, take, and drive away one cow" sufficiently charges that the taking was with the felonious intent to permanently deprive the owner of his property.

4. **Justice of the Peace: JURISDICTION.** The jurisdiction of a justice of the peace is co-extensive with the territorial limits of his county, and a judgment rendered by him in a precinct thereof other than the one for which he is elected is not void on that account. *Jones v. Church of the Holy Trinity*, 15 Neb., 81, followed.

5. **Instructions: EXCEPTIONS.** An instruction will not be reviewed unless the record affirmatively discloses that an exception was taken thereto in the trial court.

6. **Larceny: EVIDENCE.** When the owner of stolen chattels, or the person from whose immediate possession the same were taken, is examined as a witness, his testimony that he did not consent to the removal of the property is indispensable to a conviction for larceny.

7. ———: ———. **Evidence *held* to sustain the verdict.**

ERROR to the district court for Keith county. Tried below before GRIMES, J. *Affirmed.*

The facts are stated in the opinion.

*A. F. Parsons*, for plaintiff in error:

The motion to quash the information should have been sustained for the reason that the alleged offense is not therein charged to have been committed on a day certain. (*Mau-zau-mau-ne-kah v. United States*, 1 Pin. [Wis.], 124.)

The plea in abatement should have been sustained because the transcript shows that the justice of the peace before whom the complaint was made, and who issued the warrant, was a justice of the peace in and for Lincoln county, and he was acting in Keith county. (Criminal Code, sec. 260; *State v. Shropshire*, 4 Neb., 413.)

The demurrer to the information should have been sustained for the reason that no felonious intent was alleged therein, while proof of such intent was necessary to make

out the offense charged. (Criminal Code, sec. 442; *Thompson v. People*, 4 Neb., 528; *Mead v. State*, 25 Neb., 447; *Waidley v. State*, 34 Neb., 251; *Cobb v. State*, 40 Neb., 545.)

Mere conversion is not larceny. (*Turner v. O'Brien*, 5 Neb., 542.)

In a prosecution for larceny, proof of the nonconsent of the owner, by the best evidence, is indispensable to a conviction. (*Perry v. State*, 44 Neb., 416; *Bubster v. State*, 33 Neb., 663.)

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

NORVAL, J.

This was a prosecution, for the crime of larceny, in the district court of Keith county. The information under which the accused was convicted charged that he, on or about the 15th day of February, 1896, in the county of Keith, "unlawfully and feloniously did steal, take, and drive away one cow, color red, branded O (circle) on left hip, and branded O (circle) on left loin," and of the value of $25, the personal property of the Equitable Farm and Stock Improvement Co. of Nebraska, limited, a Nebraska corporation. The jury found the defendant guilty, and from a judgment which imposed a sentence to imprisonment for the term of twelve months in the state penitentiary, he prosecutes error proceedings.

A motion to quash the information was denied, and this ruling is the first ground urged for a reversal. It is insisted that this motion should have been sustained because the offense is not alleged in the information to have been committed on a day certain, but "on or about" a specified date. The information is not defective for the reason suggested. If, in a prosecution for larceny, it is important that it be alleged in the information the exact date the offense occurred, there is no escaping the conclusion that the state is required to prove the transaction took place at the identical time averred, else the prose-

cution must fail. On the other hand, if such proof is not indispensable to a conviction of such crime, it logically follows that the allegation in the information as to the time the crime was committed is immaterial, and such information is not defective if it omits to state the time definitely and with precision. This court has held in a prosecution for rape that it is not necessary to establish the commission of the offense on the identical date named in the information, but that a conviction may be had if it be shown that the crime was committed on any day not so remote that the statute of limitations would be a bar. *Yeoman v. State*, 21 Neb., 171; *Palin v. State*, 38 Neb., 862. The same doctrine obtains in all prosecutions where the time at which an offense was committed is not essential; and the crime of larceny is embraced within this class. In a prosecution like the one at bar a variance between the proofs and the averments in the information as to the time of the commission of the crime is immaterial, since the date the act was done is not a part of the description of the offense. It is only where time enters into the nature, or is made a part of the description, of an offense that the information must specifically aver the date of the transaction charged, for section 412 of the Criminal Code declares that no indictment (information) shall be deemed invalid or defective "for omitting to state the time at which the offense was committed, in any case where time is not of the essence of the offense, nor for stating the time imperfectly." Under the foregoing section this information is sufficient, notwithstanding it charges the crime as having occurred "on or about" a specific date. (*State v. Fry*, 67 Ia., 475; *Chandler v. State*, 6 So. Rep. [Fla.], 768; *State v. Howard*, 10 S. E. Rep. [S. Car.], 831; *Vowells v. Commonwealth*, 84 Ky., 52; *Pruitt v. State*, 11 S. W. Rep. [Ark.], 822; *State v. Peters*, 107 N. Car., 876; *Arrington v. Commonwealth*, 12 S. E. Rep. [Va.], 224; *State v. Thompson*, 10 Mont., 549; *State v. McCarthy*, 10 So. Rep. [La.], 673; *United States v. Conrad*, 59 Fed. Rep., 458; *Fleming v. State*, 36 N. E. Rep. [Ind.], 154.)

It is also insisted that the trial court erred in not quashing the information because it fails to charge that the property was taken with felonious intent to convert the same to the use of the defendant without the consent of the owner thereof. There is no force in the position. The averment in the information is that the defendant "unlawfully and feloniously did steal, take, and drive away" the cow in question. This is the usual form of the charge in an information for larceny, substantially follows the language in the statute, and discloses that the animal was stolen with felonious intent of the accused to permanently deprive the owner thereof without his consent. The decisions of this court cited on page 5 of the brief of the defendant are not in point here. They hold that any definition of larceny is faulty which omits to state the element of felonious intent. Such intent is specifically charged in this information. The foregoing disposes of the objection argued in the brief that the court erred in overruling the demurrer to the information, since it raised the same question as the one just considered.

Error is alleged in the overruling of the plea in abatement. It is argued that this plea should have been sustained because the transcript discloses that John H. Cannon, the justice of the peace before whom the complaint was made, and who issued the warrant in this case, was a justice of the peace in and for Lincoln county, and had no jurisdiction of the offense. A sufficient answer to this contention is that the plea in abatement specifically avers that said Cannon was a justice of the peace in and for West Ogallala precinct, Keith county, where he resided, and the demurrer to the plea admitted the truth thereof. Moreover, the transcript, in at least three places, specifically states that said J. H. Cannon was a justice of the peace of Keith county, and the same is not disputed by any other portion of the record, when properly construed, although a statement found in the complaint itself is relied upon to establish, in opposition to the allegation

in the plea in abatement, that Mr. Cannon was a justice of the peace in and for Lincoln county, and acted in Keith county. The complaint is in part as follows:

"Before John H. Cannon, a Justice of the Peace in and for Keith County.

"THE STATE OF NEBRASKA, } ss.
COUNTY OF KEITH. }

"THE STATE OF NEBRASKA }
v. } For cattle stealing.
WARREN REMA. }

"The complaint and information of Edward Richards, of Lincoln county, aforesaid, made in the state of Nebraska, before John H. Cannon, a justice of the peace within and for said county. * * *"

The words "of Lincoln county" are merely descriptive of the person who made the complaint, and should be treated as surplusage. It is very evident that the words "within and for said county," appearing in the body of the complaint, refer to the county mentioned in the caption and in the venue, namely, Keith county, in the state of Nebraska. The objection is too technical and devoid of merit to require further comment.

Another ground suggested why the plea in abatement should have been sustained is that it is alleged therein that Mr. Cannon was a justice of the peace in and for West Ogallala precinct in Keith county, and that he exercised the functions of his office by receiving said complaint, and requiring the defendant to appear before such justice at his office in East Ogallala precinct in said county. It is claimed that the justice was without jurisdiction to arraign the accused, or to accept his waiver of the statutory preliminary examination, and *State v. Shropshire*, 4 Neb., 411, is cited in support of the contention. In that case it was decided that it is the duty of a justice of the peace to hold his office in the precinct for which he is elected, and that *mandamus* would lie to compel him to do so. The question now under consideration was not

then before the court, nor was it determined. The proposition was, however, involved and passed upon in *Jones v. Church of the Holy Trinity*, 15 Neb., 81, in which case it was decided that the jurisdiction of a justice of the peace is co-extensive with the territorial limits of the county, and that a judgment rendered by him in a precinct thereof, other than the one for which he is elected or appointed, is not void for that reason. This is decisive of the point now before the court, and the plea in abatement was properly denied.

A reversal is asked because the court refused the defendant's fifth request to charge. Since the record fails to disclose that an exception was taken by the defendant to such refusal, the action of the court in that regard cannot be reviewed here. (*Unland v. Garton*, 48 Neb., 203; *Lowe v. Vaughn*, 48 Neb., 651.)

Instructions 4, 5, 6, 7, 8, and 9, given by the court on its own motion, are complained of. They having been grouped in a single assignment in the motion for a new trial, cannot be reviewed for the reason the assignment is bad as to instruction No. 5, on account of no exception having been taken thereto in the court below. (*Western Union Telegraph Co. v. Wilhelm*, 48 Neb., 913; *Graham v. Frazier*, 49 Neb., 90.)

It is finally claimed that the verdict is without sufficient evidence to support it. First, because the ownership or identification of the cow alleged to have been stolen was not established. The only testimony adduced by the state upon that branch of the case was given by Henry Chestnut, the agent of the corporation stated in the information as being the owner of the cow, who identified the animal by her brands and ear marks. The argument is that this was insufficient evidence of ownership, inasmuch as no proof was made of the recording of the brand, and attention is challenged to section 16, chapter 51, Compiled Statutes, which provides that "In all suits in law, or in equity, or in any criminal proceedings, when the title to any stock is involved, the brand on any

animal shall be *prima facie* evidence of the ownership of the person whose brand it may be; *Provided*, That such brand has been duly recorded as provided by law." It will be observed that proof of the recording of a brand is made *prima facie* evidence of owership. But that is not the only evidence receivable in proof of such fact. Certainly the owner of a particular brand is competent to testify upon the subject, and may identify his animal by the brand thereon, even though such brand may never have been recorded as provided by law. In the case at bar the cow in question was identified as belonging to the corporation, independent of the brand, by the marks on her ears. Secondly, it is contended that the evidence is insufficient, for the alleged reason it is not shown that the consent or permission of the owner was not obtained to the taking of the animal. It is a well recognized doctrine that in a prosecution like this the non-consent of the owner to the removal of the property alleged to have been stolen must be established by the best evidence attainable in order to justify a conviction. In case the owner of the stolen chattels, or the person from whose immediate possession the same were taken, is examined as a witness, his testimony that he did not give permission to the removal of the property is necessary to convict. (*Bubster v. State*, 33 Neb., 663; *Perry v. State*, 44 Neb., 414.) Applying this rule to the facts in the case in hand, are they sufficient to show that no consent was obtained to the taking of the property? If we are able to comprehend the effect and force of the testimony, the answer must be that there was an entire lack of consent, although no witness in express terms so stated at the trial. It is disclosed by the uncontradicted testimony of several persons that the cow charged to have been stolen, and many others belonging to the Equitable Farm and Stock Improvement Company, were at the time in the immediate and exclusive possession and control of Edward Richards and Henry Chestnut, the foreman and agent, respectively, of said corporation; that on the day preceding the night of the alleged

larceny both of them were apprised that some of the cattle of the corporation in their care were going to be stolen; that Chestnut and Richards, together with Sheriff Camp and one Harding, watched the pastures in which the cattle were kept the following night, and saw the defendant enter the pasture between ten and twelve o'clock of that night and with much haste drive therefrom the cow in dispute and several others; that they followed rapidly on horseback a distance of ten or twelve miles, and saw the defendant drive the cow into a ravine or "blow out," as called by some of the witnesses, and caught the accused in the very act of skinning the animal and thereupon arrested him for the theft. Thus it was shrown by the persons in whose immediate possession the property was that the same was taken without their authority, permission, or consent. We are convinced that the taking was felonious. The judgment is

AFFIRMED.

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JOSEPH GARNEAU, JR., V. OMAHA PRINTING COMPANY.

FILED OCTOBER 6, 1897. No. 7443.

1. **Review:** CONFLICTING EVIDENCE. A verdict upon conflicting evidence will not be disturbed upon review.
2. **Accounts:** INTEREST. In the absence of a contract upon the subject, unsettled accounts do not draw interest until six months after the date of the last item.
3. **Excessive Verdict:** REMITTITUR. Verdict *held* excessive and a remittitur required to be entered as a condition of affirmance for the correct amount.

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

*Joel W. West*, for plaintiff in error.

*Charles Offutt, contra.*

NORVAL, J.

The Omaha Printing Company brought two suits in the court below, each upon an itemized account, one against Joseph Garneau alone, for the sum of $581.26, and interest from August 21, 1891, and the other against Garneau and Nye, in the sum of $2,408.77, with interest thereon from January 1, 1891. There was no service of summons made upon Nye. Garneau answered by a general denial, and that the items sued for were furnished to the Topics Company, a corporation, and not to the defendant. By stipulation of the parties the two causes were consolidated for the purpose of trial. There was a verdict for plaintiff in each case, in one for $798.47, and in the other for $2,931.44. Judgments followed the verdicts.

The assignments of error relied upon for reversal are that the evidence is insufficient to sustain the findings of the jury, and that the amounts of the verdicts are excessive. The indebtedness was incurred in the publication of a paper in Omaha known as "Topics," between February 27, 1890, and February 21, 1891. As we understand it, there is no dispute that the merchandise and job printing were furnished as charged in the accounts, and it is expressly stated in the brief of defendant below that he is personally liable for the larger portion of the indebtedness in controversy; but it is insisted that he is not liable for the indebtedness incurred in the publication of the "Topics" from July 16, 1890, to November 15 of the same year, since the "Topics" was published by a corporation known as the "Topics Company," and that the indebtedness during such period was contracted by it; hence the corporation alone is liable therefor. Mr. Garneau himself testified on the trial that the business of the paper was conducted or run after the organization of the Topics Company precisely as before, without any change. Moreover, it was not shown that said corporation ever published the paper, and there is evidence tending to show that Mr. Garneau directed the Omaha Printing Company

to charge to himself the items named in the accounts, which was accordingly done. Furthermore, when the bills sued upon were presented to Mr. Garneau for payment, he made no claim that he was not individually liable, but his sole objection then was to the correctness of certain items in the accounts.

Defendant contends that the smaller verdict is eleven cents too large, but, the amount being so trifling, he waives that error. He complains that the other verdict is excessive by the sum of $90.30. The principal sum in that case was $2,408.77, which, with interest thereon at seven per cent from May 14, 1891, six months after the date of the last item of the account, to February 5, 1894, the first day of the term at which the trial was had, makes the total amount due on that cause of action $2,868.21, or $63.23 less than the verdict returned. Plaintiff below concedes in the brief that the verdict in one of the cases is excessive in the last named amount, if interest was allowable only from six months from the date of the last item, but it is urged that that is not the proper date from which to cast interest. By section 4, chapter 44, Compiled Statutes, it is provided that "unsettled accounts between parties shall bear interest after six months from the date of the last item thereof." The contention is that the accounts declared upon in these cases are not unsettled within the meaning of the above provision of the statute; that an open account by one person against another is not within the purview of the statute, but that the legislature, by the use of the term "unsettled accounts," meant cases where each party has an account against the other and there has been no settlement between them, interest shall be computed after six months from the date of the last item. Accepting, without deciding the point, that this is the proper interpretation of the statute, yet the actions are upon "unsettled accounts," and the computation made by the jury of the amount due is wrong, since the accounts contain both items of credits and debits. That certainly constituted accounts between the

parties. Plaintiff below not only exhibited its own accounts, but those of its adversary as well. This court, in obedience to the express provision of the statute, has more than once decided that in the absence of a contract unsettled accounts do not draw interest until the expiration of six months from the date of the last item therein. (*Deveraux v. Henry*, 16 Neb., 55; *Weston v. Brown*, 30 Neb., 609; *Staker v. Begole*, 34 Neb., 107.)

Attention is called to the fact that in *Beck v. Deveraux*, 9 Neb., 109, interest upon an open account was allowed from the end of each month in which the items were furnished. In that case there was disclosed an express agreement between the parties that the amount of an account for a given month was payable at the end of such month. By virtue of such agreement the account for each month was an independent demand, and drew interest from the end of the month, the time it became due. In this case no agreement of that character is alleged, hence the statutory rule for the computation of interest on unsettled accounts controls.

It is insisted the point was not urged in the court below that the verdicts were excessive. This contention is refuted by the record, which discloses that one of the grounds assigned in the motion for a new trial was that the verdicts were too large. This was the proper mode of raising the question.

The judgment upon the smaller verdict is affirmed, and the plaintiff is required to file with the clerk of this court within forty days a remittitur from the larger verdict of the sum of $63.23 as of the date of such verdict, else the judgment rendered thereon will be reversed. In case the remittitur is so entered, the judgment on the larger verdict will be affirmed for $2,868.21.

JUDGMENT ACCORDINGLY.

## NELS ANDERSON V. E. D. BEEMAN.

FILED OCTOBER 6, 1897. No. 7456.

1. **Evidence:** BOOKS: BILL OF EXCEPTIONS: REVIEW. In the district court there was a compliance with all the requirements of section 346, Code of Civil Procedure, to entitle a book of original entry to be received in evidence, unless, perhaps, there might have been a failure to "show a continuous dealing with persons generally or several charges of items at different times against the other party in the same book." *Held*, That, as this showing must be by the book itself, the failure to make such book or its contents a part of the bill of exceptions renders it impossible to consider whether or not the district court erred in its holding that said book was admissible.
2. **Instructions:** EXCEPTIONS: REVIEW. Where there was no exception to the giving of an instruction its correctness will not be considered in this court.
3. **Review:** SUFFICIENCY OF EVIDENCE: BILL OF EXCEPTIONS: OMISSIONS. When a material part of the evidence has been omitted from the bill of exceptions, a judgment of the district court will not be reversed in this court because of an alleged lack of sufcient evidence to sustain the verdict on which it was founded.

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

*A. M. Gooding*, for plaintiff in error.

*Miller & Ready* and *Wilbur F. Bryant, contra.*

RYAN, C.

In this case E. D. Beeman filed his petition in the district court of Cedar county, asking judgment against Nelson Anderson in the sum of $115.03 for goods sold and in consideration of labor performed by the former upon request of the latter. There was a judgment in favor of Beeman in the sum of $101.16 on a verdict in that amount. Anderson, as plaintiff in error, seeks the reversal of this judgment on the grounds which we shall now consider.

It is first urged that the court erred in its instructions with reference to a matter of set-off pleaded in the answer,

from which alleged error it resulted that the jury must have been confused rather than enlightened by the particular instruction of which complaint is made. With respect to all criticisms presented in regard to instructions it is sufficient to say that there was an exception noted as to none of them; hence these criticisms cannot be considered.

It is insisted that there was error in admitting in evidence the book of original entry of the plaintiff in the district court. From the bill of exceptions it appears that due proof was made that a certain book was the original book of entries of the plaintiff in the district court, that the items therein shown were entered at or near the time of the several transactions referred to, and that the charges were just and true. As to whether the other prerequisite to justify the admission of this book in evidence prescribed by section 346 of the Code of Civil Procedure existed we cannot determine, for neither the book itself nor a copy of its contents was attached to, or made a part of, the bill of exceptions. We must assume, therefore, that the book showed a continuous dealing with persons generally, or several items of charges at different times against plaintiff in error. As to whether, as claimed, another book was necessary to render admissible the book already received in evidence we cannot determine, for the reason that there was a failure to attach this book to, or make it a part of, the bill of exceptions in any way. With this book of original entries omitted, it is evident that there is such a defect in the bill of exceptions submitted that we cannot determine whether or not the verdict was sustained by sufficient evidence, for in the nature of the case this book must have been a very important factor in making proof of the claim of the defendant in error. As has already been shown, the recovery was of a less amount than that claimed in the petition in the district court, and as there appears no error on the record, the judgment of that court is

AFFIRMED.

## EDWIN E. CATRON V. STATE OF NEBRASKA.

FILED OCTOBER 6, 1897. No. 9032.

1. **Continuance**: ABSENT WITNESS: AFFIDAVIT: ADMISSIONS. Where the adverse party admits that witnesses, if present, would testify as stated in an affidavit for a continuance, and the party presenting such affidavit afterwards reads such statement in his affidavit as evidence to the jury, there is presented no ground for a reversal of the final judgment of the trial court because of its refusal to grant the continuance asked.
2. **Criminal Law**: SUBSTITUTION OF JURORS: REVIEW. After a jury had been selected and sworn, but before the trial had begun, one of the jurors in open court asked to be excused from serving because of sickness in his family. In the presence of the accused, and without objection from him, his counsel consented that the juror's request might be granted, and accordingly he was excused and another person served in his stead. *Held*, That these circumstances presented no sufficient grounds for the reversal of a judgment upon conviction of the accused.
3. ———: TRIAL: STATEMENT AS TO FACTS NOT IN EVIDENCE: INSTRUCTIONS. Where a party has improperly stated to the jury a fact concerning which there is no evidence, he cannot, as a matter of right, demand that the trial court instruct the jury that improper or unjustifiable comments made by opposing counsel with reference to such facts must not be considered.
4. ———: ———: IMPROPER STATEMENTS OF COUNSEL: REVIEW. Where there was no objection made or exception taken to a ruling on an objection, in respect to alleged improper statements of opposing counsel to the jury in the trial court, there can be no prejudicial error predicated in this court upon the impropriety of such statements.
5. ———: REASONABLE DOUBT. An instruction with reference to the definition of reasonable doubt, which follows the ruling of this court in *Barney v. State*, 49 Neb., 515, is approved.

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

*R. C. Noleman, C. Patterson, W. W. Wood,* and *Sullivan & Gutterson,* for plaintiff in error.

*C. J. Smyth, Attorney General, Ed P. Smith, Deputy Attorney General, C. E. Woods,* and *M. F. Harrington,* for the state.

RYAN, C.

The plaintiff in error in this case was convicted of having stolen and feloniously driven from Sheridan county certain cattle of the alleged value of $189. From the judgment of the district court of said county on this verdict these proceedings have been prosecuted, whereby there have been presented for our consideration the questions to which attention will now be directed.

It is insisted that there was not sufficient evidence to sustain the verdict. In the brief of counsel this contention is directed particularly to the alleged insufficiency of the proof that the offense was committed in Sheridan county by driving the cattle therefrom. The theory that these cattle may have drifted of their own volition into another county had some support in the evidence, but we are satisfied that the jury was justified in finding that the taking was from Sheridan county. It is true that no one was able to testify to this fact as one within his own knowledge. It is, however, shown quite satisfactorily that these cattle were in Sheridan county when last seen by any one having charge over or an interest in them, and when their whereabouts are next disclosed these cattle were in possession of the plaintiff in error and another person outside of Sheridan county. At this time plaintiff in error, under an assumed name, was claiming to be the owner of the stolen property, and was making false and contradictory statements as to how he had become such owner and from whence with the stock he had come. While from the nature of the case the proof was circumstantial in its character, it was none the less convincing in its effect, and the plaintiff in error should not be permitted to escape merely because for the commission of this crime he chose a time when no one could observe his movements.

It is complained that applications for a continuance were overruled. In the affidavits submitted in support of the applications there were statements as to the facts

which absent witnesses would, if present, swear to. The state offered to consent that these statements might be read as evidence and that the court should instruct that the statements were to be considered by the jury as though orally uttered by the proposed witnesses. The applications for a continuance were overruled and on behalf of the plaintiff in error the statements were read to the jury. There was no error in overruling the applications for a continuance under the circumstances. (*Fanton v. State*, 50 Neb., 351.)

It is urged that there was error in excusing a juror after the panel had been completed and the jury had been sworn but before the trial had begun. It is shown by the record that at this juncture the juror asked to be excused because of sickness in his family, and counsel for plaintiff in error in his presence in open court consented to this request of the juror being granted. Thereupon a talesman was called into the jury box and sworn as a juryman and so served without objection. There has been pointed out no prejudicial error and we can conjecture none with reference to completing the panel in the manner indicated under the circumstances disclosed.

It is urged that there was error in the admission in evidence of a certified copy of a part of the records of Cherry county as showing the brand of the owners of the stolen cattle because, as now claimed, there was no evidence that such brand was the brand of the parties indicated. There was abundant testimony that the spade and cross "T" was the design with which cattle were branded to show the ownership in question, and the certified copy of the said record disclosed these distinctive marks as they had been described by the witnesses. This sufficiently met the objection now urged.

By affidavits in support of a motion for a new trial there were described various alleged irregularities in the course of the trial. One of these transactions is thus described by Mr. Sullivan in his affidavit, he being one of the attorneys for the accused: "Affiant in his argument

of the cause to the jury referred to the fact that certain witnesses for the state had admitted that they had already received a reward of $250 each for the arrest of the defendant, and were to receive certain other rewards if the defendant was convicted, and further called the attention of the jury to the fact that these same witnesses were now in the court room and had remained over Sunday after the evidence was closed on Saturday, and were now anxiously awaiting the verdict, upon which depended their future reward; that Harrington, of the counsel for the state, in his closing argument for the state to the jury, referring to the argument of affiant, said, 'My friend has referred to the fact that these foreign witnesses have remained here,—has asked why they still remain. I'll tell him. It is because we thought some of the jury was, or might be, fixed by the defense, and that the jury would therefore fail to agree, and if so we propose to try this case again at once, and have kept these witnesses here for that purpose;' that affiant immediately objected to this statement and asked the court to instruct the jury that they should not consider the same, whereupon the court said the statement was improper, but did not instruct the jury not to consider the same." It is not to be questioned that the district court was correct in saying that the language of Mr. Harrington was improper, and the same criticism was applicable to some of the statements of Mr. Sullivan as described in his own affidavit. Under the circumstances the remarks with which the opinion in *Stratton v. Dole*, 45 Neb., 472, closed are not entirely inapplicable and uninstructive. The statements of Mr. Sullivan were with reference to the delay of witnesses in taking their departure from the place of trial. This delay was not shown by evidence, its existence as a physical fact was called to the attention of the jury by Mr. Sullivan himself. The statement of Mr. Harrington admitted that the witnesses were present and had remained over Sunday, and this fact was therefore established. The trial court should hardly be required to cau-

tion the jury against an unwarrantable inference which they might draw from a fact improperly stated by the complaining party. As to the remainder of the remarks of Mr. Harrington, it had reference to an intention to take a defined course of conduct in a certain event. As to this it could have subserved no useful purpose to tell the jury that they should not consider this statement as having the weight of evidence. If the jurors resented the imputation contained in the remark of counsel, and evidenced that resentment by a verdict of acquittal, we cannot see that this unwarranted course would be one of which the accused could complain. At any rate there was no objection made or exception taken to the failure to do more than characterize the remarks of counsel as improper, hence under this head there was no available ground of error. (*Gran v. Houston*, 45 Neb., 813; *Bankers Life Ass'n v. Lisco*, 47 Neb., 340.) There were other statements of Mr. Harrington recited in the affidavit of Mr. Sullivan, but as there was no exception to the ruling or the failure to rule on the objection presented these objections are not now available.

It was shown by affidavit that when the jurors were called into the court room for the purpose of being asked if they were not likely to agree, one of the jurors was not present for some time, and of this absence complaint is now made. There were conflicting affidavits with reference to this matter, and the court must have concluded that, as claimed, the missing juror was asleep when the others were called out of the jury room and that during his separation from the others this juror was by himself safely locked in the jury room. We cannot say, in view of the conclusion of the trial court with reference to matters which, in part, must have occurred in the court room that the accused was prejudiced in his rights by the failure of the juror to come into the court room with his associates immediately upon being called.

In the third instruction given by the court there was this language: "This defense of alibi is a legitimate de-

fense, and if from a consideration of the evidence you should be convinced that the defendant was not in this county at the time when it is claimed the cattle in question were stolen, or if you entertain a reasonable doubt as to his whereabouts at that time, he would be entitled to an acquital on this defense of alibi." It is urged that this instruction, by the use of the words "If from a consideration of the evidence you should be convinced," imposed upon the accused the task of convincing the jury that he was not in Sheridan county when the offense was committed. This construction ignores the clause which immediately follows that above quoted from, whereby the jury were instructed that if they entertained a reasonable doubt as to the whereabouts of the defendant he should be acquitted. This language was contained in a single instruction and the propositions were in the alternative, hence there is no applicability of the rule invoked, that an erroneous instruction cannot be cured by giving a different instruction on the same subject, though such instruction may be abstractly correct. The further criticisms of the instructions of the court were of the same character as those considered in *Barney v. State*, 49 Neb., 515, with reference to the proper definition of the term reasonable doubt. It would be unprofitable to do more than merely refer to the discussion in the case cited, for the instruction in that case is in the same language as that criticised in the case at bar.

It is finally urged that the punishment is excessive. The value of the property stolen was found by the jury to be $50, and the term of imprisonment was fixed by the court at seven years. The maximum imprisonment permitted by statute is ten years in this class of cases, and we cannot say that there was error justifying a reversal of the judgment complained of, because of the punishment being excessive.

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

AFFIRMED.

# LOUIS SLOBODISKY, APPELLANT, V. PHENIX INSURANCE COMPANY OF HARTFORD, APPELLEE.

FILED OCTOBER 6, 1897. No. 7452.

1. **Insurance**: REFORMATION OF POLICY: EVIDENCE. An insurance policy, like any other written contract, may be impeached by either party thereto for fraud or mistake, and parol testimony is competent to reform the policy so as to make it recite the actual agreement between the parties.
2. ———: ———: ———. In order to authorize the reformation of a written contract it must be made to appear what the actual contract between the parties was; that the written contract exhibited does not express the contract made; and these facts must be established by clear, convincing, and satisfactory evidence.
3. ———: ADDITIONAL INSURANCE: EFFECT. Where an insurance policy provides that it shall be void if the insured without the consent of the insurer takes out additional insurance, the violation of the contract by the insured in that respect does not render the first policy absolutely void, but voidable only at the option of the insurer, since that provision is placed in the policy for the benefit of the insurer and is one which it may waive.
4. ———: ———: NOTICE. Notice to an agent of an insurer that the insured has taken out additional insurance on the insured property is notice to such agent's principal.
5. ———: ———: ———: WAIVER OF FORFEITURE. If an insurer has notice before a loss occurs that the insured has, contrary to the terms of his policy, taken out additional insurance, makes no objection thereto, and does not cancel its policy on account thereof, these facts constitute evidence which tends to show that the first insurer waived the forfeiture of the policy by reason of the insured's violation thereof, and elected to keep such policy in force.
6. ———: ———. *Home Fire Ins. Co. v. Wood*, 50 Neb., 381, followed and reaffirmed.
7. ———: ———: EVIDENCE. Evidence examined and *held* to sustain the finding of the district court that the policy in suit represented the contract actually made between the insured and the insurer.

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

*Parke Godwin* and *John D. Howe*, for appellant.

*Wright & Stout, contra.*

RAGAN, C.

November 7, 1892, the Phenix Insurance Company of Hartford, Connecticut, hereinafter called the "insurer," issued its policy to Louis Slobodisky, hereinafter called the "insured," insuring against loss or damage by fire for a period of one year, to the extent of $4,500, a dwelling house and furniture therein belonging to the insured. By the terms of the insurance contract no other or concurrent insurance on the insured property was permitted. The policy provided that it should be void "if the assured now has or shall hereafter make any other insurance, whether valid or not, on the said property or any part thereof," without the consent of the first insurer thereto being indorsed on its policy. During the life of this policy the insured procured from another insurance company $500 additional insurance on the insured property, the consent of the first insurer thereto not being indorsed on its policy. February 21, 1893, the insured property was destroyed by fire. The insured brought this suit in the district court of Douglas county, alleging in his petition the issuance of the $4,500 policy, and that it was "but a continuation and renewal of a line of insurance" which the insured had placed with the insurer a number of years prior to the date of the policy in suit, and which said insurance had been placed with the insurer upon the agreement between the parties that the insured should be permitted to carry a total insurance upon the insured property of $5,000; that such a limitation was duly written in all policies which had been issued by the insurer to the insured on his property prior to this $4,500 policy, and such a limitation should have been likewise written in that policy; that it was agreed between the insured and the insurer at the time of the issuance of the $4,500 policy that the insured might increase the insurance on such policy to an amount not to exceed $5,000, in such insurance com-

pany as he might desire, and that in pursuance of that agreement the insured did take out the additional $500 insurance; that at the time the $4,500 policy was delivered to the insured he supposed that it had been drawn up and filled out according to the agreement existing between him and the insurer and correctly recited the contract existing between them; that he did not read the $4,500 policy and did not know of the mistake therein until after the loss; that the agent of the insurer wrote out said $4,500 policy, but by mistake or fraud limited the total insurance on the insured property therein described to the sum of $4,500 instead of $5,000, as was agreed between the insured and the insurer. The prayer was that the $4,500 policy might be reformed so as to express the alleged contract between the insured and the insurer, and for judgment for $5,000 and interest. The answer of the insurer admitted the issuance of the $4,500 policy, the procuring by the insured of $500 additional insurance, and denied all other allegations of the petition. The insurer also pleaded as a defense, among others, that the insured had, contrary to his contract of insurance, procured $500 additional insurance on the insured property without having the consent of the first insurer thereto indorsed on its policy, and had procured such additional insurance without the knowledge or consent of the insurer. The reply of the insured, so far as material here, alleged that the insurer and its agent "were fully advised and informed before such fire of said additional insurance, consented thereto and waived all objection thereto, and continued such policy in full force and effect." The district court found the issues against the insured, dismissed his petition, and he has appealed.

1. One question of fact presented to the district court was whether the policy sought to be reformed recited the contract actually made and existing between the insured and the insurer. The court below found that the contract in reference to insurance actually made and existing between the parties was correctly recited in the policy. We

cannot see that even a summary of this evidence here would be of any benefit, either to these litigants or the legal profession, and shall therefore not make one. But the evidence sustains the conclusion reached by the trial court. The courts are invested with authority "to reform," as it is called, a written contract, when, by mistake or fraud, the written instrument does not express the actual contract made by the parties. This is but another method of stating the rule that a party when sued upon a written contract may show by parol testimony that through fraud or mistake the written instrument exhibited does not recite the contract actually made. An insurance policy, like any other written contract, may be impeached by either party thereto for fraud or mistake, and parol testimony is competent to reform the policy so as to make it recite the actual agreement between the parties. The law applicable to all the issues involved in this case is laid down in *Home Fire Ins. Co. v. Wood*, 50 Neb., 381. In that case it was held that the courts were invested with authority to reform a written contract resulting from mistake or fraud; but that in order to authorize such reformation it must be made to appear what the actual contract between the parties was, and that the written contract exhibited did not express the contract made, and that these facts must be established by clear, convincing, and satisfactory evidence. The appellant has not brought himself within the rule laid down in this case as to the nature, character, and degree of evidence required to entitle him to a decree reforming the contract in suit. Indeed, we think he has not brought himself within the rule that where one asserts an affirmative proposition the burden is upon him to establish it by a preponderance of the evidence. The insurance policy in suit presumably represents the contract made between the insured and the insurer. The insured has impeached this contract for fraud and mistake, and his evidence fails to establish that the contract between himself and the insurer was a different contract from the one written in the policy.

2. Another question of fact presented by the issues to the district court was whether the insurer had notice of the additional insurance before the fire. The trial court found that the additional insurance was procured without the knowledge or consent of the first insurer, and that it had no knowledge thereof before the loss occurred. The evidence sustains this conclusion of the trial court. As already stated, the law applicable to this issue is also found in *Home Fire Ins. Co. v. Wood, supra,* and in the cases there cited; and it was there held that if an insurance policy provides that an insured shall, without the knowledge or consent of the first insurer, take out additional insurance on the insured property the first policy shall be void; nevertheless, if the insured violates that provision of the policy by taking out additional insurance, the first policy by reason thereof does not become absolutely void; that the policy by reason of the conduct of the insured becomes voidable at most; that such a provision is placed in the insurance policy for the benefit of the insurer and is a provision which it may waive; and if the first insurer has notice before a loss occurs that the insured has, contrary to the terms of his policy, taken out additional insurance, and makes no objection to such additional insurance, and does not cancel its policy on account thereof, these facts constitute evidence which tends to show that the first insurer waived the forfeiture of the policy by reason of the conduct of the insurer and elected to keep such policy in force.

It was also held in the case referred to that a statement made by the insured to the agent of the first insurer that the former intended to procure additional insurance on the insured property was not notice of the existence of such additional insurance when obtained; but it was ruled in the case cited that notice to the agent of the first insurer that additional insurance had been taken out upon the insured property was notice to such agent's principal. But the appellant has not brought himself within the doctrine of the case cited. It stands admitted of rec-

ord that he took out $500 additional insurance on the insured property, contrary to the terms of the contract existing between him and the first insurer; and the appellant has not shown, by even a preponderance of the evidence, that the first insurer or its agent had any knowledge or notice of the taking out of such additional insurance until after the fire occurred. Since neither the insurer nor its agent had any knowledge of the existence of the additional insurance prior to the loss, their conduct in keeping the first policy in force is no evidence of an intention on their part to waive the forfeiture incurred by the insured taking out the additional insurance.

The insurer had the right to presume that the insured would live up to the terms of the insurance contract, and it was no part of the insurer's duty, or that of its agent, to institute inquiries or make investigations for the purpose of determining whether the insured had violated its contract. The judgment of the district court is

AFFIRMED.

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CARRIE A. HUBBARD ET AL., APPELLEES, V. BENJAMIN P. KNIGHT, IMPLEADED WITH CHARLES DOLL, APPELLANT.

FILED OCTOBER 6, 1897. No. 7457.

1. **Subrogation:** NOTICE OF RECITALS IN MORTGAGE. Hubbard owned certain real estate and mortgaged it to secure a debt. She then conveyed an undivided half interest in the real estate to Knight, subject to the mortgage, he agreeing in the conveyance and as a part consideration therefor to pay $2,200 and interest of the mortgage debt. This deed was duly recorded. Subsequently Knight mortgaged his interest in the real estate to secure a debt of his evidenced by a promissory note. Doll purchased this note for value before maturity without actual knowledge of the recitals in the deed from Hubbard to Knight. Knight failed to pay the mortgage debt he had assumed and Hubbard paid it on its maturity and brought suit praying to be subrogated to the rights of her mortgagee as against Knight and that the $2,200 and interest might be decreed a first lien upon the interest in the real estate

conveyed by her to him. *Held*, (1) That as against Knight and his privies she was entitled to the decree prayed for; (2) that Doll's lien upon Knight's land was subject to Hubbard's lien thereon.

2. Deeds: RECITALS: NOTICE. All persons claiming an interest in or lien upon real estate are bound to take notice of the recitals in a duly recorded deed in the chain of title of their grantor.

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

*G. W. Shields*, for appellant.

*E. Wakeley, contra.*

RAGAN, C.

This case has been advanced and submitted under rule 2. The facts necessary to an understanding of the questions involved and decided are briefly as follows: Carrie A. Hubbard owned certain real estate situate in Douglas county and mortgaged the same to secure a debt of $2,500 and interest, which mortgage was duly recorded. Subsequently she sold and conveyed an undivided half interest in this real estate to Benjamin P. Knight for the consideration of $3,200, $1,000 of which Knight then and there paid in cash and discharged the remaining consideration by assuming and promising to pay $2,200 and interest of the mortgage previously placed on said real estate by Carrie A. Hubbard. This contract between Knight and Hubbard was fully expressed in the deed from Hubbard to Knight, which deed was duly recorded. Subsequent to the recording of his deed Knight mortgaged his interest in the real estate purchased of Hubbard to secure a debt of $1,000. The note evidencing this debt and the mortgage securing the same were subsequently sold and assigned to Charles Doll, who now owns and holds the same. Knight neglected to pay the $2,200 mortgage on the premises conveyed to him by Hubbard, and she was compelled to, and did, advance and pay said mortgage debt. She then brought suit to foreclose the mortgage

paid by her and asked to be subrogated to the rights of her mortgagee as against Knight, and to have $2,200 and interest of the amount due on the mortgage which she had paid declared a first lien upon the real estate which she had conveyed to Knight. Doll filed a cross-bill setting up the mortgage made by Knight and sought to have it declared a lien upon the lands conveyed to the latter by Hubbard, and claimed that Hubbard's mortgage was only a first lien upon the lands conveyed to Knight to the extent of $1,250 and interest, or one-half the mortgage made by Hubbard. It also appears that Doll is an innocent purchaser for value before maturity of the Knight note and mortgage, and had no actual notice or knowledge of the agreement of Knight to assume and pay $2,200 of the mortgage made by Hubbard in consideration of the conveyance of the real estate made by her to him. The court entered a decree subrogating Carrie A. Hubbard to the rights of her mortgagee as against Knight, and giving her a lien upon the undivided half interest of the real estate conveyed to Knight for the $2,200 and interest. From this decree Doll has appealed.

1. The decree of the district court is right for the following reasons: If Mrs. Hubbard's mortgagee had brought suit to foreclose his mortgage, making Mrs. Hubbard and Knight parties, the proper decree would have been that Knight's interest in the real estate conveyed to him by Hubbard should be sold to satisfy $2,200 and interest of the mortgage debt before selling Mrs. Hubbard's real estate; and Mrs. Hubbard having been compelled to pay this mortgage debt, and having paid it, she was entitled as against Knight to be subrogated to the lien which her mortgagee held against this real estate, and to have the $2,200 and interest assumed by Knight made a first lien upon his interest in the real estate. (*Cooper v. Foss*, 15 Neb., 515; *Keedle v. Flack*, 27 Neb., 836; *Rockwell v. Blair Savings Bank*, 31 Neb., 128; *Stover v. Tompkins*, 34 Neb., 465; *Grand Island Savings & Loan Ass'n v. Moore*, 40 Neb., 686; *Cox v. Wheeler*, 7 Paige Ch. [N. Y.], 248;

*Jumel v. Jumel*, 7 Paige Ch. [N. Y.], 591; *Hopkins v. Wooley*, 81 N. Y., 77.)

2. The fact that the appellant was an innocent purchaser before due of the mortgage debt created by Knight, without actual notice of the contract existing between Hubbard and Knight in and by which the latter promised in his deed of conveyance to pay and discharge $2,200 of the mortgage placed on the premises by Hubbard, does not make the appellant an innocent purchaser of the real estate so as to entitle his mortgage to be made a lien upon the real estate prior to the lien of Mrs. Hubbard thereon. Since the appellant claims under the conveyance made by Hubbard to Knight he is charged with constructive notice of the recitals in that deed, it being recorded prior to the record of the mortgage which the appellant seeks to enforce. (*Baker v. Mather*, 25 Mich., 51; *Jumel v. Jumel*, 7 Paige Ch. [N. Y.], 591; *Matthews v. Jones*, 47 Neb., 616; *Mason v. Payne*, Walker Ch. [Mich.], 460; *Norris v. Hill*, 1 Mich., 202; *Fitzhugh v. Barnard*, 12 Mich., 104; *Gibert v. Petcler*, 38 N. Y., 165; *Bonner v. Ware*, 10 O., 465; *Hamilton v. Nutt*, 34 Conn., 501; *Robertson v. Guerin*, 50 Tex., 317.) The decree of the district court is

AFFIRMED.

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## JOHN A. WAINWRIGHT V. WILLIAM T. SATTERFIELD, EXECUTOR.

FILED OCTOBER 6, 1897. No. 7455.

1. **Excessive Verdict: PREJUDICE OF JURY.** The sole fact that a verdict for plaintiff was for $5 more than claimed by him in his petition does not justify the conclusion that the verdict is the result of the jury's passion or prejudice.

2. ———: ———: **REMITTITUR.** The statute has not changed the common law rule that an excessive verdict might be cured by a remittitur, except in so far as to entirely vitiate such a verdict, when it is made to appear that it is the result of the jury's passion or prejudice.

3. ——: ——: ——. An excessive verdict in an action *ex contractu* may be cured by a remittitur, it not appearing that the verdict is the result of the jury's passion or prejudice.

ERROR from the district court of Sarpy county. Tried below before KEYSOR, J. *Affirmed.*

*George A. Magney* and *James Hassett*, for plaintiff in error.

*Martin Langdon, contra.*

RAGAN, C.

In the district court of Sarpy county, Satterfield, executor, sued Wainwright to recover a sum of money which the executor claimed Wainwright borrowed of his testatrix and which remained unpaid. The executor sued to recover the sum of $1,150, with seven per cent interest thereon from October 1, 1889. In addition to a general denial of the allegations of the petition of the executrix, Wainwright pleaded that he had borrowed of the testatrix $700, and no more, and that he had repaid that sum to the testatrix. The executor had a verdict and judgment, to reverse which Wainwright prosecutes here a petition in error.

1. The only assignment of error which we think deserves serious attention in this opinion is that the damages awarded the executor by the jury are "excessive, appearing to have been given under the influence of passion or prejudice," and for this reason the court below should have awarded the plaintiff a new trial. As already stated, the executor claimed in his petition $1,150, with seven per cent interest from October 1, 1889. The jury found that there was due to the executor the sum of $1,155, with seven per cent interest from October 1, 1889. In other words, the jury awarded the plaintiff below $5 more than he claimed in his petition, and the plaintiff in error insists that this action of the jury shows that it was influenced by passion or prejudice.

There is nothing in this record which tends to show that the finding of the jury is the result of passion or prejudice, unless we shall infer prejudice on the part of the jury from the simple fact that the verdict was $5 more than that claimed by the plaintiff. However, after an examination of this record we conclude that the amount of the verdict was not the result of passion or prejudice on the part of the jury, but resulted from a mistake or oversight. The witnesses for the executor testified that the amount which Wainwright had borrowed or owed the testatrix was $1,155, and the jury placed this sum in its verdict instead of the sum prayed for in the petition.

We do not think the facts in this case justify an inference of passion or prejudice on the part of the jury. When the attention of the district court was challenged to this excessive finding by Wainwright's motion for a new trial, it permitted the executor to remit the excess of $5 and interest, and thereupon overruled the motion for new trial and rendered a judgment for $1,150 and interest from October 1, 1889. The motion for a new trial here is based on subdivision 4, section 314, of the Code of Civil Procedure, which declares in effect that a verdict may be set aside and a new trial granted for "excessive damages appearing to have been given under the influence of passion or prejudice." At common law an excessive verdict might be cured by a remittitur. The statute has not changed this rule, except in so far as to entirely vitiate an excessive verdict when it was made to appear that such verdict was the result of passion or prejudice. It is the uniform holding of this court, even in actions *ex delicto*, that a verdict erroneous because of excessive damages awarded may be cured by a remittitur when it does not appear that such verdict was the result of passion or prejudice. (*Regier v. Shreck*, 47 Neb., 667, and cases there cited; *Fremont, E. & M. V. R. Co. v. French*, 48 Neb., 638.) The case at bar is an action *ex contractu*, and since it does not appear that the excessive finding of the jury was the result of its passion or prejudice, the remittitur entered

by the executor cured the defect in the verdict. (*Durrell v. Boyd*, 9 O. St., 72; *Doty v. Rigour*, 9 O. St., 526; *Lear v. McMillen*, 17 O. St., 464.)

Plaintiff in error makes complaint in his brief because of the action of the district court in admitting certain evidence. To set out this evidence here would subserve no useful purpose whatever. We have carefully examined the record and reached the conclusion that the court committed no error in that respect. Nor have we overlooked the suggestion of counsel that the court erred in one of the instructions given to the jury. We have examined the instruction and do not think the court erred in giving it. Nothing in the record calls for a reversal and the judgment of the district court is accordingly

AFFIRMED.

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WILLIAM A. FREY, APPELLANT, V. GEORGE R. CURTIS ET AL., APPELLEES.

FILED OCTOBER 6, 1897. No. 7465.

**Payment of Mortgage:** EVIDENCE: AGENCY. In an action to foreclose a mortgage, the defense being payment, evidence examined and *held* insufficient to establish authority, or ostensible authority, in a third person, to whom the money was paid, to act for the holder of the note and mortgage in that behalf.

APPEAL from the district court of Chase county. Heard below before WELTY, J. *Reversed.*

*S. S. Bishop, J. C. Hayes, John M. Stewart,* and *Wheeler & Switzer,* for appellant.

*A. B. Taylor* and *N. V. Harlan, contra.*

IRVINE, C.

This was an action by Frey to foreclose a mortgage. The defense was payment. From a finding and decree in

favor of the defendants plaintiff appeals. The case belongs to that class, unfortunately become recently very familiar, where the mortgagor has paid the debt to a third person, who failed to remit to the one entitled, and the question at issue is the authority, or apparent authority, of that person to receive payment.

In this case the note and mortgage were made to one W. J. Neill, the note being negotiable. The maker was George R. Curtis, who afterwards conveyed the mortgaged premises to Alexander Stock, by whom all payments were made and whose heirs defend this case. From a printed indorsement on the blanks used, and from some very indirect evidence, it seems that the loan which formed the consideration had been negotiated through the Western Farm Mortgage Company, of Lawrence, Kansas. Plaintiff Frey, soon after the execution of the note and mortgage, purchased them, Neill indorsing the note and interest coupons and assigning the mortgage. The assignment was not recorded until after the events relied on as constituting payment. The note and all interest coupons were made payable at the Third National Bank of New York. Before the maturity of each interest coupon plaintiff indorsed the same and gave it to bankers in Albany, where he resided, by whom it was sent to the Third National Bank, the place of payment. The Albany bank is named by the plaintiff in his deposition as the National Commercial Bank, but the indorsements on the coupons indicate that it was M. V. B. Bull & Co. Stock, on his part, paid each installment of interest to the Western Farm Mortgage Company or to the Western Farm Mortgage Trust Company of Denver, Colorado, which, in the words of the witnesses, had "bought the good-will" of the Kansas company. The Trust Company remitted to the Third National Bank of New York, and procuring the coupon delivered it to Stock. Shortly before the maturity of the note and last coupon Stock paid the amount thereof to the Trust Company, which credited Frey therewith on its books, but passed into the hands

of a receiver without remitting the money. Frey had no dealings whatever with the Western Farm Mortgage Company or Western Farm Mortgage Trust Company. He did not know that either of those companies had been collecting the interest on his mortgage. On the other hand, he had pursued the policy of sending the coupons through a bank to the place where they were in terms payable, and thus seeking collection in the proper and regular manner. While the case in many particulars resembles *Thomson v. Shelton*, 49 Neb., 644, where a finding favorable to the defendant was sustained, it does not fall within the rule of law therein announced, and upon which that case was decided, to-wit, that "ostensible authority is that which a principal intentionally, or by the want of ordinary care, causes or allows a third person to believe the agent to possess." Here the principal had by no affirmative act conferred any apparent authority on the alleged agent, nor had he been guilty of any negligence. While the course of dealing between the Trust Company and the mortgagor had been such as perhaps to justify the latter in believing the Trust Company to be in some way authorized to act for Frey, this was due wholly to the conduct of the Trust Company, and was not authorized or consented to by Frey, nor were those acts known to him. It has several times been held by this court that authority to collect interest installments is not alone sufficient from which to infer authority to collect the principal, where the evidences of indebtedness are negotiable and are not in the possession of the person assuming to act as agent. (*Stark v. Olsen*, 44 Neb., 646; *Richards v. Waller*, 49 Neb., 639; *Porter v. Ourada*, 51 Neb., 510.) So that, even had Frey been aware that the Trust Company had been collecting the interest, this would not estop him from denying its authority to collect the principal while he retained possession of the note, and especially before its maturity.

It is claimed that there is evidence tending to show that the note had in fact been placed in possession of the Trust

Company's agent for collection. There is evidence that M. V. B. Bull was the eastern agent of the Trust Company. Whether he had any connection with the banking firm of M. V. B. Bull & Co., through whom Frey had transmitted the coupons to the Third National Bank, does not appear, nor do we think that fact material to the present inquiry. A witness testified that a memorandum on the books of the Trust Company showed that on November 24, 1891,—three days after the payment,—the papers were held by M. V. B. Bull for collection. The books themselves were not offered in evidence, and the testimony referred to was objected to as incompetent and not the best evidence. It was not the best evidence and should have been excluded, and must now be disregarded. It therefore becomes unnecessary to consider what effect, if any, it might be given if properly in the case.

It is also urged that the evidence shows a custom prevailing among these loan companies to collect interest and principal on loans by them made and remit to their customers, regardless of the provisions of the notes making them elsewhere payable. It is argued that the plaintiff had availed himself of the benefits of the Trust Company's acts in pursuance of this custom, and that he must adopt the agent's acts as a whole or reject them altogether. Passing by the question of the validity of a custom directly in the teeth of the terms of a written contract, it is to be observed that only one witness testified to such a custom, and he did not say how long it had prevailed or to what extent. He only undertook to testify as to transactions which had come within his own experience. No attempt was made to show that plaintiff, a resident of New York, knew of such custom, and certainly, under the other evidence, such knowledge was necessary to charge him with its consequences. (*Milwaukee & Wyoming Investment Co. v. Johnston*, 35 Neb., 554; *Union Stock Yards Co. v. Westcott*, 47 Neb., 300.)

It is further urged in support of the judgment that there was proof of actual authority. Such proof consists

merely of the testimony of officers of the Trust Company that it was acting for Frey. This was on their part merely a conclusion, and one contradicted by all the facts of the case. At most the company was assuming to act for Frey, but without any authority so to do.

We cannot find any evidence tending to sustain the finding of the district court. The judgment is reversed and the cause remanded, with directions to enter a decree foreclosing plaintiff's mortgage.

REVERSED AND REMANDED.

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## NEBRASKA LAND, STOCK-GROWING & INVESTMENT COMPANY ET AL. V. MCKINLEY-LANNING LOAN & TRUST COMPANY.

FILED OCTOBER 6, 1897. No. 7448.

1. **Review:** ELECTION OF REMEDIES. When a case is in its nature appealable and the party seeking a review files in connection with the transcript a petition in error, he will be deemed to have elected to proceed in error and not by appeal.
2. **Record for Review.** This court will not draw an inference contradictory to the record in order to sustain an assignment of error.
3. **Foreclosure Sale:** PUBLICATION OF NOTICE. A notice of a foreclosure sale set for February 21, which was published in a weekly newspaper in five consecutive issues of the paper, beginning January 19, is a sufficient advertisement under the statute requiring publication for at least thirty days before the day of sale.
4. **Notice of Foreclosure Sale:** PROOF OF PUBLICATION. The affidavit proving publication may in such case be made immediately after the last publication, even though that be less than thirty days after the first.
5. ———: ———. The word "printed" in the statute requiring the notice to be in some newspaper printed in the county, is used in the sense of "published," and an affidavit that the newspaper was published in the county is therefore sufficient.
6. **Judicial Sales:** APPRAISEMENT. Objections to the appraisement of property for the purpose of a judicial sale should be filed in the trial court prior to the sale.

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

*Francis G. Hamer*, for plaintiff in error.

*William Gaslin, contra.*

IRVINE, C.

This is a proceeding having for its object the review of an order confirming a sale made in pursuance of a decree of foreclosure. There was filed with the transcript a petition in error, but the plaintiffs in error ask that the court consider the case as also presented on appeal. This we cannot do. It is the settled practice that a party whose case is in its nature appealable has an election as to the method of review, but he cannot pursue both methods. By filing a petition in error that method was here selected. (*Burke v. Cunningham*, 42 Neb., 645; *Woodard v. Baird*, 43 Neb., 310; *Monroe v. Reid*, 46 Neb., 316; *Beatrice Paper Co. v. Beloit Iron Works*, 46 Neb., 900; *Childerson v. Childerson*, 47 Neb., 162; *Thomas v. Churchill*, 48 Neb., 266.)

The first assignment of error discussed in the briefs is that the order of confirmation was obtained by the mortgagee's waiving his right to a judgment for the deficiency remaining after applying the purchase money to the payment of the decree. The argument is that the court would not have confirmed the sale at the price bid unless the right to a deficiency judgment had been waived, that this course was taken as a substitute for a resale, and so operated to the prejudice of the defendants. Unfortunately for this contention, it finds no support in the record. The order of confirmation recites that the court finds the proceedings regular and according to law. That finding required an absolute confirmation. The waiver of the personal judgment appears as a part of the same journal entry, but after the order of confirmation and without anything to indicate that the two were interdependent.

We cannot indulge the presumption that the court, in contradiction of its record, found the proceedings irregular or not according to law, but this presumption would have to be indulged in order to ground the contention of plaintiffs in error.

The next assignment is that the notice was not published for thirty days prior to the day of sale. It is quite doubtful whether this assignment is sufficiently specific to present for review many of the questions raised with regard to the published notice. We nevertheless shall consider these questions as if properly presented. The sale took place February 21, 1894. The affidavit of publication, which is undisputed, is as follows: "I, S. S. Smith, being duly sworn, on oath say that I am one of the publishers of the Nebraska Standard, a weekly newspaper of general circulation, published in Kearney, Buffalo county, Nebraska, and that the notice, a true copy of which is hereto annexed, was published five consecutive weeks in the regular and entire issue of every number of said newspaper for the time stated, the first publication being on the 19th day of January, A. D. 1894." There can be no doubt that publication of such a notice in a weekly newspaper satisfies the statute, the language of which is "public notice of the time and place of sale to be given for at least thirty days before the day of sale by advertisement in some newspaper printed in the county, or in case no newspaper be printed in the county, in some newspaper of general circulation therein." (Code of Civil Procedure, sec. 497.) That the publication being in a weekly newspaper was at the proper time and for a sufficient period before the sale, see *Carlow v. Aultman*, 28 Neb., 672, and *Von Dorn v. Mengedoht*, 41 Neb., 525. In this connection the point is made that the affidavit was executed February 17, 1894, which was less than thirty days after the first publication of the notice, and therefore could not serve as proof of publication for the requisite time. An inspection of the cases cited, together with others cognate thereto, will disclose that it has always been the opinion of this court, and

we have no doubt that such is the correct view, that a publication is not to be considered as an instantaneous act, but endures through the period elapsing between the issuing of one number of the paper selected and the issuing of the next. Thus, if the law required publication for one week, a publication in a weekly newspaper issued on January 19 would suffice for an event to take place January 26. To constitute two weeks' publication the notice would have to be repeated in the issue of the latter date, and so if time were designated in days instead of weeks. The affidavit shows that the notice was published in five consecutive issues of the paper, which would bring the last publication on February 16, or in the last issue preceding the sale. The issue of February 16 having been published, the affidavit showing the fact of five consecutive weekly publications next preceding the time fixed for the sale could be and was made, and in examining the proceedings it required only the efflux of time, of which the court could take notice, to complete the proof of legal publication. It will have been observed that the statute requires the notice to be published in "some newspaper printed in the county, or in case no newspaper be printed in the county, in some newspaper of general circulation therein," while the affidavit is that the newspaper employed for the purpose was a "newspaper of general circulation published in Kearney, Buffalo county." The main argument on this point is that the affidavit does not, by showing that the paper was of general circulation, show that it was of general circulation in Buffalo county, as the statute seems to require. We conceive, however, that the real difficulty lies farther back. If any newspaper be printed in the county the notice must be in that, and a notice published merely in a paper of general circulation, either in that county or elsewhere, would be insufficient. The affidavit does not show, nor is it elsewhere shown, that no newspaper was printed in the county, and the affidavit before us does not state that the newspaper employed was printed in the county, but that it was pub-

lished therein. It seems clear, therefore, that the affidavit does not show a compliance with the law, unless the word "published" is synonymous with or includes within its sense the meaning of the word "printed." In *Bragdon v. Hatch*, 77 Me., 433, it was held that the terms were not synonymous, and that a statute requiring that the paper should be printed in the county was not satisfied by a certificate that it was published therein. This case is open to three comments. In the first place, the procedure there in question was a statutory extra-judicial method of foreclosure, whereby the mortgagee proceeded by himself merely publishing notice. The court very properly deemed such a procedure to be the subject of strict construction. In the next place, the proof under review was a certificate which the court held to be in its nature wholly incompetent, so that remarks with regard to the legal sufficiency of language employed therein were necessarily *obiter*. In the third place, the court rested its conclusion apparently upon the effect of *Blake v. Dennett*, 49 Me., 102, and that case is not in point. There the certificate was that the notice to be proved was "copied from the Bangor Journal" of certain dates. There was nothing to show where the Bangor Journal was either printed or published, or that it was even a newspaper. Indeed, the court remarked that it might be only the proceedings of some society, so far as the name indicated. We do not feel bound by the case referred to, which is the only one really close to the point which has fallen within our notice. We do not think that the word "print" was by the legislature used in the specific and somewhat technical sense of designating the purely mechanical act of impressing the characters upon the paper. The object of the statute was to give notice, and if the legislature had the distinction at all in view it would not for that purpose have selected the place of printing instead of that of publication. "Print" is familiarly used in the sense of "publish," and in that sense the word receives recognition in many if not all of the dictionaries, and in that sense we are satisfied the legislature used it.

It is assigned as error that the land did not sell for two-thirds of its actual or its appraised value. The record shows that it did sell for more than two-thirds of its appraised value, and that is all the statute requires. (Code of Civil Procedure, sec. 491*d*.) For the purposes of the sale the appraisement determines the actual value.

Another assignment is that a copy of the appraisement was not filed with the clerk of the district court thirty days before the date of sale, or forthwith after making the appraisement. The appraisement was made January 13, which was more than thirty days before the sale and before the first publication of the notice, and the sheriff returns that he "forthwith" after the appraisement deposited a copy thereof with the clerk of the district court. There is no other evidence on the subject, and while a transcript of the copy so deposited does not appear, the clerk does not certify up the whole record but only certain designated instruments, so that we can infer nothing contrary to the officer's return from the absence of the copy.

Next it is assigned that the appraisement was fraudulent. On this point plaintiffs in error rely on the inadequacy of the appraised value as establishing fraud. Affidavits in the bill of exceptions show that witnesses estimated the value of the property as greater than the value placed thereon by the appraisers. There is not, however, so great a discrepancy as to justify any inference of fraud. The question sought to be raised is, in effect, merely that of the sufficiency of the appraisers' valuation. Such objections must be filed before the sale. A case in point, where the objection was in the same form as here presented, is *Hamer v. McFeggan*, 51 Neb., 227.

Some other points are referred to in the briefs, but they are not presented by the petition in error.

AFFIRMED.

## M. T. PATRICK V. COMMERCIAL NATIONAL BANK OF FREMONT ET AL.

FILED OCTOBER 20, 1897. No. 7495.

**Review:** CONFLICTING EVIDENCE. A finding or verdict based on conflicting evidence will not be disturbed if supported by sufficient evidence. (*Lundgren v. Crum*, 47 Neb., 242; *Haubrock v. Loeb*, 46 Neb., 868; *Hooper v. Castetter*, 45 Neb., 67.)

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

*John H. Grossman*, for plaintiff in error.

*Loomis & Abbott* and *John H. Grossman, contra.*

HARRISON, J.

It appears from the pleadings and evidence in this case that in the course of business transactions between the plaintiff in error, John H. Grossman, and the Commercial National Bank of Fremont, Nebraska, there was executed and delivered to the bank a promissory note of date June 10, 1887, in the sum of $1,392.13, which was signed on its face by John H. Grossman and on the back by the plaintiff in error. Over the latter's signature there were the following words: "Waiving presentment and demand for payment and protest and notice of non-payment." The note was not paid at maturity, and this suit was instituted for the bank in the district court of Douglas county against Grossman and the plaintiff in error, in which the bank was successful and secured a judgment. M. T. Patrick brings the case to this court for a review of the proceedings in the trial court.

In the answer filed for the plaintiff in error were the following statements:

"4. This defendant admits that he signed his name on the back of said note, with the indorsement thereon in

the words following: 'Waiving presentment and demand for payment and protest and notice of non-payment.'

"5. This answering defendant alleges the facts to be that when he signed his name upon the back of said note, with the indorsement in writing thereto as above set forth, that it was understood and agreed between plaintiff and this defendant that this defendant's liability thereon was that of a guarantor only, and said note was delivered and accepted by the plaintiff upon such condition and agreement.

"6. * * * Wherefore this defendant submits that this defendant and his co-defendant, John H. Grossman, are improperly joined as defendants herein, and that several causes of action are improperly joined in this action."

Whatever the liability or presumptions which arose from the appearance of the signature of plaintiff in error on the note in the place where it stood, the course of the litigation in the district court during the trial was shaped on the theory that parol evidence was admissible to prove or disprove the contention of the plaintiff in error that he occupied the position of a guarantor of the payment of the note, and evidence on this point was received on behalf of either of the contending parties.

It is urged for the plaintiff in error, in the brief presented here, that the evidence disclosed that the plaintiff in error signed the note pursuant to an agreement with the bank by which his liability was fixed as that of a guarantor. We have carefully examined the evidence, and, while it is conflicting on the issue now directly in contention, it sufficiently supports the finding and judgment of the trial court, and the judgment must be

AFFIRMED.